IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S138 of 2012

BETWEEN:

**PLAINTIFF S138/2012**
Plaintiff

and


**DIRECTOR GENERAL OF SECURITY**
First Defendant

**MINISTER FOR IMMIGRATION AND CITIZENSHIP**
Second Defendant

**COMMONWEALTH OF AUSTRALIA**
Third Defendant

**DIRECTOR, DETENTION OPERATIONS, NSW/ACT**
Fourth Defendant

**SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP**
Fifth Defendant

# PLAINTIFF'S SUBMISSIONS

## PART I: SUITABILITY FOR PUBLICATION

1 This submission is in a form suitable for publication on the internet.

## PART II: ISSUES ARISING IN THE PROCEEDINGS

2 The issues arising in the proceedings, which reflect the questions posed in the Special Case,[1] are as follows:

(a) Did the Department of Immigration and Citizenship (the **Department**), in making its recommendation to the Minister not to exercise his power under s. 46A(2) of the *Migration Act 1958* (Cth) (the **Act**) to allow the plaintiff to make a visa application:

[1] Special Case ("SC") at [45].

Date of Document: 20 May 2013
Filed on behalf of the plaintiff by:
**KING & WOOD MALLESONS**
Level 61 Governor Phillip Tower
1 Farrer Place
SYDNEY NSW 2000

DX 113 Sydney
T +61 2 9296 2000
F +61 2 9296 3999
Ref: CMM / JLB / RM

(i) act in breach of the requirements of procedural fairness (the question relating to whether the Director General of Security provided procedural fairness is in effect subsumed into this issue); and/or

(ii) act by reference to incorrect legal principles in treating public interest criterion 4002[2] ("**PIC 4002**") as a criterion for the grant of a visa?

(b) If so, what relief should follow?

(c) Do ss. 189 and 196 of the Act authorise the detention of the plaintiff as a matter of construction?

(d) If so, are ss. 189, 196 and 198 beyond the legislative power of the Commonwealth in so far as they apply to the plaintiff and, if so, what relief should follow?

## PART III: NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

3 The plaintiff has served notices under s. 78B of the *Judiciary Act 1903* (Cth).

## PART IV: DECISIONS BELOW / JURISDICTION

4 This matter is brought in the Court's original jurisdiction pursuant to s. 75(iii) and (v) of the *Constitution*.

## PART V: MATERIAL FACTS

5 The relevant facts are set out in the Special Case filed on 15 February 2013. The key facts are as follows. As at March 2009, the Department applied the Offshore Refugee Status Assessment Procedures Manual (the **Manual**) to the assessment of claims for refugee protection made by any person who was, for the purposes of the Act, an "offshore entry person".[3]

6 On or about 10 March 2009, the Minister directed the Department that "*Govt policy is for health, identity and security checks to be completed prior to release from detention. Unless there are extenuating or special circumstances, those requirements should be applied before seek bar to be lifted under Sect 46A(2)*" (the **Policy**).[4]

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2 See plaintiff's submissions at [20] below.
3 SC [9] and paragraph 1.1 of the Manual at SC1.
4 SC [10] and submission dated 6 March 2009 which is SC2.

7 On or about 12 July 2009, the plaintiff arrived by boat at Christmas Island, being an "excised offshore place" within the meaning of s. 5 of the Act. He did not have (and has never held) a visa under the Act. He therefore became an "offshore entry person" and an "unlawful non-citizen" within the meaning of the Act.[5]

8 The plaintiff was detained upon his arrival at Christmas Island by an officer relying on s. 189(3) of the Act. He has been held in detention since that time.[6]

9 In September 2009, the plaintiff submitted to the Department an application for a Refugee Status Assessment (**RSA**).[7] Later the same month, an officer of the Department assessed the plaintiff to be a person in respect of whom Australia owed protection obligations under
10 the Refugees Convention as amended by the Refugees Protocol (the **Convention**).[8]

10 On 2 November 2009, officers of the Australian Security Intelligence Organisation (**ASIO**) interviewed the plaintiff.[9] ASIO officers conducted a further interview with the plaintiff on 1 December 2009.[10] The plaintiff was not informed, in a way which would have enabled him to respond in a meaningful way, of the basis for ASIO's concerns, the evidence on which ASIO was relying or the nature of the risk which he allegedly posed to security.[11]

11 On or about 18 December 2009, ASIO furnished the Department with a security assessment (the **Adverse Security Assessment**) to the effect that ASIO assessed the plaintiff to be directly or indirectly a risk to security within the meaning of s. 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (the **ASIO Act**).[12]

20 12 On or about 6 April 2010, the Department notified the plaintiff in writing that as a result of his Adverse Security Assessment and PIC 4002, he was not eligible for the grant of a permanent visa to remain in Australia.[13]

13 Following this Court's decision in *Plaintiff M47/2012 v Director General of Security* (2012) 292 ALR 243 ("***M47***") — in which the current plaintiff had intervened — the plaintiff's solicitors wrote to the Minister's solicitors seeking the grant of a permanent

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5 SC [11]–[12].
6 SC [12].
7 SC [13] and SC3, SC4 and SC5.
8 SC [14] and SC6.
9 SC [15] and SC7.
10 SC [16] and SC8.
11 See SC [17].
12 SC12.
13 SC [21] and SC12.

protection visa, along with his release from detention.[14] The Minister's solicitors responded that the plaintiff was in a different position to Plaintiff M47 because he was an offshore entry person (unlike Plaintiff M47); he therefore had not been able to make a valid visa application in light of s. 46A of the Act; thus unlike Plaintiff M47 "your client has not been refused a protection visa relying on PIC 4002"; and guidelines made by the Minister on 24 March 2012 with respect to s. 46A indicated that offshore entry persons who had received an adverse security assessment should not be referred to the Minister.[15]

## PART VI: PLAINTIFF'S ARGUMENT

**Erroneous reliance on PIC 4002 as a criterion for the grant of a visa**

10 14 In the plaintiff's submission, the present case is effectively governed by *M47*, having regard to *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 ("***Offshore Processing Case***"). By treating the non-satisfaction of PIC 4002 as the reason for concluding that the plaintiff is not eligible for the grant of a visa — as occurred in 2009 and 2010 — the Department declined to refer the plaintiff's request on an erroneous understanding of the correct legal principles.

15 As an offshore entry person and unlawful non-citizen, the plaintiff was not entitled to bring a valid visa application under the Act: s. 46A(1). However, the Minister had the power to "lift the bar" so as to allow the making of a valid visa application by such a person: s. 46A(2), *Offshore Processing Case* at [13].

20 16 As the Court held in the *Offshore Processing Case* at [70], the exercise of the Ministerial power given by s. 46A(2) involves two distinct steps: first, the decision to consider exercising the power to lift the bar, and second, the decision whether to lift the bar. The Minister is not obliged to take either step. However, the Minister had at the relevant time (in the present case as in the *Offshore Processing Case*) effectively made a decision to consider exercising the power to lift the bar: *Offshore Processing Case* at [70]; see also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616 at [45]. The implementation and application by the Department of the Manual and the RSA process reflects such a decision by the Minister: *Offshore Processing Case* at [66].

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14 SC [31] and SC18
15 SC [32] and SC19.

17 Pursuant to this decision and the Policy as announced by the Minister, the Department was required to apply the Manual and provide advice to the Minister as to whether he should exercise the power to lift the bar under s. 46A(2): *Offshore Processing Case* at [37]–[40], [66] and [69]–[70]. This was a process undertaken under, and for the purpose of, the Act: *Offshore Processing Case* at [9(a)]. The process of determining whether an offshore entry person should be permitted to make an application for a visa is essential to justifying the ongoing detention of such a person under s. 189: *Offshore Processing Case* at [21]–[25] and [71]. Having these particular statutory foundations, consideration of the exercise of the power must be procedurally fair and must proceed by reference to correct legal principles: *Offshore Processing Case* at [77]–[78].

18 The Department's consideration of the plaintiff's request to be granted a visa was defective on both grounds. The Department proceeded in a manner that was procedurally unfair, for the reasons developed in the next section of these submissions. The Department also failed to apply the correct legal principles. Application of the correct legal principles involves applying the criteria and principles for the grant of a visa identified in the Act, as construed and applied by the courts of Australia: *Offshore Processing Case* at [88]–[89].

