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

SUBMISSIONS OF REFUGEE AND IMMIGRATION LEGAL CENTRE SEEKING LEAVE TO BE HEARD AS AMICUS CURIAE

Date of document: 30 May 2013
Filed on behalf of: Refugee & Immigration Legal Centre

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Part I: PUBLICATION

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

Part II: BASIS OF APPLICATION

2. The Refugee & Immigration Legal Centre (**RILC**) seeks leave to appear as amicus curiae, for the purposes of making written and oral submissions in support of the result contended for by the plaintiff. If granted leave, those submissions would be limited to aspects of questions (4) and (5) in the Special Case.

Part III: WHY LEAVE TO APPEAR AS AMICUS CURIAE SHOULD BE GRANTED

3. Leave to appear as amicus curiae is sought on the grounds set out in the affidavit of David Thomas Manne sworn on 30 May 2013. The nature and functions of RILC are set out in paragraphs 4 to 6 of that affidavit.

4. The issues raised in this proceeding are of importance to a wider group of people than the parties to the litigation. In particular, that includes the 30 people whom RILC represents referred to in paragraph 12 of Mr Manne's affidavit, being persons who are subject to adverse security assessments and who are detained on an apparently indefinite basis. Many, but not all, of their interests in the outcome of this matter coincide with those of the plaintiff. For example, the plaintiff in *Plaintiff M47 of 2012 v Director General of Security*[1] (who was and is a client of RILC) had been afforded procedural fairness in respect of his adverse security assessment.[2] Accordingly, the scope of the constitutional principle identified by Plaintiff S138 in the current proceeding may not extend to Plaintiff M47.

5. As French CJ observed in *Wurridjal v Commonwealth*,[3] an amicus may be permitted to intervene, where it is 'in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer'. Significantly in that regard, RILC's proposed submissions posit a wider constitutional principle than that advanced by Plaintiff S138 — one not limited to cases affected by a denial of procedural fairness.[4]

6. By reason of its expertise and experience (referred to in paragraphs 9 to 11 of Mr Manne's affidavit) RILC is well placed to provide that assistance to the

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[1] (2012) ALJR 1372

[2] Ibid, at [140] and [144] per Gummow J, [253] per Heydon J, [380] per Crennan J, [415] per Kiefel J and [505] per Bell J

[3] (2009) 237 CLR 309 at 312.

[4] Cf Plaintiff's Written Submissions at [55]-[79].

Court. That is particularly so given RILC's extensive experience in dealing with the wider group of people who will be directly affected by the outcome of this proceeding.

7. Finally, no prejudice would be occasioned to the parties should leave be granted. RILC's submissions are confined in the manner noted above and are further to, not in derogation of, the contentions of Plaintiff S138. The defendants will suffer no prejudice if RILC is granted leave to appear as amicus. Further, the timetable need not be disrupted.

Part IV: ISSUES ADDRESSED

8. In summary, RILC contends that, to the extent that ss 189, 196 and 198 are construed to permit indefinite detention of an alien, they infringe the constitutional separation of powers. Although executive detention of aliens for the purpose of removal is permissible as an exception to a constraint upon legislative and executive power, that exception is subject to limits and indefinite detention violates those limits. The exception does not authorise preventative detention of an alien by the executive as a means of protecting the community from a perceived risk or threat posed by an individual.

9. These submissions address aspects of question (4) and question (5), if they arise for determination, as follows.

Question (4): construction of ss 189 and 196 of the Act

10. RILC supports the construction of ss 189 and 196 of the Act advanced by Plaintiff S138 at paragraphs [34]-[54] of his written submissions. However, RILC contends that the constitutional principle that requires that construction, flowing from limits imposed by Chapter III of the Constitution, is wider than one linked to questions of whether procedural fairness was accorded to the detainee. It is to that principle that these submissions are directed.

Question (5): constitutional validity

11. If, contrary to the answer proposed to question (4), ss 189, 196 and 198 authorise the (continued) detention of the plaintiff, RILC submits that they are beyond the legislative power of the Commonwealth. The following matters inform the approach to construction of those provisions of the Act, as well as the approach to their validity.

