2022-2023-2024

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

Migration Amendment (Removal and Other Measures) Bill 2024

No. , 2024

(Home Affairs)

A Bill for an Act to amend the *Migration Act 1958*, and for related purposes

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A Bill for an Act to amend the *Migration Act 1958*, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act is the *Migration Amendment (Removal and Other Measures) Act 2024*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provisions	**Commencement**	**Date/Details**
1. The whole of this Act	The day after this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Main amendments

Migration Act 1958

1 Subsection 5(1)

Insert:

removal concern country means a country designated as such by the Minister under subsection 199F(1).

removal pathway direction means a direction given under subsection 199C(1) or (2).

removal pathway non-citizen has the meaning given by subsection 199B(1).

2 At the end of paragraph 46(1)(e)

Add:

; (vi) section 199G (visa applications by certain nationals of a removal concern country).

3 At the end of Division 8 of Part 2

Add:

Subdivision D—Duty to cooperate in relation to removal and removal concern countries

199A Reason for Subdivision

(1) This Subdivision is enacted because the Parliament expects that a removal pathway non-citizen:

(a) will voluntarily leave Australia; and

(b) if the non-citizen does not voluntarily leave Australia, will cooperate with steps taken under this Act for the purposes of arranging the non-citizen's lawful removal from Australia; and

(c) will not attempt to obstruct or frustrate the non-citizen's lawful removal from Australia.

(2) This Subdivision is also enacted because the Parliament expects that a foreign country will cooperate with Australia to facilitate the lawful removal from Australia of a non-citizen who is a national of that country.

199B Removal pathway non-citizens

*Meaning of **removal pathway non-citizen***

(1) Each of the following is a ***removal pathway non-citizen***:

(a) an unlawful non-citizen who is required to be removed from Australia under section 198 as soon as reasonably practicable;

(b) a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending)) visa;

(c) a lawful non-citizen who:

(i) holds a Subclass 050 (Bridging (General)) visa; and

(ii) at the time the visa was granted, satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia;

(d) a lawful non-citizen who holds a visa prescribed for the purposes of this paragraph.

Removal pathway non-citizens for whom protection findings have been made

(2) To avoid doubt, a removal pathway non-citizen for whom a protection finding has been made within the meaning of subsection 197C(4), (5), (6) or (7):

(a) may be given a removal pathway direction by the Minister; and

(b) may commit the offence of refusing or failing to comply with the direction under section 199E.

Note: For the circumstances in which the Minister must not give a removal pathway direction, see section 199D.

(3) To avoid doubt, nothing in section 199C or 199D authorises or requires the removal of an unlawful non-citizen under section 198 to a country to which the non-citizen could not be removed because of subsection 197C(3).

199C Minister may give removal pathway directions

Direction powers

(1) The Minister may, by written notice given to a removal pathway non-citizen, direct the non-citizen to do one or more of the following things:

(a) complete, sign and submit an application for one or more of the following documents (including doing and providing all things required for the application process by the person or authority to which it is to be submitted):

(i) a passport;

(ii) a travel-related document within the meaning of the *Australian Passports Act 2005*;

(iii) a foreign travel document within the meaning of the *Foreign Passports (Law Enforcement and Security) Act 2005*;

(b) complete, sign and submit any other document or form required for, or to facilitate, travel (including doing and providing all things required for submission by the person or authority to which it is to be submitted);

(c) provide documents or information to an officer or another person specified in the direction;

(d) attend an interview or appointment with an officer or another person specified in the direction;

(e) report in person to an officer or another person in accordance with instructions specified in the direction.

(2) Without limiting subsection (1), the Minister may, by written notice given to a removal pathway non-citizen, direct the non-citizen to do a thing, or not do a thing, if the Minister is satisfied that the non-citizen doing, or not doing, the thing is reasonably necessary to:

(a) determine whether there is a real prospect of the removal of the non-citizen from Australia under section 198 becoming practicable in the reasonably foreseeable future; or

(b) facilitate the removal of the non-citizen from Australia under that section.

Note: For the circumstances in which the Minister must not give a direction under subsection (1) or (2), see section 199D.

(3) The Minister may, by written notice given to a removal pathway non-citizen, revoke a removal pathway direction given to the non-citizen.