19 Having regard to the combined effect of the Manual and the Policy, the Department approached the request on the basis that it needed to determine whether the person in question was a person to whom Australia owed protection obligations under the Convention (referable to s. 36(2)(a) of the Act) and, if so, whether according to health and character requirements[16] and health, identity and security checks,[17] the person otherwise satisfied the criteria for the grant of a visa (stemming from s. 65(1) of the Act).

20 The prescribed criteria for a Subclass 866 Protection Visa were set out at 866.2 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the **Regulations**). Amongst other things, the criteria as specified at the relevant time purportedly, but invalidly, included that the applicant satisfy PIC 4002.[18] Schedule 4 defined PIC 4002 as "*The applicant is not assessed by the [ASIO] to be directly or indirectly a risk to security, within the meaning of section 4 of the [ASIO Act]*".

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16 Paragraph 46.1 of the Manual at SC1.
17 SC [10] and submission dated 6 March 2009 which is SC2.
18 See agreed fact at SC [22].

21 The record makes clear that the Department concluded that the plaintiff was ineligible for a visa, and that there should be no recommendation to the Minister to lift the bar under s. 46A(2), because the Department had concluded that PIC 4002 was a necessary criterion which had not been satisfied because of ASIO's Adverse Security Assessment.[19] Absent reliance on PIC 4002, there was nothing to prevent the officer of the Department from making a recommendation that the plaintiff be considered by the Minister for the exercise of his power to lift the bar under s. 46A(2).

22 In *M47*, PIC 4002 was found to be invalid.[20] Accordingly, in using PIC 4002 as a necessary criterion for the grant of a protection visa and the non-satisfaction of PIC 4002 as the basis for not referring the plaintiff to the Minister, the Department acted upon an erroneous understanding of the legal principles governing the request, and fell into jurisdictional error.

23 As in the *Offshore Processing Case* (see [101]), the appropriate relief is a declaration that in deciding not to refer the plaintiff to the Minister for the exercise of his power under s. 46A(2) of the Act, the fifth defendant made an error of law, in that he relied on PIC 4002 as a criterion governing the putative visa application of the plaintiff.

24 The Minister has subsequently issued different guidelines that may involve a different treatment in the future of any further requests by the plaintiff for a visa.[21] The change in guidelines does not avoid the fact that the Department has dealt with the plaintiff's request in an unlawful manner. Nor does it mean that relief should not issue to reflect that error: see the *Offshore Processing Case* at [103]. It could hardly be suggested that the Minister, as the repository of the broad discretion in s. 46A(2), would be indifferent to the fact that the only request for a visa made by a recognised refugee who has been detained for almost four years was declined by his Department on a legally erroneous basis.

25 If the defendants seek to rely on the new guidelines as a discretionary reason for opposing relief in respect of the past errors, the plaintiff will submit that the procedure contemplated by the new guidelines is inconsistent with the statutory scheme and constitutes no proper basis for the Court declining relief in its discretion. Whilst that argument is best developed

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19 See letter from the Department to the plaintiff dated 6 April 2012 at SC12.

20 *M47* at [71], [221], [399] and [458].

21 SC [25]. The new guidelines issued on 24 March 2012 are SC14. See also letter from the defendants' solicitors to the plaintiff's solicitors dated 17 October 2012 at SC19.

in reply, if necessary, in brief that is so because the 2012 guidelines involve the Minister declining in all cases to consider whether to exercise his power under s. 46A(2) solely on the basis of a decision made by ASIO under a different statutory scheme which is not harmonious with the scheme of the Act or the Convention. Such an arrangement suffers from much the same defects as those which led the majority of the Court to conclude in *M47* that PIC 4002 was invalid: see, for example, Hayne J at [204]–[206].

**Breach of procedural fairness by the Department and ASIO**

26 For the reasons explained above and in the *Offshore Processing Case*, the Department in considering the request from the plaintiff for the grant of a protection visa was required to act in a procedurally fair manner. In the ordinary course, procedural fairness would require that the plaintiff be given the opportunity to know, and be put in a position to answer, the allegations and information which it is proposed will be relied upon in the making of a decision that affects his rights: see *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638 ("***Condon***") at [30] per French CJ and the authorities cited therein (at footnote 33).

27 The plaintiff was not given such an opportunity by the Department or ASIO at any time prior to either the Adverse Security Assessment or the Department's decision to reject the request for a visa on the basis of that assessment. The records of the ASIO interviews do not demonstrate that ASIO informed the plaintiff in any meaningful way about the allegations against him (including the basis on which he may be a threat to security) or the information which ASIO proposed to rely upon: compare the equivalent interviews considered in *M47,* for example per Gummow J at [143]. It is accepted that the plaintiff was not informed of the relevant matters by any other process at the time.[22] The Department took no steps of its own to allow the plaintiff to respond to the matters underlying the Adverse Security Assessment.

28 The requirements of procedural fairness are flexible and must adapt to circumstances. In *Applicant VEAL of 2002*, the Court indicated that just as courts "mould their procedures" to accommodate public interest immunity, so too the content of an administrative decision-maker's obligation to give procedural fairness may be informed by the same

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22 SC [17].

considerations.[23] The Court recognised the public interest in maintaining the confidentiality of certain information (in that case information submitted to the Tribunal by an informant) while at the same time affording procedural fairness to the applicant. The Court dealt with the "problem of confidentiality" by finding that the conflicting imperatives could and should have been accommodated by the applicant being informed of the substance of the allegations made against him and being given an opportunity to respond.[24] What is required is the avoidance of "practical injustice": *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37]; *Condon* at [188] per Gageler J.

10 29 The principles of public interest immunity require that regard be had in the balancing exercise to the importance of the matter before the court and the significance of the material in question to the matter to be determined.[25] These principles are consistent with those which inform the content of the duty of procedural fairness. The scope of the obligation to provide an opportunity to be heard depends not only upon the statutory context but also upon the particular circumstances in which the relevant power is exercised.[26] The application of principles of procedural fairness in a particular case must always be moulded to the particular circumstances.[27] Cases such as the present are materially different from *Leghaei v Director General of Security*,[28] where liberty was not at stake. Where a decision is to be made affecting a matter of such critical importance as a person's liberty —
20 potentially for an extended or indefinite period — the circumstances compel disclosure of the substance of the allegations against the person, and the grounds of concern, such that the person has a meaningful opportunity to answer the case against him or her. No such opportunity was given to the plaintiff.

30 The present case may be analysed as a breach of procedural fairness by ASIO which in turn infected the decision of the Department or as a direct breach of procedural fairness by the

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23 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [24].

24 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [29].

25 *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 616–619.

26 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [60] per Gaudron and Gummow JJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [129] and [143] per McHugh J.

27 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [25].

28 (2007) 241 ALR 141.

Department in not giving the plaintiff an opportunity to be heard on these matters. In either event, the consequence is that the Department considered the request for a visa in a procedurally unfair way. The consequence is that a declaration of the kind made in the *Offshore Processing Case* should be made.

31 The lack of procedural fairness at the time of the operative decisions has not been cured by the subsequent provision of further information to the plaintiff about the reasons for his Adverse Security Assessment. As part of the "Independent Reviewer" process, the plaintiff has now been provided with an unclassified written summary of reasons for the Adverse Security Assessment.[29] The reasons represent an advance on the information previously conveyed to the plaintiff, which itself highlights the lack of procedural fairness in the ASIO interview process. However, the lack of particularity in the statement of reasons and the lack of any information about the evidence relied upon by ASIO means that the plaintiff has still not been given a proper opportunity to answer the allegations and adverse information. In any event, the Independent Reviewer is not a statutory decision maker and has no authority to reconsider or overturn the Adverse Security Assessment or the Department's decision refusing the request for a visa.[30] The Independent Reviewer process therefore has no bearing on the plaintiff's complaint that he has been denied procedural fairness, other than to highlight the complete absence of procedural fairness and the "practical injustice" of the process prior to the involvement of the Independent Reviewer.