12. This submission is not directed to whether ss 189, 196 and 198 are supported by a head of power. A law infringing upon the liberty of an alien can be a law with respect to s 51(xix) (and perhaps also s 51(xxvii)).[5] However,

[5] Cf Gaudron J in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 57 and in *Kruger v Commonwealth* (1997) 190 CLR 1 at 109-11.

such a law is subject, by the opening words of s 51, to the other provisions of the Constitution — particularly Chapter III.[6]

Separation of judicial power

13. Chapter III of the Constitution, and the separation of the judicial function from the political branches of government thereby effected, achieves the constitutional object described by five members of this Court as "the guarantee of liberty".[7]

14. It may be that the constraint identified in *Chu Kheng Lim v Minister for Immigration*[8] that flows from those structural features of the Constitution is not properly regarded as an individual "immunity" or "guarantee". The better view may be that what is protected is not the rights of individuals, but rather the constitutionally prescribed scheme that vests the judicial power of the Commonwealth exclusively and exhaustively in Chapter III courts.[9]

15. On either analysis, judicial power cannot be exercised otherwise than by the judicial branch of government, thereby giving "practical effect to the assumption of the rule of law upon which the Constitution depends for its efficacy".[10]

Central conception of judicial power

16. The power to deprive a person of their liberty, conditioned upon the adjudication of guilt, lies at the heart of judicial power and is exclusively judicial.[11] It is an aspect of the guarantee of liberty (or the structural imperative) that, "exceptional" cases aside, the involuntary detention of a person in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that person for past acts. This is an

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[6] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 55 [149] per Gummow J.

[7] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 per Brennan CJ, Dawson, Toohey, McHugh & Gummow JJ. See also, referring to *Wilson*, *State of South Australia v Totani* (2010) 242 CLR 1 at 156 [423] per Crennan and Bell JJ and the other authorities there collected at footnote 598.

[8] (1992) 176 CLR 1 at 28-9 per Brennan, Deane and Dawson JJ (Mason CJ agreeing at 10).

[9] See, by way of analogy with the implied freedom cases, *Monis v The Queen* (2013) 87 ALJR 340 at 360 [62]; 295 ALR 259 at 279 per French CJ; *Wotton v Queensland* (2012) 246 CLR 1 at 13 [20] and 15 [25]; and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561. See also, in the context of Chapter III, *Assistant Commissioner Michael James Condon v Pompano Pty Limited* (2013) 87 ALJR 458 at 497-8 [180]-[183]; 295 ALR 638 at 686-7 per Gageler J.

[10] *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351-2 [30].

[11] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 per Gummow J at 611 [76], 611 [77], 612 [80] and 613 [83] – see also *Lim* at 27-8 per Brennan, Deane and Dawson JJ and at 70-1 per McHugh J; *Woolley* at 12 [17] per Gleeson CJ and at 35 [82] per McHugh J (although, cf his Honour's reasons at 24 [57]) – note also the doubts expressed by Hayne J in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648 [258]. The references in those passages to "citizens" being the beneficiaries of the principle should be understood in accordance with Gummow J's reasons in *Fardon* at 611-2 [78].

implied constraint on executive and legislative power, derived from the constitutional landscape.

17. So far as the structural imperative is concerned, it is no answer to say that the exclusive domain of judicial power remains unsullied by executive detention because the executive branch has deprived a person of their liberty *without* the adjudication of criminal guilt. To use this as a general criterion is impermissibly to decouple the result or consequence — deprivation of liberty — from its essential precondition — judicial determination of criminal guilt.[12]

Exceptions and compatibility with the constitutionally prescribed scheme

18. Question (5) of the special case is directed to the exercise of legislative power. In that context, the so called "exceptions" to the constraint identified above supply certain permissible statutory objects. If, as a matter of objective intention, a legislative measure can be said to be directed to such an object, it will not necessarily exceed that constitutional constraint, subject to the further requirements identified below.

19. As in analogous areas of constitutional discourse, the identification of such exceptions (and associated permissible objects) requires consideration of whether they can be regarded as "compatible" with the relevant constitutional imperative.[13] In that regard, certain of the recognised exceptions are readily understood as being compatible with the constitutional scheme:

(a) Detention on remand is ancillary to and facilitative of the process of adjudication of guilt (and is also subject to judicial supervision). It therefore facilitates the constitutionally prescribed scheme by ensuring that accused persons are available to be dealt with by the exercise of judicial power and is unlikely to objectionable.