Period for compliance

(4) A removal pathway direction must specify:

(a) the period within which the non-citizen must do a specified thing; or

(b) for a direction not to do a specified thing—the period during which the non-citizen must not do the thing.

Consequences of non-compliance

(5) A removal pathway direction must state that a non-citizen who refuses or fails to comply with the direction may commit an offence under section 199E.

Interaction with monitoring conditions on certain bridging visas

(6) To avoid doubt, if a removal pathway non-citizen mentioned in paragraph 199B(1)(b) refuses or fails to comply with a removal pathway direction, the refusal or failure does not constitute a failure to comply with a requirement of a monitoring condition (within the meaning of subsection 76B(4)) for the purposes of paragraph 76B(1)(d).

Multiple and concurrent directions

(7) A non-citizen may be given more than one removal pathway direction.

(8) However, the Minister must not give a removal pathway direction to a non-citizen to do a thing, or not do a thing:

(a) that is the subject of a direction previously given by the Minister to the non-citizen; and

(b) for which the period specified in the previous direction for the thing has not ended.

199D Circumstances in which Minister must not give a removal pathway direction

Non-citizens subject to a protection finding

(1) The Minister must not give a removal pathway direction to a removal pathway non-citizen to do, or not do, a thing in relation to a particular country if:

(a) in the case of an unlawful non-citizen—the non-citizen cannot be removed to that country because of subsection 197C(3); or

(b) in the case of a lawful non-citizen—the non-citizen could not be removed to that country because of that subsection if the non-citizen were an unlawful non-citizen.

Non-citizens who have applied for protection visas

(2) The Minister must not give a removal pathway direction to a removal pathway non-citizen if:

(a) the non-citizen has made a valid application for a protection visa; and

(b) the application is not yet finally determined.

Interaction with monitoring conditions on certain bridging visas

(3) The Minister must not give a removal pathway direction to a removal pathway non-citizen if all of the following apply:

(a) the non-citizen holds a Subclass 070 (Bridging (Removal Pending)) visa;

(b) the visa is subject to a monitoring condition (within the meaning of subsection 76B(4));

(c) an instruction or specification under the monitoring condition has been given to the non-citizen;

(d) the direction would require the non-citizen to do, or not do, a thing that is substantially the same as the instruction or specification;

(e) the Minister has not, in writing:

(i) withdrawn the instruction or specification; or

(ii) confirmed that the instruction or specification has been complied with.

Children

(4) The Minister must not give a removal pathway direction to a removal pathway non-citizen if the non-citizen is a child under 18.

(5) However, if the parent or guardian of the child is a removal pathway non-citizen, the Minister may give a removal pathway direction in relation to the child to the parent or guardian.

Court or tribunal proceedings etc.

(6) The Minister must not give a removal pathway direction to a removal pathway non-citizen directing the non-citizen:

(a) not to commence, or to discontinue, court or tribunal proceedings; or

(b) to take or not take particular steps in the conduct of such proceedings; or

(c) not to make a visa application under this Act; or

(d) to withdraw a visa application made under this Act.

199E Offence for non-compliance with removal pathway direction

(1) A person commits an offence if:

(a) the person is a removal pathway non-citizen; and

(b) the person is given a removal pathway direction; and

(c) the direction has not been revoked; and

(d) the person refuses or fails to comply with the direction.

Penalty: 5 years imprisonment or 300 penalty units, or both.

(2) If a person is convicted of an offence under subsection (1), the court must impose a sentence of imprisonment of at least 12 months.

Exception

(3) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

(4) For the purposes of subsection (3), it is not a reasonable excuse that the person:

(a) has a genuine fear of suffering persecution or significant harm if the person were removed to a particular country; or

(b) is, or claims to be, a person in respect of whom Australia has non-refoulement obligations; or

(c) believes that, if the person were to comply with the removal pathway direction, the person would suffer other adverse consequences.

Note: See subsections 199D(1) and (2) for restrictions on giving removal pathway directions to non-citizens who are subject to a protection finding or who have applied for a protection visa.

No continuing offence

(5) Section 4K (continuing offences) of the *Crimes Act 1914* does not apply in relation to an offence under subsection (1) of this section.