32 The Director General of ASIO deposed on 20 December 2012 that procedural fairness was accorded by ASIO, to the extent possible, in the interviews with the plaintiff.[31] No weight should be attached to such an assertion. The Director General has subsequently come to a very different view about the amount of information that can be conveyed to the plaintiff without compromising security.[32] As of 20 December 2012, the Director General considered that to disclose any adverse information to the plaintiff not disclosed to him during the interview would cause "significant damage to security".[33] However, the Director General subsequently provided such further adverse information in the form of an

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29 SC [33]–[37] and letter from the Independent Reviewer to the plaintiff's solicitors dated 30 January 2013 at SC22.

30 SC [33] and Terms of Reference for Independent Review at SC20.

31 SC9, see [5].

32 See affidavit of 6 February 2013 at SC10.

33 SC9 at [5].

unclassified statement of reasons for the Adverse Security Assessment.[34] The Director General's further affidavit of 6 February 2013[35] does not suggest that there was any relevant change in circumstances between December 2012 and February 2013 which led him to reach a different conclusion about the security impacts of disclosing such information.

33 The change in position tells strongly against any conclusion that the denial of procedural fairness prior to the Adverse Security Assessment was justifiable because of the need to preserve the confidentiality of adverse information. It also illustrates the need to hold the Director General, and others involved in this decision-making process, to a significant and meaningful requirement of procedural fairness, such that the plaintiff knows the substance of the allegations against him, and the grounds of concern, so he may have a meaningful opportunity to answer the case against him.

**Sections 189 and 196 of the Act do not authorise the detention of the plaintiff**

34 At the time of his arrival at Christmas Island, the plaintiff was detained under s. 189(3) of the Act.[36] Since the time the plaintiff was transferred to Villawood Immigration Detention Centre (on 13 August 2010), the plaintiff has been detained pursuant to s. 189(1).[37]

35 The duty to detain in s. 189(1) must be read together with s. 196 which describes and limits the statutory purposes of detention and imposes implicit limitations on the duration of detention. Section 196(1) relevantly provides that an unlawful non-citizen detained under s. 189 must be kept in immigration detention until he or she is:

(a) removed from Australia under s. 198 or 199;

(b) deported under s. 200; or

(c) granted a visa.

36 There is no present prospect of the plaintiff being granted a visa, nor any suggestion that the plaintiff is being detained pursuant to s. 196(1)(c) until he is granted a visa. Nor is s. 196(1)(b) enlivened. The Minister has not ordered the deportation of the plaintiff pursuant to s. 200. The plaintiff is therefore purportedly being detained "until he ... is

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34 SC10 at [4]; SC22.
35 SC10.
36 SC [12] and letter from the Department to the plaintiff's solicitors dated 24 May 2012 at SC17.
37 Letter from the defendants' solicitors to the plaintiff's solicitors dated 17 October 2012 at SC19.

removed from Australia under section 198 or 199". The Minister has confirmed, through his representatives, that the plaintiff is being detained until he is removed from Australia and that removal will occur "as soon as is reasonably practicable".[38]

37 A determination of whether the plaintiff may lawfully be detained for the purpose of removal depends in part upon whether his removal is permitted by the Act. Section 198 of the Act exhaustively defines the circumstances in which an unlawful non-citizen may be "removed" from Australia. Section 198 contemplates various circumstances in which an unlawful non-citizen may be removed. None is applicable to the plaintiff. The plaintiff has not asked to be removed (s. 198(1)), he was not brought to Australia under s. 198B for a temporary purpose (s. 198(1A)), he is not a non-citizen covered by s. 193(1)(a)(iv) (s. 198(2A)), he was not entitled to apply for a visa under s. 195 or for the revocation of the cancellation of a visa under s. 137K (s. 198(5)), he has not made a valid application for a substantive visa which was refused or cannot be granted (s. 198(6)), he is not a person to whom Subdivision AI of Division 3 of Part 2 of the Act (safe third country agreements) applies (s. 198(7)), he has never held a temporary safe haven visa under Subdivision AJ of Division 3 of Part 2 of the Act (s. 198(8)) and he has no right to avail himself of the protection of a third country within the meaning of Subdivision AK of Division 3 of Part 2 of the Act (s. 198(9)). The non-satisfaction of ss. 198(7) and (9) is of particular significance, for the reasons developed below.

38 In the circumstance of this case, s 198(2) does not authorise the removal of the plaintiff. The plaintiff has been assessed to be a person to whom Australia owes protection obligations under the Convention. This creates a significant point of distinction from *Al-Kateb v Godwin* ("***Al-Kateb***").[39] In *Al-Kateb* the only obstacle to removal was essentially a practical one stemming from the statelessness of Mr Al-Kateb. The plaintiff, as a person to whom Australia owes protection obligations, has a legal status that engages Australia's non-refoulement obligations. The power to remove a person under s 198(2) is constrained by those obligations: *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 ("***Malaysian Declaration Case***") at [98] and [233]. Section 198(2) does not authorise the removal of the plaintiff to Sri Lanka or to any country that does not observe

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38 SC [25]. The new guidelines issued on 24 March 2012 are at SC14. See also letter from the defendants' solicitors to the plaintiff's solicitors dated 17 October 2012 at SC19.

39 (2004) 219 CLR 562.

the principle of non-refoulement: compare, in the case of persons with outstanding claims to refugee status, *Malaysian Declaration Case* at [237] and [239].

39 The legislature, being cognisant of Australia's obligations under Convention, has made specific provision in ss. 198(7) and (9) for the removal of persons to whom Australia does or may owe protection obligations. Subdivision AI of Division 3 of Part 2 of the Act, which is relevant to the operation of s. 198(7), was inserted by the Migration Legislation Amendment Bill (No 4) 1994 (Cth). The second reading speech for that Bill provided that:

> [T]he bill also enables Australia to identify safe third countries which will allow for the return to those countries of any asylum seekers ... for whom effective protection is available in those countries. In accordance with our obligations under international law, countries with whom we enter into safe third country agreements would need to observe the principle of non-refoulement of refugees and internationally accepted minimum standards of human rights. The bill requires the minister to make a statement to the parliament after a particular safe country is prescribed by the regulations about the country's, or each of the countries', compliance with relevant international law concerning the protection of persons seeking asylum and relevant human rights standards.

40 Subdivision AK of Division 3 of Part 2 provides an alternative mechanism. As explained in s. 91M, Subdivision AK was enacted because Parliament considered that "a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa."

41 Section 198(2) must be read in light of the section and the Act as a whole, including the specific provision made for removal pursuant to ss. 198(7) and (9) in a manner which accommodates non-refoulement concerns. The Act should be construed so that, to the extent possible, it facilitates Australia's compliance with its obligations under the Convention: *Offshore Processing Case* at [27]; *Malaysian Declaration Case* at [90], [98]; *M47* at [222]. To construe s. 198(2) as conferring a broad power to remove a person notwithstanding that the person is a person to whom Australia owes protection obligations and without any restriction on the country to which that person is being removed is inconsistent with the scheme of the Act: *Malaysian Declaration Case* at [98] and [237].

42 If it is accepted that s. 198(2) is not an available power to remove the plaintiff, there is no power available under s. 198 or otherwise in the Act to authorise his removal. It follows

that he cannot be described as being detained for the purpose of removal or until he is removed and there is no authority pursuant to s. 189, read with s. 196, to detain the plaintiff.

**The scope of the authority to detain where no reasonable prospect of imminent removal**

43 There is a separate issue of construction as to whether there is authority under the Act to detain the plaintiff in circumstances where there is no reasonable likelihood of his being removed in the reasonably foreseeable future. The plaintiff seeks leave to argue that in this respect *Al-Kateb* should be overturned. For the reasons developed by Bell J in *M47* at [525]–[533], leave to reopen should be given. The bare majority in *Al-Kateb* were divided in their reasons and the difference of opinion between majority and minority has been sustained in a recent decision of the Court: *M47* [145] and [148] per Gummow J and [533] per Bell J. The Court ought not insist on maintaining an erroneous interpretation of a statute that does not give effect to the legislative intention: *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 ("***John***") at 439–440. The consequences for the plaintiff of maintaining an erroneous construction of the Act are drastic and there has not been reliance on the decision of a kind that militates against reconsideration: *John* at 438–439.

44 As a factual matter, it is plain from the Special Case that there is no reasonable likelihood of the plaintiff being removed in the reasonably foreseeable future.[40] Any suggestion that the plaintiff will in fact be removed would be no more than speculative.