(b) Military justice (in its traditional form) is unobjectionable because it does not involve the exercise of Chapter III judicial power: see *Lane v Morrison* (2009) 239 CLR 230.

(c) Detention for contempt of Parliament has a clear textual basis in s 49 of the Constitution: *R v Richards; Ex Parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167.

(d) Quarantine and mental health reflect traditional forms of executive detention that the law has long recognised[14] as a matter of pragmatic

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[12] See *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497 per Gaudron J.

[13] See eg *Monis v The Queen* (2013) 87 ALJR 340 at 396; 396 [277], [278]; 295 ALR 259 at 329 per Crennan, Kiefel and Bell JJ; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85] per Gummow, Kirby and Crennan JJ; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 59 [161] per Gummow and Bell JJ.

[14] Their history is traced in Gordon, "Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention" (2012) 36 *Melbourne University Law Review* 41 at 77-84.

necessity – see eg Lord Eldon LC in *Crowley's Case*[15] referring to the "most serious mischiefs" that might result from habeas corpus issued in respect of a quarantined ship if there were no requirement for probable cause verified by affidavit. But, being born of necessity to address mischief of that nature, those exceptions are limited to the extent of the need.[16]

20. The constitutionally mandated separation of powers is not threatened by such exceptions, at least in their traditional forms.

21. It is clear that it is not the dichotomy between punitive and non-punitive that differentiates these categories from judicial power (cf *Lim*). Nor should it. Such language may be a convenient shorthand; however, as a taxonomy it is apt to mislead:[17]

    (a) One difficulty with the "punitive vs non punitive" criterion is that it suggests that the constraint upon power is animated by matters that are subjective to the person detained; rather than a functional concern to guard the exclusivity of the otherwise purely judicial power to deprive of liberty.

    (b) A further difficulty is that it proceeds from the unstated assumption that non-punitive detention is in some way a lesser intrusion upon the detainee's liberty than punitive detention. But no normative assumption can or should be made about the quality or severity of conditions of 'punitive' compared to 'non-punitive' detention. The 'non-punitive' label will offer little comfort to the detainee who has been neither charged with nor convicted of any crime.

22. It can also be accepted that the classes of case that may constitute such an exception are not closed.[18] The development of new cases is to be approached by reference to historical antecedents, from which analogies may be developed using ordinary processes of legal reasoning[19] (and the overriding requirement that their accommodation be compatible with the maintenance of the constitutionally prescribed separation of powers).

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[15] (1818) 36 ER 514 at 531.

[16] See, by way of analogy, *APLA Ltd v Legal Services Commissioner (NSW)* 224 CLR 322 at 361 [66] per McHugh J.

[17] *Al-Kateb* at 611-3 [135]-[138] per Gummow J; *Fardon* at 162 [81] per Gummow J and at 647-8 [196] per Hayne J.

[18] Eg *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at 648 [108] per Gummow and Hayne JJ.

[19] See, apparently adopting such an approach, *Vasiljkovic* per Gummow and Hayne JJ at 648 [108]-[109] and 649 [113] and see Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166 at 174. See also eg (in the context of 51(xxxi)), *The Queen v Smithers; Ex parte McMillan* (1982) 152 CLR 477 at 487; *Theophanous v Commonwealth* (2006) 225 CLR 101 at 126-7 [60]-[64]; and (in the context of s 55) *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467. See also, in a different context, *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635 at 665 [85].

23. The engagement of those exceptions depends, as a critical starting point, upon the identification of the legislative purpose for which the authority to detain is conferred. However, as submitted above, the fact that that purpose may be a permissible one in the sense identified above is a necessary, but not sufficient, condition for validity. For reasons developed below, it is also necessary that the legislative means adopted be proportionate to the permissible purpose and not impose an undue burden upon the constitutionally prescribed scheme.