199F Designation of removal concern country

(1) The Minister may, by legislative instrument, designate a country as a ***removal concern country*** if the Minister thinks it is in the national interest to designate the country to be a removal concern country.

(2) Before the Minister designates a country under subsection (1), the Minister must consult with:

(a) the Prime Minister; and

(b) the Minister administering the *Diplomatic Privileges and Immunities Act 1967*.

(3) If the Minister designates a country under subsection (1), the Minister may, by legislative instrument, revoke the designation.

Personal power etc.

(4) The powers under subsections (1) and (3) may only be exercised by the Minister personally.

(5) The rules of natural justice do not apply to the exercise of the power under subsection (1) or (3).

Copy of designation etc. to be laid before Parliament

(6) If the Minister designates a country under subsection (1), the Minister must cause to be laid before each House of the Parliament:

(a) a copy of the designation; and

(b) a statement of the Minister's reasons for thinking it is in the national interest to designate the country to be a removal concern country.

(7) The Minister must comply with subsection (6) within 2 sitting days of each House of the Parliament after the day on which the designation is made.

(8) A failure to comply with subsection (6) or (7) does not affect the validity of the designation.

Definition

(9) In this section, ***country*** includes:

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

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

199G Visa applications by certain nationals of a removal concern country

(1) An application for a visa by a non-citizen is not a valid application if, at the time the application is made:

(a) the non-citizen is a national of one or more removal concern countries; and

(b) the non-citizen is outside Australia.

Exceptions to bar on visa application

(2) Subsection (1) does not apply in relation to an application for a visa by a non-citizen if:

(a) both of the following apply:

(i) the non-citizen is a national of a country (within the meaning of subsection 199F(9)) that is not a removal concern country;

(ii) the non-citizen holds a passport issued by that country that is in force; or

(b) the non-citizen is the spouse, de facto partner or dependent child (within the meaning of the regulations) of:

(i) an Australian citizen; or

(ii) the holder of a permanent visa that is in effect; or

(iii) a person who is usually resident in Australia and whose continued presence in Australia is not subject to a limitation as to time imposed by law; or

(c) the non-citizen is the parent of a child who is under 18 and in Australia; or

(d) the application is for the grant of a Refugee and Humanitarian (Class XB) visa (within the meaning of section 39A); or

(e) the non-citizen is included in a class of persons determined in an instrument made under subsection (3) of this section; or

(f) the application is for the grant of a visa of a class determined in an instrument made under subsection (3) of this section.

(3) The Minister may, by legislative instrument, determine the following:

(a) a class of persons for the purposes of paragraph (2)(e);

(b) a class of visa for the purposes of paragraph (2)(f).

Minister may determine bar on visa application does not apply

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

(5) A determination under subsection (4) may provide that it has effect only for the period specified in the determination and, if it does so, the determination ceases to have effect at the end of the specified period.

(6) The Minister may, by written notice given to a non-citizen, vary or revoke a determination made under subsection (4) in relation to the non-citizen if the Minister thinks that it is in the public interest to do so.

(7) The power under subsection (4) or (6) may only be exercised by the Minister personally.

(8) The Minister does not have a duty to consider whether to exercise the power under subsection (4) or (6) in respect of any non-citizen, whether the Minister is requested to do so by the non-citizen or by any other person, or in any other circumstances.

4 Paragraph 474(7)(a)

Before "351", insert "199G,".

5 Application of amendments

Paragraphs 199B(1)(b) and (c) of the *Migration Act 1958*, as inserted by this Schedule, apply in relation to a non-citizen who holds a visa, whether the visa was granted before, on or after the commencement of this item.

Schedule 2—Other amendments

Migration Act 1958

1 Subsection 76E(2)

Omit "For the avoidance of doubt", substitute "To avoid doubt".

2 At the end of section 76E

Add:

(6) To avoid doubt, nothing in this section prevents the grant, from time to time, of a Subclass 070 (Bridging (Removal Pending)) visa to the non-citizen.

3 Subsections 197C(4), (5), (6) and (7)

Omit "For the purposes of subsection (3), a", substitute "A".