45 The starting point in approaching this issue of construction is that the right to personal liberty is among the most fundamental rights recognised by the law: *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523; *Williams v The Queen* (1986) 161 CLR 278 at 292; *Al-Kateb* at [19]. Reflecting this, the common law does not sanction preventative detention, and statutory authorisations of such "should be confined to very exceptional cases".[41] A statute will not be taken as abolishing, suspending or adversely affecting such a right of personal liberty in the absence of a "clear expression of an unmistakable and unambiguous intention": *Coco v R* (1994) 179 CLR 427 ("***Coco***") at 438; see further *Commissioner of*

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40 SC [38]–[43].

41 *Chester v The Queen* (1988) 165 CLR 611 at 618; *Lowndes v The Queen* (1999) 195 CLR 665 at 670–1. Kirby J stated in *McGarry v The Queen* (2001) 207 CLR 121 at [61] that: "In part, the reason why the system of criminal justice treats an order of indefinite imprisonment as a serious and extraordinary step, derives from the respect which the law accords to individual liberty and the need for very clear authority, both of law and of fact, to deprive a person of liberty, particularly indefinitely."

*Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [11] and [43]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [30].

46 In *Al-Kateb* at [20], Gleeson CJ described this principle of legality as the expression of a legal value that is brought to bear on the process of discerning the legislature's intention. The requirement for unambiguous language to displace fundamental rights is justified by the need for a clear indication that that the legislature has "directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment": [19]. The principle serves to "enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights": *Coco* at 437–438. The more fundamental the right or interest, the stricter should be the requirement for a clear expression of intention to affect it adversely.[42] That is so because the more important the right or interest, the less likely it is that Parliament intended to infringe on it — and the more stringent the requirement that if infringement is intended, then this should be pellucid, and any necessary political price paid.

47 While Gleeson CJ was in dissent in *Al-Kateb*, the reasoning of the majority does not involve any disagreement with these principles. The difference between the minority and the majority in *Al-Kateb* on this point turned instead on whether the words of the Act did reflect in unambiguous terms an intention to authorise detention even in circumstances where there was no real likelihood or prospect of removal in the reasonably foreseeable future: see [35] per McHugh J.

48 In the present case, the relevant question is whether the words of the Act indicate that the legislature directed its attention to the question of whether a person could be detained pursuant to s. 189 in circumstances where the person is ostensibly being detained until being removed from Australia and for that purpose, but there is no reasonable likelihood of his being removed in the reasonably foreseeable future. As far as the infringement on fundamental rights is concerned, there is a *substantial and categorical difference* between detention for a limited period of time to achieve the specified purpose of removal and detention for an unlimited period of time, potentially until death. The principle of legality

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42 See *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at [92].

requires that one consider whether the legislature has directed its attention to the latter form of detention, not just to detention more broadly.

49 An analysis of the Act indicates that there are no unambiguous words reflecting an intention to authorise detention of unlawful non-citizens for an unlimited period of time, potentially until death. The Act does not, in terms, deal with that possibility: *Al-Kateb* at [21]. Nor does it deal with it by necessary implication. The plaintiff respectfully adopts the reasoning of Gleeson CJ in *Al-Kateb* on this point (with which Gummow and Bell JJ agreed in *M47*, at [145], [148] and [533]) and emphasises the following matters about his Honour's analysis and the statutory scheme. That reasoning indicates that it cannot be said that Parliament has expressed its will to authorise indefinite detention with "irresistible clearness".[43]

50 Sections 189, 196 and 198 of the Act must be read together. As Gleeson CJ observed at [17], in respect of a person in the plaintiff's position the Act operates upon the combined effect of two imperatives: the plaintiff must be removed as soon as reasonably practicable; and he must be detained until he is so removed. The first imperative assumes the possibility of removal. Because of the textual relationship between the provisions, the authority (and duty) to detain until removed is subject to a cognate qualification. It follows that the legislature has not in clear terms conferred authority to detain in circumstances where the underlying assumption — the possibility of removal — is not satisfied. Where the underlying assumption is not satisfied there is a corresponding suspension in the power to detain under s. 189. The language of s. 198, which refers throughout to an obligation to remove "as soon as reasonably practicable", confirms that the legislature had in mind that removal was an imminent act and that the associated detention "until removal" would be a short-term scenario: see, in this regard, *Al-Kateb* per Gummow J at [121]–[122].

51 The real impact on individual liberty which follows from detention when there is no reasonable expectation of removal occurring has not been squarely confronted in the Act, given that detention of the relevant kind is effectively justified under the banner of being for removal. The very notion of being detained in order to be removed assumes a temporary status and denies an engagement by the legislature with the extreme prospect of being held indefinitely. To be held indefinitely for removal is a contradiction in terms. In

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43 Cf, for example, *Monis v The Queen* (2013) 295 ALR 259 at [331], quoting *Potter v Minahan* (1908) 7 CLR 277 at 304.

order to find words of necessary intendment reflecting a true engagement by the legislature with this eventuality, it would be necessary to find a direct statement to the effect that all people without a visa shall be detained. The Act in its present form does not contain any such statement.

52 Grants of power are commonly expressed in unqualified terms, yet are nevertheless taken to be subject to reasonable limitations. In this light, the principle of legality extends to require specific words to authorise interference with aspects of fundamental rights which are distinct by their nature or because of some significant difference of extent. Section 196 authorises some interference with the right of liberty. Yet, despite its mandatory language, the nature and extent of the detention it authorises remains general. It is unlikely that the Parliament intended to exclude all reasonable limitations on a grant of power, in relation to distinct facets of the right or interest at stake, without having expressed itself clearly.

53 Such an approach to general words is illustrated by the judgment of Mason CJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ("***Lim***").[44] His Honour held (in the minority) that s. 54R of the Act did not sufficiently manifest an intention to preclude judicial action in relation to unlawful detention, thus holding that the general words of the section did not exclude a reasonable implied limitation. That implied limitation is analogous to those supported here. This part of his Honour's judgment was cited approvingly by the majority in *Coco* at 437 in support of the "general words" proposition.

54 The fact that courts of other nations have reached similar conclusions about implied limitations on grants of power to detain supports such an approach here.[45] The reasoning of the majority in *Al-Kateb* should not be followed.

**Constitutional defects with ss. 189, 196 and 198 of the Act**

55 The power to detain a person attracts special constitutional considerations bearing on the scope of both legislative and executive power. In the present case, the constitutional considerations must also take account of the fact that the plaintiff is being detained pursuant to a decision that he has little practical capacity to challenge and which was made without

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44 (1992) 176 CLR 1 at 12.

45 As discussed in *Al-Masri* (2003) 126 FCR 54 at [96]–[113]. See in particular *R v Governor of Durham Prison; Ex parte Singh* [1984] 1 All ER 983; *Thang Thieu Quyen v Director of Immigration* (1998) 1 HKCFAR 167; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 (PC); *Zadvydas v Davis* 533 US 678 (2001).

him being given a reasonable opportunity to be heard (ie assuming, for the purposes of this argument, that the procedural fairness argument made above is not accepted).

56 Other than in recognised "exceptional cases", the involuntary detention of a person by the state is only permissible as a consequential step in the adjudication of the person's criminal guilt for past acts.[46] In *Fardon v Attorney-General (Qld)* ("***Fardon***"), Gummow J stated that formulating the principle in these terms emphasises that "the concern is with the deprivation of liberty without adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose".[47] The concern about liberty is central to the protective role played by Ch III of the *Constitution*, which protects certain "basic rights" of persons by "ensuring that those rights are determined by a judiciary independent of the parliament and the executive."[48] In the result, as the plurality stated in *Lim*, other than in the accepted exceptional cases there is "a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth."[49] Whilst some doubt has been expressed about the primacy to be attached to judicial power in understanding the scope of the Commonwealth's power to detain,[50] the approach adopted in *Lim* and *Fardon* remains authoritative.[51]

57 Although the plurality in *Lim* spoke of the involuntary detention of *citizens*, the principle is not limited to Australian citizens. The protections of Ch III are not bounded by any such notion, citizenship itself being a statutory creation. So much was implicit in the plurality analysis in *Lim*; the protections were reduced with respect to non-citizens only to the extent of recognising an exception to the principle allowing executive detention for the purposes

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46 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [80] per Gummow J; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 10 per Mason CJ , 27–29 per Brennan, Deane and Dawson JJ and 71 per McHugh J.