The exception concerning the power to expel or deport aliens

24. *Lim* establishes that, in addition to the exceptions discussed above, there is an exception concerning laws conferring on the executive power to expel or deport a particular alien and the associated power to "restrain an alien in custody to the extent necessary" to make expulsion or deportation "effective".[20] The terms in which that exception is formulated and the discussion in *Lim* suggest that it is to be explained by reference to matters of necessity and history (like the categories of quarantine and mental health) – see also *Koon Wing Lau v Calwell*.[21]

25. The existence of the category appears to be common ground, but not its content. In the particular circumstances where expulsion or deportation of the detainee is not reasonably practicable, the question arises whether that power to detain continues to exist, even in circumstances where the principal power to expel or deport *cannot be exercised effectively*.

26. What is in issue is whether detention of that kind falls within that category, or outside it.

27. The outer limits of that permissible category of deprivation of liberty were stated by Brennan, Deane and Dawson JJ in *Lim* in these terms: the detention authorised by the enactment must be restricted to what is "reasonably capable of being seen as necessary" for the purposes of deportation or to enable an application for an entry permit to be made and considered.[22]

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[20] *Lim* at 30-1 per Brennan, Deane and Dawson JJ.

[21] (1949) 80 CLR 533 at 555-556 per Latham CJ.

[22] *Lim* at 33 per Brennan, Deane and Dawson JJ. See, to somewhat similar effect (albeit resting upon a dichotomy between punitive and non-punitive objects), McHugh J at 71. See also, seemingly endorsing that test: *Al-Kateb* per Callinan J at 660 [294]; *Woolley* per Gleeson CJ at 13-14 [21]-[22], 14 [25], Gummow J at 51-52 [133]-[134] and 60 [163]-[165], Callinan J at 84 [260]; *Fardon* per Callinan and Heydon JJ at 653-654 [215] (in regard to detention generally); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 per Kirby J at 527 [118]-[119] and per Callinan J at 559 [218]; *Kruger* per Gummow J at 162 (in regard to detention generally). However, compare *Al-Kateb* per Hayne J at 647-648 [252]-[256] (Heydon J concurring) and per McHugh J at 584 [45]; *Woolley* per McHugh J at 33 [78] and Hayne J at 77 [227]-[228] (Heydon J concurring) and *Behrooz* per Hayne J who, at 541-2 [171], expresses doubt about the "line" drawn in *Lim*.

28. Contrary to the suggestions made in some of the authorities, that formulation does not suggest that the principle in issue here rests upon a requirement for a sufficient connection with a relevant head of power[23] – indeed, aside from the special case of purposive powers, it is to be doubted that that is now the correct approach to characterisation, even in the area of the so called implied incidental power.[24] The starting point of the argument (see above) is that a law providing for the detention of an alien will be a law with respect to, at least, the subject matter in s 51(xix).

29. The test for validity proposed in *Lim* is rather correctly understood as arising from the nature of the constraint imposed by Chapter III. The existence of exceptions to the general principle identified above (even in the case of citizens) indicates that that constraint is not absolute and that some test of what constitutes a legitimate type or level of restriction or incursion must be developed.[25] The test must explain the relationship between the deprivation of liberty and the effective exercise of the power (in this case) to remove.

30. So understood, the inquiry in *Lim* becomes a familiar one, applied to other express and implied constitutional constraints, and involving consideration of the relationship between the "permissible" end to be served by the impugned law (supplied by the exceptions) and the means by which it does so (which must be limited to what is "appropriate and adapted", "reasonably necessary", "reasonably capable of being seen as necessary" or "proportionate" to that end).[26] However, what is regarded as "necessary" or "proportionate" is more demanding in the context of deprivation of liberty than in other contexts.

31. The reasons of Crennan, Kiefel and Bell JJ in *Monis v The Queen* may suggest that it is necessary to ask, in addition, whether the legislative means adopted imposes an unreasonable burden or strain upon the prescribed constitutional scheme (or, put another way, whether it is proportionate to the object of maintaining that scheme, that being the object that underlies the principle in *Lim*).[27]

32. Those matters are, of course, not at large and cannot be conclusively determined by any but the judicial branch of government – the Constitution does not contemplate that a member of the Executive may be given power

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[23] Cf Hayne J in *Al-Kateb* at 647 [253].