4 Subsection 197D(1)

Repeal the subsection, substitute:

(1) This section applies in relation to a non-citizen if:

(a) the non-citizen is:

(i) an unlawful non-citizen; or

(ii) a lawful non-citizen of a kind mentioned in paragraph 199B(1)(b), (c) or (d); and

(b) the non-citizen has made a valid application for a protection visa that has been finally determined; and

(c) in the course of considering the application, a protection finding, within the meaning of subsection 197C(4), (5), (6) or (7), was made for the non-citizen with respect to a country (whether or not the protection visa was refused or was granted and has since been cancelled).

5 Subsection 197D(2)

Omit "an unlawful non-citizen to whom paragraphs 197C(3)(a) and (b) apply in relation to a valid application for a protection visa", substitute "the non-citizen".

6 After subsection 197D(2)

Insert:

(2A) A decision made under subsection (2) is a decision of a kind referred to in subparagraph 197C(3)(c)(ii), whether it is made in relation to:

(a) an unlawful non-citizen; or

(b) a lawful non-citizen of a kind mentioned in paragraph 199B(1)(b), (c) or (d).

7 Subsections 197D(3) and (4)

Omit "an unlawful non-citizen", substitute "a non-citizen".

8 Paragraph 411(1)(e)

Omit "an unlawful non-citizen", substitute "a non-citizen".

9 Application of amendments

Section 197D of the *Migration Act 1958*, as amended by this Schedule, applies in relation to a protection finding, whether the protection finding is made before, on or after the commencement of this item.

2022-2023-2024

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (REMOVAL AND OTHER MEASURES) BILL 2024

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration, Citizenship and Multicultural Affairs, the Honourable Andrew Giles MP)

MIGRATION AMENDMENT (REMOVAL AND OTHER MEASURES) BILL 2024

GENERAL OUTLINE

The Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill) amends the *Migration Act 1958* (the Migration Act) to strengthen the legislative framework in the Act relating to the removal from Australia of certain non-citizens who are on a removal pathway. This includes unlawful non-citizens as well as non-citizens who hold certain bridging visas, including the Subclass 070 (Bridging (Removal Pending)) visa.

The Bill strengthens the integrity of the migration system by requiring non-citizens who are on a removal pathway and have exhausted all avenues to remain in Australia to cooperate in efforts to ensure their prompt and lawful removal. The amendments in the Bill are necessary to address circumstances where non-citizens who have no valid reason to remain in Australia, and who have not left voluntarily as expected, are not cooperating with appropriate and lawful efforts to remove them.

The Bill amends the Migration Act to set out clear legislative expectations in relation to the behaviour of non-citizens who are on a removal pathway. As amended, the Act will make clear that a non-citizen who is on a removal pathway is expected to voluntarily leave Australia, and will cooperate with steps taken under the Migration Act for the purposes of arranging the non-citizen's lawful removal from Australia. A non-citizen who is on a removal pathway should not attempt to obstruct or frustrate the non-citizen's lawful removal from Australia.

To support this, the Bill provides the Minister with a power to direct certain non-citizens who are on a removal pathway to cooperate with removal efforts. This includes unlawful non-citizens who are subject to removal powers under the Migration Act, Bridging (Removal Pending) visa (BVR) holders; Subclass 050 (Bridging (General)) visa holders who hold that visa on the basis of making or being subject to acceptable arrangements to depart Australia; and certain other non-citizens who hold a visa that may be prescribed in relation to these measures as a removal pathway non-citizen.

The new powers in this Bill will enable the Minister to give a direction to a removal pathway non-citizen to do specified things necessary to facilitate their removal, or to do other things the Minister is satisfied are reasonably necessary to determine whether there is a real prospect of their removal becoming practicable in the reasonably foreseeable future. The Bill also includes appropriate safeguards in relation to the exercise of this power. The amendments provide for certain circumstances in which the Minister must not give a direction, including: if the non-citizen has applied for a protection visa and the application is not yet finally determined; to do a thing in relation to a country in relation to which a protection finding has been made for the non-citizen; directly to children under 18 who are removal pathway non-citizens; in relation to an Australian visa application; and regarding court or tribunal proceedings. Importantly, a non-citizen on a removal pathway cannot be directed to interact with, or be removed to, a country in respect of which the non-citizen has been found to engage Australia's protection obligations; however, they may otherwise be given a direction to do certain things necessary to facilitate their removal to a safe third country.