47 (2004) 223 CLR 575 at [81].

48 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11 per Jacobs J; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [40].

49 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28–29.

50 See *Al Kateb v Godwin* (2004) 219 CLR 562 at [258] per Hayne J (Heydon J agreeing).

51 See, for example, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 97–8 per Toohey J and 131–2 per Gummow J.

of receiving, investigating and determining an application for entry, and for the purposes of expulsion or deportation.[52]

58 As the statement by Gummow J in *Fardon* indicates, the critical matter is that detention must be a consequence of a particular process of law. In the ordinary course, where detention is based upon a judicial finding of guilt, the process is attended by the procedural protections inherent in the judicial process, including a requirement that the parties "be given an opportunity to present their evidence and to challenge the evidence led against them."[53] Any Commonwealth law which required a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which are characteristic of the judicial process, including procedural fairness, would be invalid as being repugnant to Ch III.[54]

59 The exceptions to the constitutional principle are, necessarily, limited in their scope. The exceptions do not devour the rule. The present case raises a question as to the limits on the exception relating to immigration assessment and removal. It is submitted that the exception to the constitutional immunity does not apply in circumstances where:

(a) a condition precedent to detention is in substance unreviewable, including because the person has not been provided a substantial and meaningful opportunity to be heard; and

(b) indefinite detention is the result, in the sense that there is no reasonably foreseeable prospect of removal.

60 In *Al-Kateb* at [44], McHugh J observed that "[e]ven a law whose object is purely protective will infringe Ch III if it prevents the Ch III courts from determining some matter that is a condition precedent to authorising detention." At [48] his Honour noted that there was nothing in ss. 189, 196 or 198 to prevent courts from examining any condition precedent to detention. And Hayne J noted at [254] that, there, "[t]he premise for the

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52 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29–32.

53 *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 at [56] per curiam.

54 *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 at [56]; *Thomas v Mowbray* (2007) 233 CLR 307 at [111] per Gummow and Crennan JJ; *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638 at [177]. In *Al-Rawi v Security Service* [2011] UKSC 34 at [12], Lord Dyson JSC identified the principle that a party has a right to know the case against him and the evidence on which it is based as one of the features of a common law trial which is fundamental to the English system of justice.

debate [was] that the non-citizen does not have permission to be at liberty in the community." His Honour observed at [254] that any dispute about whether a person was an unlawful non-citizen could readily be adjudicated by the courts. By the time *Al-Kateb* (and *Al Khafaji*)[55] reached this Court there was no relevant controversy about the process by which the plaintiff came to be held in detention for the purposes of removal.

61 That premise does not apply here. The only apparent obstacle standing in the way of granting a visa to the plaintiff — and thus ending detention — is the Adverse Security Assessment. The correctness and validity of ASIO's determination is not accepted by the plaintiff. The condition precedent to detention is in dispute.

62 The defendants may seek to argue that this case is indistinguishable from *Al-Kateb*, and that detention falls within the constitutional exception because it is for the purpose of removal. But the substance of the matter cannot be ignored when constitutional principles are at stake. And that substance includes that the only apparent impediment to release is the Adverse Security Assessment. The legal character of the detention cannot be divorced from the process of executive decision-making that has led to the detention of the plaintiff under a combination of powers in the Act and the ASIO Act. The lawfulness of the detention here depends upon the proposition that the Commonwealth may detain a person based on an adverse security assessment without providing that person with a meaningful and substantial opportunity to be heard in respect of the assessment, including by informing the person of the allegations and grounds for concern.

63 The executive decision pursuant to which the plaintiff is detained is not unreviewable in a strict or jurisdictional sense, although the regime under Part IV of the ASIO Act governing the provision of reasons and merits review in respect of adverse security assessments does not apply in respect of a non-citizen in the plaintiff's position.[56] Judicial review is technically available. However, where there is only very limited explanation of the basis for the decision, the capacity to pursue judicial review is severely constrained. Even with the benefit of the unclassified reasons provided as part of the Independent Reviewer process, there is little meaningful prospect of determining whether ASIO has fallen into jurisdictional error, such as to warrant an application for judicial review. Any call for document production as part of an application for judicial review would be met by a

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55 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

56 See *Australian Security Intelligence Organisation Act 1979* (Cth), ss. 36 and 37.

comprehensive public interest immunity claim that would frustrate the exercise (ie given the attitude disclosed in the affidavits of the Director General, and given that the principles relating to that immunity and procedural fairness relevantly overlap, disclosure pursuant to a court process would be no better than what has presumptively been found to be valid here).

64 It is not suggested that the interests of the plaintiff, the principles of procedural fairness, or the requirements of Ch III are such that the conflicting imperatives of national security should be ignored or overridden. Plainly there is a critical public interest in national security and in maintaining the confidentiality of material where necessary in the interests of national security. The relevant constitutional issue is how the conflicting principles are to be reconciled in the exceptional circumstance where the Commonwealth executive is making a decision which has the necessary consequence of subjecting a person to indefinite detention.

65 It is instructive to compare the procedures adopted in respect of ASIO's administrative decision-making with the principles governing public interest immunity claims in a judicial context. The principles of public interest immunity apply as a means of reconciling the conflict between, on the one hand, the public interest in the administration of justice which dictates that all relevant material should be available to the parties and the court and, on the other, the public interest in ensuring that harm is not caused by the disclosure of material that ought not, for one reason or another, be disclosed.[57] Importantly, where the latter interest prevails in a particular case, the consequence is that the parties and the court must proceed without the forensic benefit of such material.

66 Where a claim of public interest immunity is upheld, the information the subject of the immunity is not available as evidence to be taken into account in deciding the outcome of the proceedings.[58] The principles of public interest immunity do not contemplate a situation in which the judicial decision-maker and one party to the proceedings, but not the other party, may have access to certain restricted material for the purposes of determining

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57 *Alister v The Queen* (1983) 154 CLR 404 at 412 per Gibbs CJ; *Sankey v Whitlam* (1978) 142 CLR 1 at 42–43 per Gibbs ACJ and 95–96 per Mason J; *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 614–619.

58 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [5] per Gleeson CJ and [23]–[24] per Gummow, Hayne, Heydon and Kiefel JJ.

some contested question of rights (apart from the very question of whether material is subject to public interest immunity).[59]

67 There have been limited statutory departures from the principle that rights cannot be determined by a court without mutual access to the material founding the decision, whereby in certain proceedings confidential evidence may be received that is not made available to one or more of the parties. But such procedures are exceptional and remain subject to close judicial control.[60] Further, issues of degree must arise taking account of the context and the consequences of the decision. It would be impermissible for a person to be tried, convicted and then detained for a criminal offence based upon information provided to the trier of fact but not made available to the accused or the accused's representatives.

68 In the ordinary case where a person is detained pursuant to an adjudication of guilt by a court, the person will have the procedural protections afforded by the judicial process. If an issue were to arise in the course of such proceedings regarding confidential material, the issue would be resolved in accordance with the principles of public interest immunity (or statutory equivalents), according to a judicial process and without any prospect that the decision-maker would determine the matter (and hence the person's liberty) on the basis of material to which the accused was not privy. A Commonwealth law which purported to permit the adjudication of guilt by a court on the basis of evidence that was not available to the accused would be invalid as being repugnant to Ch III of the *Constitution* and the proper exercise of judicial power in accordance with the judicial process.

69 These considerations must also be brought to bear when considering the "exceptional case" in which detention stems not from an exercise of judicial power but from a process of administrative decision-making. The Commonwealth legislature cannot validly confer upon the executive the power to make a decision that has the effect of indefinitely depriving a person of his or her liberty on the basis of material that the person has not had any meaningful opportunity to respond to. To do so impermissibly undermines Ch III's protection of liberty.

70 This requirement exists as a limitation on the exception to the *Lim* principle relating to immigration assessment and removal. That exception could only authorise indefinite detention for the purposes of removal (assuming that can be authorised at all) where the

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59 As to which see, for example, *Alister v The Queen* (1983) 154 CLR 404 at 469.

60 See, for example, *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501 at [10].

person subject to the detention has had, or is then afforded, a substantial and meaningful opportunity to challenge the basis of detention, including by being informed of the allegations and grounds for concern.