[24] *Theophanous v Commonwealth* (2006) 225 CLR 101 at 128 [70].

[25] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 136 [444] per Kiefel J. Indeed, such an inquiry is particularly apposite when regard is had to the origins of the exception, including judicial statements that have consistently emphasised its limited nature and the importance of the existence of a relationship with the object of making effective particular aspects of sovereign power: see eg *Calwell* at 595.

[26] See eg *Monis v The Queen* (2013) 87 ALJR 340 at 408 [345]; 295 ALR 259 at 345; *Hogan v Hinch* (2011) 243 CLR 506 at 542-3 [47], 544 [50] per French CJ and 556 [97]-[98] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; and *Betfair v WA* (2008) 234 CLR 418 at 476-8 [101]-[105].

[27] (2013) 87 ALJR 340 at 396 [277]-[278], 396-7 [282]; 295 ALR 259 at 329, 330.

with a quality of complete freedom from legal control.[28] As such, the continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the Executive.[29] While the legislature may confer a power of detention upon the Executive, that power is necessarily constrained by any applicable constitutional restrictions upon the legislative power. Assuming that, on its proper construction, the statute complies with the constitutional constraint identified above, the result that will be that the Executive will act *ultra vires* if it exceeds those constraints[30] (that is so, even though the power is conferred in "wide general words" imposing few if any express constraints or if the legislature specifies that the exercise of the power of detention is mandatory[31]).

33. Does that exceptional category apply to a case where it is not reasonably foreseeable that the object of deportation could be achieved? The answer must be no: once it is recognised that that object, for the foreseeable future, will not realistically be achieved, the justification for detention to facilitate that object necessarily falls away. There is no other permissible object. For reasons developed below, segregation of aliens generally from the community is not such an object. Accordingly, detention cannot be validly authorised in those circumstances. The further questions regarding proportionality do not arise.

34. Of course if deportation were to become a realistic possibility at some future point, then grounds for such detention may again exist and further detention may be warranted. But in the intervening period, detention serves no permissible purpose in the sense identified above.

35. Alternatively, it follows from the requirement that the legislative means must be proportionate to a permissible end (and perhaps also to the object of maintaining the constitutionally prescribed scheme) that it is not sufficient for the Commonwealth to assert that the Act validly authorises detention provided that the object of removal (at some unspecified date in the future) remains on foot.

36. Where the relevant end – expulsion or deportation of an alien – is not reasonably practicable (ie impossible to achieve, consistently with Australia's international obligations, in the foreseeable future), it does not follow that what is authorised by the exceptional case grows correspondingly more extreme. If that were so, then in the most extreme cases what is authorised is unlimited and indefinite executive detention at the unconstrained discretion of the executive: cf *Plaintiff M61/2010E v*

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[28] *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 629-30.

[29] *Al-Kateb* at 613 [140] per Gummow J.

[30] *Wotton* at 13-14 [21]-[22]; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613-4 per Brennan J.

[31] See *Al-Kateb* at 609 [126]-[127] per Gummow J; cf Hayne J at 647 [254].

Commonwealth.[32] Rather, it must follow that the only available means (ie indefinite detention) ceases to be proportionate to the permissible object.[33] That is so while it remains a fact that expulsion or deportation cannot be achieved.

37. Importantly, once removal of a person who is not to be granted a visa is impracticable, it is not permissible to rely on the limited executive power to detain aliens for the purpose of removal in order to perform a different function of preventative detention — that is, detention at the control of the executive for the purpose of protection of the community against a threat or risk posed by a particular individual. It is irrelevant to the content of that detention whether the threat is posed by an alien or a citizen. Preventative detention is not within the *Lim* exceptions. If preventative steps are thought to be necessary in relation to particular individuals, those individuals must be dealt with under the general law conformably with Chapter III,[34] including the law relating to control orders.[35]

Principles concerning executive detention not limited by reference to citizenship

38. The constitutional separation of judicial power is not to be limited by reference to a criterion of citizenship. One matter that may be apt to mislead is that the beneficiaries of that principle have sometimes been described by reference to the criterion of "citizenship".[36] That may be seen to reflect the fact that, unlike a citizen, an alien is subject to detention for the purposes of "deportation or expulsion" and as an incident to the executive powers to "receive, investigate and determine an application by that alien for an entry permit".[37]

39. The principle identified above applies equally to aliens, save in the "particular area" of detention for the purposes of considering permission to enter or removal.[38] That "particular area" is properly regarded as no more than an example of an exception to that overarching principle[39] (or a legitimate "category of deprivation of liberty"), albeit one which applies only to a subset of the people entitled to the protection afforded by the Constitution and the

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[32] (2010) 243 CLR 319 at 348 [64].