71 To take the contrary view is to contravene the principle identified in the *Australian Communist Party v Commonwealth* ("***Communist Party Case***").[61] On any view, the immigration assessment/removal exception to the *Lim* principle must have limits. In particular, a limit on the removal aspect of the exception is that the person is being detained for the purpose of removal because they do not have a right to enter or remain. If they do have such a right, then the constitutional exception can have no possible application.[62] Thus whether or not they have such a right is a constitutional fact.

72 The effect of the scheme as it applies to the plaintiff is that that constitutional fact has been determined by the Director General of Security in a way which is, in practical terms, incapable of review by the courts. The Executive branch has read itself into power.

73 The mere technical ability to seek judicial review may not suffice when it comes to satisfying the *Communist Party Case* principle. As Dixon CJ, McTiernan and Webb JJ said in *Hughes and Vale Pty Ltd v The State of New South Wales [No. 2]*, with respect to a very broad discretion:[63]

> But in any case the grounds for the refusal of a licence would rarely prove to be practically examinable in a court of law. If the unsuccessful applicant for a licence sought a writ of mandamus, it would only be by a chance that he could show that the discretion had been exercised on some ground outside the limits, so difficult of ascertainment, of sub-s. (4) of s. 17.

74 In *Miller v TCN Channel Nine Pty Ltd*, Brennan J suggested that the difficulty was answered where there are means available to examine and review the reasons for a decision.[64] Mason CJ, Brennan and Deane JJ each made a similar point in *Cunliffe v Commonwealth* with respect to the freedom of political communication.[65] Here, as in those

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61 (1951) 83 CLR 1, for example at 262 per Fullagar J. Note *Al-Kateb v Godwin* (2004) 219 CLR 562 at [140] per Gummow J.

62 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29.

63 (1955) 93 CLR 127 at 158, see also at 166, 187, 202 and 243.

64 (1986) 161 CLR 556 at 614–615, see also Deane J at 619. Note also *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* (2005) 65 NSWLR 331 at [57] per Spigelman CJ, referring to the availability there of merits review. And see the discussion by Zines in *The High Court and the Constitution* (5th edn, 2008, Federation Press) at 320–1.

65 (1994) 182 CLR 272 at 303, 331 and 342.

cases, a type of constitutional guarantee or immunity is at issue. No less stringent approach should be taken here than was required there.

75 To recognise that it is a limitation on the immigration exception to the *Lim* principle that indefinite detention cannot be authorised without a substantial and meaningful opportunity to challenge the basis of detention is not to conclude that the *Constitution* overrides the important public interests relating to national security. It is not here submitted that a person in the position of the plaintiff has some effective constitutional right to access material which would be covered by public interest immunity. Rather, it is to recognise that if the Executive wishes to use such information to detain a person indefinitely, then that use comes with a condition — disclosure of the substance of the allegations and grounds for concern. If that price is too high for the Executive, then the person cannot be detained indefinitely based upon it, just as a person could not be convicted of a crime and imprisoned based upon secret information.

76 That position does not leave the nation unduly exposed to danger. The constitutional principle here is founded on the protection of liberty from detention. Lesser restrictions may be imposed to protect the public interest, whether as conditions on the grant of a writ of habeas corpus, or by imposition of control orders of the kind considered in *Thomas v Mowbray*.[66] It is not necessary here to resolve the extent to which such orders might be made based upon secret information.[67] Nor is it necessary here to resolve the extent to which detention might be authorised in times of total war with only limited rights of judicial review.[68]

77 The constitutional limitation outlined is not infringed if ss. 189 and 196 of the *Migration Act* are read down so as not to permit detention in circumstances where an application for a visa or release has been denied and avenues for challenge practically exhausted, the person is detained, there is no reasonably foreseeable prospect of removal, and the decision to deny the visa was made upon secret information where the person was not informed of the substance of the allegations and the information upon which the adverse decision was

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66 (2007) 233 CLR 307.

67 Cf *Thomas v Mowbray* (2007) 233 CLR 307 at [31] per Gleeson CJ and [122]–[126] per Gummow and Crennan JJ.

68 See similarly *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 fn 66 per Brennan, Deane and Dawson JJ; see also *Al-Kateb v Godwin* (2004) 219 CLR 562 at [140] per Gummow J. Cf *Little v Commonwealth* (1947) 75 CLR 94 at 103 per Dixon J.

made. In other words, if it is accepted that a real constitutional concern arises, that constitutes a further reason for construing the sections in the manner outlined above.

78 What does the limitation articulated here mean in practice, given that it will commonly not be known in advance, at the time a decision is made with respect to their immigration status, that a person may come to be detained indefinitely? It is submitted that the limitation arises at least when the detention assumes the character of being indefinite, that is, there is no reasonably foreseeable prospect of removal. At that stage unless the Minister re-determines the assessment of eligibility for a visa — this time providing the constitutionally necessary degree of disclosure — the detention will exceed the scope of the
10 exception, and will be impermissible.

79 The vexed question of how to reconcile basic principles of liberty, fair process and national security has arisen for consideration in a number of overseas jurisdictions in recent years.[69] Whilst the constitutional and legislative context differs from place to place, the outcome of a number of decisions of courts of final appeal suggests that the principles identified above as constraining the power of detention are recognised as fundamental in a number of similar systems.[70]

## PART VII: APPLICABLE STATUTES AND REGULATIONS

See Annexure A.

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69 See, for example, *Al-Rawi v Security Service* [2012] 1 AC 531 at [14] per Lord Dyson JSC.

70 From Canada, see *Re Charkaoui* [2007] 1 SCR 350, especially at [19], [28], [53] and [70]–[84]; from the United Kingdom, see *Secretary of State for the Home Department v MB* [2008] 1 AC 440 and *Secretary of State for the Home Department v AF (No. 3)* [2010] 2 AC 269, especially at [65] and [81]–[83]; from the United States, see *Hamdi v Rumsfeld* 542 US 507 (2004), especially at 533.

## PART VIII: ORDERS

81 The plaintiff submits that the questions in the Special Case should be answered as follows:

(a) **Question 1:** Yes.

(b) **Question 2:** Yes, the Secretary erred in both respects.

(c) **Question 3:** A declaration that, in concluding that the plaintiff was not a person who satisfied the criteria for the grant of a visa, the fifth defendant made an error of law, in that the fifth defendant treated Public Interest Criterion 4002 as a criterion for the grant of a visa under the *Migration Act 1958* (Cth) in circumstances where it was invalid, and, further, failed to observe the requirements of procedural fairness.

(d) **Question 4:** No.

(e) **Question 5:** [If necessary to answer.] Yes.

(f) **Question 6:** A writ of habeus corpus.

(g) **Question 7:** The Defendants.

## PART IX: ORAL ARGUMENT

82 Presentation of the plaintiff's oral argument will take approximately 3.5 hours.

20 May 2013

J K Kirk
T: (02) 9223 9477 F: (02) 8028 6060
kirk@wentworthchambers.com.au

Stephen Free
T: (02) 9233 7880 F: (02) 9232 7626
stephenfree@wentworthchambers.com.au

Amy Munro
T: (02) 8228 2037 F: (02) 9232 7626
amymunro@wentworthchambers.com.au

ANNEXURE A

The applicable provisions are still in force at the date of making the plaintiff's submissions.

**Applicable provisions of the *Migration Act 1958* (Cth)**

**36** Protection visas

(1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa; or

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa.

(2A) A non-citizen will suffer significant harm if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

*Ineligibility for grant of a protection visa*

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

(a) the Minister has serious reasons for considering that:

(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

*Protection obligations*

(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

*Determining nationality*

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

**46A** Visa applications by offshore entry persons

(1) An application for a visa is not a valid application if it is made by an offshore entry person who:

(a) is in Australia; and

(b) is an unlawful non-citizen.

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.

(3) The power under subsection (2) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under subsection (2), the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that the Minister's actions are in the public interest.

(5) A statement under subsection (4) must not include:

(a) the name of the offshore entry person; or

(b) any information that may identify the offshore entry person; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) must be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances.