[33] See, in that regard, *Plaintiff M47 of 2012 v Director General of Security & Ors* (2012) ALJR 1372 at 1402-2 [103]-[106] and1403 [115] per Gummow J (noting, but not deciding, the issue).

[34] See, eg, the discussion in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [68]-[84] (Gummow J).

[35] As considered by this Court in *Thomas v Mowbray* (2007) 233 CLR 307.

[36] See *Lim* at 27 per Brennan, Deane and Dawson JJ and *Woolley* at 12 [17] per Gleeson CJ.

[37] *Lim* at 32.

[38] *Fardon* at 611-2 [78] per Gummow J; *Vasiljkovic* at 643 [84] per Gummow and Hayne JJ and 669 [189] per Kirby J.

[39] See, apparently adopting such an analysis, *Vasiljkovic* at 648 [108]-[109] per Gummow and Hayne JJ and at 668 [183] per Kirby J.

laws of Australia.[40] That explains the references in *Lim* to there being "limited" authority to detain an alien for certain purposes.[41] In other words, the fact that a person is an alien does not mean that legislation may authorise her or his detention at any time and for any purpose without contravening Chapter III of the Constitution.

The exception is not a general power to detain for the purposes of segregation

40. The remarks of some members of this Court might be said to support an argument that, in addition to the purposes identified above, the permissible category of executive deprivation of liberty that applies in connection with the status of alienage extends more broadly to detention directed at the segregation of aliens from the community.[42] That is not a matter which has been authoritatively determined[43] and for the following reasons is incorrect.

(a) First, such remarks are better understood, from their terms and the contexts in which they were made, as directed solely at detention pending a decision about entry, or to facilitate removal (and to the segregation of aliens from the Australian community only in those circumstances).

(b) Secondly, as developed by some members of the Court in *Al-Kateb v Godwin* and in *Woolley; Ex parte Applicants M276/2003*, that view seems to rest upon the notion that s 51(xix) confers power upon the Commonwealth Parliament to make laws with respect to the "exclusion" of aliens.[44] However, "exclusion", as that concept has been understood in the context of s 51(xix),[45] comparative

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[40] Indeed, the same may be said of other "exceptions" – for example, the detention of a person suffering from a mental illness or infectious disease.

[41] *Lim*, per Mason CJ at 10 and Brennan, Deane and Dawson JJ at 32 and 33.

[42] See *Al-Kateb* at 584 [45] and 586 [49] per McHugh J and at 648 [255]-[256] per Hayne J (with whom Heydon J agreed at 662-3 [303]) and *Woolley* at 46-7 [115] per McHugh J and at 75-6 [222]-[223] per Hayne J (with whom Heydon J agreed at 87 [270]). Gleeson CJ's comments in *Woolley* at 14-5 [26]-[28] do not extend that far – while his Honour explained *Lim* on the basis that the "power of exclusion" supported detention, his Honour characterised that power as one to keep those persons separate from the community "while their visa applications were being investigated and considered" (at 15 [27]).

[43] While Callinan J in *Al-Kateb* said that it "may be the case" that detention for such purposes is constitutionally permissible (and identified a number of practical considerations that might favour that view) he expressly refrained from deciding that issue: at 658 [289]. Moreover, Hayne J's reasons in *Al-Kateb* may suggest that that purpose is not sufficient in itself and may require (in addition) an ongoing purpose of removal: see the words "in the meantime" at 648 [255] but cf the seemingly broader formulation at 651 [267].

[44] See eg *Al-Kateb* at 584 [45] per McHugh J and at 648 [255] per Hayne J; *Woolley* at 31 [72] per McHugh J (seemingly endorsing Hayne J's reasoning in *Al-Kateb*) and at 75 [222] per Hayne J.

[45] *Robtelmes v Brenan* (1906) 4 CLR 395 at 400-4 per Griffith CJ, 415 per Barton J, 420-2 per O'Connor J; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 132-3 per Starke J; *O'Keefe v Calwell* (1949) 77 CLR 261 at 277-8 per Latham CJ - dealing with s 51(xxvii); *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555-6 per Latham CJ; *Lim* at 26 per Brennan, Deane and

jurisprudence[46] and international law,[47] is merely the "complement" of the power to expel or deport. As an aspect of sovereignty, a State may legitimately turn back aliens at the border (and so "exclude the entry of non-citizens or a particular class of non-citizens": *Lim* at 26) or remove aliens after they have entered the territory (the power of expulsion or deportation). So understood, the power of expulsion (and not the power of exclusion) is traditionally understood to be the applicable power as regards aliens within territory. The power to exclude should not be understood more broadly as some form of all encompassing power of segregation. Given the apparent breadth of the notion of the "exclusion/segregation" power, that would mean that the principle identified above has no application to non-citizens — but that is contrary to authority, as discussed above.

(c) Thirdly, even if the notion of exclusion carried with it some broader power of segregation, that would not answer the question of whether Chapter III is infringed. As with other constitutional guarantees or constraints, the question of whether a law is within a head of s 51 power is distinct from the question of whether the relevant constraint is contravened.[48]

(d) Fourthly, for the reasons given by Gummow J in *Woolley* at 52-55 [135]-[148], the notion of exclusion from the Australian community is an indeterminate concept, reflecting the equally indeterminate nature of the concept of membership of that community (applied in the context of the so called absorption doctrine in determining whether a person is beyond the reach of the immigrants power).[49] That "very vague" conception has no part to play in the construction of the content or outer limits of the aliens power or the constraints applied to that power by Chapter III.[50]

Dawson JJ – see also *Musgrove v Chun Teeong Toy* (1891) AC 272 at 282 and *Chung Teong Toy v Musgrove* (1888) 14 VLR 349 at 378.

[46] *Attorney-General for Canada v Cain* (1906) AC 542 at 546-547 – see also the United States authorities referred to in *Robtelmes*.

[47] 'Exclusion' is not recognised as a distinct concept in international law. To the extent that the term is used, it is generally used as a synonym for non-admission: see eg Griffin, "Colonial Expulsion of Aliens", 33 *American Law Review* 90 at 90-91 (1899) and Kamto, Special Rapporteur, *Second report on the expulsion of aliens*, International Law Commission, Fifty-eighth session, 20 July 2006, A/CN.4/573 at 54 [170]. See also the decision of the Permanent Court of International Justice in *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (1932) PCIJ Reports, Series A/B, No. 44 at 41.

[48] See, in the context of s 51(xxxi), *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 387 [187] per Gummow and Hayne JJ and *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at 250 [339] per McHugh J.

[49] Which, in so far as it is reflected in the so called "absorption doctrine" applicable to s 51(xxvii), has been described as a "very vague conception": *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 444-5 [160].

[50] *Woolley* at 54-5 [147]-[148] per Gummow J.

The importance of procedural fairness (ie Plaintiff S138's argument)

41. It may well be that a person the subject of an adverse security assessment such as Plaintiff S138 will not know the substance of the allegations against them or the grounds of concern. In such a case, detention may more clearly be incompatible with the constitutionally prescribed scheme.

42. But even if procedural fairness were afforded, it follows from RILC's submissions that this does not necessarily achieve a complete compatibility with Chapter III and the separation of judicial power.

43. To ask an administrator to act in a more 'judicial' manner (ie by affording procedural fairness) will likely produce a higher quality (or better informed standard) of executive decision-making.

44. But it does not overcome the deeper problem that, ultimately, the power to detain indefinitely is premised on a determination — albeit a procedurally fair one — of something other than criminal guilt, by an entity other than a Court.

Part V: TIME ESTIMATE

45. RILC seeks to intervene principally by filing written submissions, with oral submissions supplemental to these written submissions. Any such oral submissions would take 15 minutes.

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