**65** Decision to grant or refuse to grant visa

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

Note: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

(2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

**Subdivision AI Safe third countries**

**91A** Reason for Subdivision

This Subdivision is enacted because the Parliament considers that certain non-citizens who are covered by the CPA, or in relation to whom there is a safe third country, should not be allowed to apply for a protection visa or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

**91B** Interpretation

(1) In this Subdivision:

*agreement* includes a written arrangement or understanding, whether or not binding.

*CPA* means the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva, Switzerland, from 13 to 14 June 1989.

(2) For the purposes of this Subdivision, if, apart from this section:

(a) a colony, overseas territory or protectorate of a foreign country; or

(b) an overseas territory for the international relations of which a foreign country is responsible;

is not a country in its own right, the colony, territory or protectorate is taken to be a country in its own right.

**91C** Non-citizens covered by Subdivision

(1) This Subdivision applies to a non-citizen at a particular time if:

(a) the non-citizen is in Australia at that time; and

(b) at that time, the non-citizen is covered by:

(i) the CPA; or

(ii) an agreement, relating to persons seeking asylum, between Australia and a country that is, or countries that include a country that is, at that time, a safe third country in relation to the non-citizen (see section 91D); and

(c) the non-citizen is not excluded by the regulations from the application of this Subdivision.

(2) To avoid doubt, a country does not need to be prescribed as a safe third country at the time that the agreement referred to in subparagraph (1)(b)(ii) is made.

**91D** Safe third countries

(1) A country is a safe third country in relation to a non-citizen if:

(a) the country is prescribed as a safe third country in relation to the non-citizen, or in relation to a class of persons of which the non-citizen is a member; and

(b) the non-citizen has a prescribed connection with the country.

(2) Without limiting paragraph (1)(b), the regulations may provide that a person has a prescribed connection with a country if:

(a) the person is or was present in the country at a particular time or at any time during a particular period; or

(b) the person has a right to enter and reside in the country (however that right arose or is expressed).

(3) The Minister must, within 2 sitting days after a regulation under paragraph (1)(a) is laid before a House of the Parliament, cause to be laid before that House a statement, covering the country, or each of the countries, prescribed as a safe third country by the regulation, about:

(a) the compliance by the country, or each of the countries, with relevant international law concerning the protection of persons seeking asylum; and

(b) the meeting by the country, or each of the countries, of relevant human rights standards for the persons in relation to whom the country is prescribed as a safe third country; and

(c) the willingness of the country, or each of the countries, to allow any person in relation to whom the country is prescribed as a safe third country:

(i) to go to the country; and

(ii) to remain in the country during the period in which any claim by the person for asylum is determined; and

(iii) if the person is determined to be a refugee while in the country—to remain in the country until a durable solution relating to the permanent settlement of the person is found.

(4) A regulation made for the purposes of paragraph (1)(a) ceases to be in force at the end of 2 years after the regulation commences.

**91E** Non-citizens to which this Subdivision applies unable to make valid applications for certain visas

Despite any other provision of this Act, if this Subdivision applies to a non-citizen at a particular time and, at that time, the non-citizen applies, or purports to apply, for a protection visa then, subject to section 91F:

(a) if the non-citizen has not been immigration cleared at that time—neither that application nor any other application made by the non-citizen for a visa is a valid application; or

(b) if the non-citizen has been immigration cleared at that time—neither that application nor any other application made by the non-citizen for a protection visa is a valid application.

**91F** Minister may determine that section 91E does not apply to non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine:

(a) that section 91E does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given; or

(b) that section 91G does not apply to an application for a visa made by the non-citizen during the transitional period referred to in that section.

(2) The power under subsection (1) may only be exercised by the Minister personally.

(3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(4) A statement under subsection (3) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(5) A statement under subsection (3) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

**91G** Applications made before regulations take effect

(1) Subject to section 91F and subsection (3), if:

(a) this Subdivision applies to a non-citizen immediately after a regulation prescribing a country as a safe third country takes effect and did not apply to the non-citizen immediately before that time; and

(b) the regulation prescribes a day as the cut off day; and

(c) during the period (the transitional period) from the beginning of the cut off day until immediately before that regulation takes effect, the non-citizen made an application for a protection visa;

then:

(d) if the non-citizen had not been immigration cleared at the time of making the application—that application, and any other application made by the non-citizen for a visa made during the transitional period, ceases to be a valid application when the regulation takes effect; and

(e) if the non-citizen had been immigration cleared at the time of making the application—that application, and any other application made by the non-citizen for a protection visa made during the transitional period, ceases to be a valid application when the regulation takes effect; and

(f) on and after the regulation takes effect, this Act applies as if the non-citizen had applied for a protection visa immediately after the regulation takes effect.

(2) To avoid doubt:

(a) paragraphs (1)(d) and (e) apply even if an application referred to in the paragraph concerned, or a decision in relation to such an application, is the subject of a review by, or an appeal or application to, the Migration Review Tribunal, the Refugee Review Tribunal, the Administrative Appeals Tribunal, a Federal Court or any other body or court; and

(b) no visa may be granted to the non-citizen as a direct, or indirect, result of such an application.

(3) Subsection (1) does not apply in relation to a non-citizen who, before the regulation referred to in that subsection takes effect, has:

(a) been granted a substantive visa as a result of an application referred to in that subsection; or

(b) been determined under this Act to be a non-citizen who satisfies the criterion mentioned in subsection 36(2).

(4) The cut off day specified in the regulation must not be:

(a) before a day on which the Minister, by notice in the Gazette, announces that he or she intends that such a regulation will be made; or

(b) more than 6 months before the regulation takes effect.

**Subdivision AK Non-citizens with access to protection from third countries**

**91M** Reason for this Subdivision

This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

Note: For protection visas, see section 36.

**91N** Non-citizens to whom this Subdivision applies

(1) This Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries.

(2) This Subdivision also applies to a non-citizen at a particular time if, at that time:

(a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the available country) apart from:

(i) Australia; or

(ii) a country of which the non-citizen is a national; or

(iii) if the non-citizen has no country of nationality—the country of which the non-citizen is an habitual resident; and

(b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations prescribe a longer continuous period, for at least that longer period; and

(c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.

(3) The Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking protection, to effective procedures for assessing their need for protection; and

(ii) provides protection to persons to whom that country has protection obligations; and

(iii) meets relevant human rights standards for persons to whom that country has protection obligations; or

(b) in writing, revoke a declaration made under paragraph (a).

(4) A declaration made under paragraph (3)(a):

(a) takes effect when it is made by the Minister; and

(b) ceases to be in effect if and when it is revoked by the Minister under paragraph (3)(b).

(5) The Minister must cause a copy of a declaration, or of a revocation of a declaration, to be laid before each House of the Parliament within 2 sitting days of that House after the Minister makes the declaration or revokes the declaration.

*Determining nationality*

(6) For the purposes of this section, the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

**91P** Non-citizens to whom this Subdivision applies are unable to make valid applications for certain visas

(1) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a visa; and

(c) the non-citizen is in the migration zone and has not been immigration cleared at that time;

neither that application, nor any other application the non-citizen makes for a visa while he or she remains in the migration zone, is a valid application.

(2) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a protection visa; and

(c) the non-citizen is in the migration zone and has been immigration cleared at that time;

neither that application, nor any other application made by the non-citizen for a protection visa while he or she remains in the migration zone, is a valid application.

**91Q** Minister may determine that section 91P does not apply to a non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91P does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

(2) For the purposes of subsection (1), the matters that the Minister may consider include information that raises the possibility that, although the non-citizen satisfies the description set out in subsection 91N(1) or (2), the non-citizen might not be able to avail himself or herself of protection from the country, or any of the countries, by reference to which the non-citizen satisfies that description.

(3) The power under subsection (1) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement under subsection (4) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

**189** Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person (other than a person referred to in subsection (3A)) in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

(3A) If an officer knows or reasonably suspects that a person in a protected area:

(a) is an allowed inhabitant of the Protected Zone; and

(b) is an unlawful non-citizen;

the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3), (3A) and (4) and any other provisions of this Act that relate to those subsections, officer means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

Note: See Subdivision B for the Minister's power to determine that people who are required or permitted by this section to be detained may reside at places not covered by the definition of immigration detention in subsection 5(1).

**196** Duration of detention

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until:

(a) he or she is removed from Australia under section 198 or 199; or

(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or

(b) he or she is deported under section 200; or

(c) he or she is granted a visa.

(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1)(a), (aa) or (b)) unless the non-citizen has been granted a visa.

(4) Subject to paragraphs (1)(a), (b) and (c), if the person is detained as a result of the cancellation of his or her visa under section 501, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen.

(4A) Subject to paragraphs (1)(a), (b) and (c), if the person is detained pending his or her deportation under section 200, the detention is to continue unless a court finally determines that the detention is unlawful.

(5) To avoid doubt, subsection (4) or (4A) applies:

(a) whether or not there is a real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future; and

(b) whether or not a visa decision relating to the person detained is, or may be, unlawful.

(5A) Subsections (4) and (4A) do not affect by implication the continuation of the detention of a person to whom those subsections do not apply.

(6) This section has effect despite any other law.

(7) In this section:

***visa decision*** means a decision relating to a visa (including a decision not to grant the visa, to cancel the visa or not to reinstate the visa).

**198** Removal from Australia of unlawful non-citizens

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as

reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the original decision) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(11) This section does not apply to an offshore entry person to whom section 198AD applies.

**Applicable provisions of the *Migration Regulations 1994* (Cth)**

**Schedule 2 Provisions with respect to the grant of Subclasses of visas**

*Subclass 866 Protection visas*

**866.2** Primary criteria

Note All applicants must satisfy the primary criteria.

**866.21** Criteria to be satisfied at time of application

866.211

(1) One of subclauses (2) to (5) is satisfied.

(2) The applicant:

(a) claims to be a person to whom Australia has protection obligations under the Refugees Convention; and

(b) makes specific claims under the Refugees Convention.

(3) The applicant claims to be a member of the same family unit as a person who is:

(a) mentioned in subclause (2); and

(b) an applicant for a Protection (Class XA) visa.

(4) The applicant claims to be a person to whom Australia has protection obligations because the applicant claims that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

(5) The applicant claims to be a member of the same family unit as a person who is:

(a) mentioned in subclause (4); and

(b) an applicant for a Protection (Class XA) visa.

**866.22** Criteria to be satisfied at time of decision

866.221

(1) One of subclauses (2) to (5) is satisfied.

(2) The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

Note See paragraph 36 (2) (a) of the Act.

(3) The Minister is satisfied that:

(a) the applicant is a person who is a member of the same family unit as an applicant who is mentioned in subclause (2); and

(b) the applicant mentioned in subclause (2) has been granted a Protection (Class XA) visa.

Note See paragraph 36 (2) (b) of the Act.

(4) The Minister is satisfied that the applicant:

(a) is not a person to whom Australia has protection obligations under the Refugees Convention; and

(b) is a person to whom Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Note See paragraph 36 (2) (aa) of the Act.

(5) The Minister is satisfied that:

(a) the applicant is a person who is a member of the same family unit as an applicant mentioned in subclause (4); and

(b) the applicant mentioned in subclause (4) has been granted a Protection (Class XA) visa.

Note See paragraph 36 (2) (c) of the Act.

866.223 The applicant has undergone a medical examination carried out by any of the following (a relevant medical practitioner ):

(a) a Medical Officer of the Commonwealth;

(b) a medical practitioner approved by the Minister for the purposes of this paragraph;

(c) a medical practitioner employed by an organisation approved by the Minister for the purposes of this paragraph.

866.224 The applicant:

(a) has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia; or

(b) is under 11 years of age and is not a person in respect of whom a relevant medical practitioner has requested such an examination; or

(c) is a person:

(i) who is confirmed by a relevant medical practitioner to be pregnant; and

(ii) who has been examined for tuberculosis by a chest clinic officer employed by a health authority of a State or Territory; and

(iii) who has signed an undertaking to place herself under the professional supervision of a health authority in a State or Territory and to undergo any necessary treatment; and

(iv) who the Minister is satisfied should not be required to undergo a chest x-ray examination at this time.

866.224A A relevant medical practitioner:

(a) has considered:

(i) the results of any tests carried out for the purposes of the medical examination required under clause 866.223; and

(ii) the radiological report (if any) required under clause 866.224 in respect of the applicant; and

(b) if he or she is not a Medical Officer of the Commonwealth and considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, has referred any relevant results and reports to a Medical Officer of the Commonwealth.

866.224B If a Medical Officer of the Commonwealth considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, arrangements have been made, on the advice of the Medical Officer of the Commonwealth, to place the applicant under the professional supervision of a health authority in a State or Territory to undergo any necessary treatment.

866.225 The applicant:

(a) satisfies public interest criteria 4001, 4002 and 4003A; and

(b) if the applicant had turned 18 at the time of application -- satisfies public interest criterion 4019.

866.226 The Minister is satisfied that the grant of the visa is in the national interest.

866.227

(1) The applicant meets the requirements of subclause (2) or (3).

(2) The applicant meets the requirements of this subclause if the applicant, or a member of the family unit of the applicant, is not a person who has been offered a temporary stay in Australia by the Australian Government for the purpose of an application for a Temporary Safe Haven (Class UJ) visa as provided for in regulation 2.07AC.

(3) The applicant meets the requirements of this subclause if section 91K of the Act does not apply to the applicant's application because of a determination made by the Minister under subsection 91L (1) of the Act.

866.230

(1) If the applicant is a child mentioned in paragraph 2.08 (1) (b), subclause (2) or (3) is satisfied.

(2) Both of the following apply:

(a) the applicant is a member of the same family unit as an applicant mentioned in subclause 866.221 (2);

(b) the applicant mentioned in subclause 866.221 (2) has been granted a Subclass 866 (Protection) visa.

(3) Both of the following apply:

(a) the applicant is a member of the same family unit as an applicant mentioned in subclause 866.221 (4);

(b) the applicant mentioned in subclause 866.221 (4) has been granted a Subclass 866 (Protection) visa.

866.231 The applicant has not been made an offer of a permanent stay in Australia as described in item 3 or 4 of the table in subregulation 2.07AQ (3).

866.232 The applicant does not hold a Resolution of Status (Class CD) visa.

**Applicable provisions of the *Australian Security and Intelligence Organisation Act 1979* (Cth)**

4 Definitions

In this Act, unless the contrary intention appears:

...

***security*** means:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

**36** Part not to apply to certain assessments

This Part (other than subsections 37(1), (3) and (4)) does not apply to or in relation to:

(a) a security assessment in relation to the employment, by engagement outside Australia for duties outside Australia, of a person who is not an Australian citizen or is not normally resident in Australia; or

(b) a security assessment in relation to action of a kind referred to in paragraph (b) of the definition of prescribed administrative action in section 35 (other than an assessment made for the purposes of subsection 202(1) of the Migration Act 1958) in respect of a person who is not:

(i) an Australian citizen;

(ii) a person who is, within the meaning of the Migration Act 1958, the holder of a valid permanent visa; or

(iii) a person who holds a special category visa or is taken by subsection 33(2) of the Migration Act 1958 to have been granted a special purpose visa; or

(c) a security assessment in relation to the engagement, or proposed engagement, of a person by or in the Organisation, or an intelligence or security agency, as a staff member of the Organisation or agency.

**37** Security assessments

(1) The functions of the Organisation referred to in paragraph 17(1)(c) include the furnishing to Commonwealth agencies of security assessments relevant to their functions and responsibilities.

(2) An adverse or qualified security assessment shall be accompanied by a statement of the grounds for the assessment, and that statement:

(a) shall contain all information that has been relied on by the Organisation in making the assessment, other than information the inclusion of which would, in the opinion of the Director-General, be contrary to the requirements of security; and

(b) shall, for the purposes of this Part, be deemed to be part of the assessment.

(3) The regulations may prescribe matters that are to be taken into account, the manner in which those matters are to be taken into account, and matters that are not to be taken into account, in the making of assessments, or of assessments of a particular class, and any such regulations are binding on the Organisation and on the Tribunal.

(4) Subject to any regulations made in accordance with subsection (3), the Director-General shall, in consultation with the Minister, determine matters of a kind referred to in subsection (3), but nothing in this subsection affects the powers of the Tribunal.

(5) No proceedings, other than an application to the Tribunal under section 54, shall be brought in any court or tribunal in respect of the making of an assessment or anything done in respect of an assessment in accordance with this Act.