A failure to comply with a direction, without a reasonable excuse, will be a criminal offence carrying a mandatory minimum sentence of 12 months' imprisonment, and a maximum available sentence of five years' imprisonment or 300 penalty units, or both. The proposed

offence and associated penalty are intended to ensure that non-citizens remain appropriately engaged and cooperate with arrangements to facilitate their removal from Australia. Non-cooperation with removal processes demonstrates a disregard for Australian laws. This behaviour is contrary to the Australian community's expectations that a non-citizen should engage with the process to resolve their migration status and to effect their removal from Australia where required by law.

The amendments in the Bill also confer a discretionary personal power on the Minister to designate a country as a removal concern country, by legislative instrument, if the Minister thinks it is in the national interest to do so. Before designating a country as a removal concern country, the Minister is required to consult the Prime Minister and the Foreign Minister. If made, the designation would have the effect, by operation of law, that a non-citizen who is a national of a removal concern country and who is outside Australia cannot, subject to certain exceptions, make a valid application for a visa while the designation is in force.

Designating a country as a removal concern country, and imposing a bar on new visa applications from non-citizens outside Australia who are nationals of a country that does not accept removals reflects the Government's expectation that a foreign country will cooperate with Australia to facilitate the lawful removal of a non-citizen who is a national of that country. It is an appropriate and proportionate measure to safeguard the integrity of Australia's migration system, available if necessary to act in the national interest to slow down that entry pipeline into Australia and reduce growth in the cohort of potentially intractable removals over time. The designation would also ensure the removal concern country is aware of Australia's concerns in relation to the removal of the country's nationals from Australia where they have no valid reason to remain, and Australia's expectations of cooperation by that country in relation to the prompt and lawful removal of its nationals.

Exemptions for appropriate classes of persons will be available to allow for continued processing of visa applications made by close family of Australian citizens and permanent residents, and to ensure compliance with Australia's international obligations. The designation would not invalidate a visa application made by a non-citizen who is a national of a removal concern country but is also a national of a country that is not a removal concern country, and holds a valid passport issued by that other country. While the designation will prevent new visa applications from being made, it will not affect the validity of applications made before the designation comes into force.

The Bill also includes other minor and technical amendments to the Migration Act. This includes amendments to provide that a protection finding can be revisited in relation to a lawful non-citizen who holds a visa as a removal pathway non-citizen. The Bill also includes amendments to clarify that a further BVR may be granted without application to an NZYQ-affected non-citizen at any time (from time to time) regardless of whether the Minister has invited the BVR holder to make representations in accordance with section 76E of the Migration Act in relation to the imposition of certain conditions on that first BVR.

FINANCIAL IMPACT STATEMENT

The amendments in the Bill are considered to have a low financial impact.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The Bill is compatible in most respects with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that the measures in this Bill limit human rights, they do so in order to maintain the integrity of the migration system.

The statement of compatibility with human rights has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at Attachment A.

COMMON ABBREVIATIONS AND ACRONYMS

Abbreviation or acronym	Meaning
BVR	Subclass 070 (Bridging (Removal Pending)) visa
BVE (050)	Subclass 050 (Bridging (General)) visa
Criminal Code	*Criminal Code* (Schedule to the *Criminal Code Act 1995 (Cth)*)
Department	Department of Home Affairs
Migration Act	*Migration Act 1958*
Migration Regulations	*Migration Regulations 1994*

MIGRATION AMENDMENT (REMOVAL AND OTHER MEASURES) BILL 2024

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1. This section provides that the short title of this Bill, once enacted, is the *Migration Amendment (Removal and Other Measures) Act 2024*.

Clause 2 Commencement

2. This section provides for the commencement of the provisions in the Act.

3. Subsection 2(1) provides that each provision of the Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

4. The effect of this provision is that the Act will commence in its entirety on the day after the Act receives the Royal Assent.

5. A note at the foot of the table under subsection 2(1) explains that the table relates only to the provisions of the Act as originally enacted. The table will not be amended to deal with any later amendments of the Act.

6. Subsection 2(2) provides that any information in column 3 of the table is not part of the Act. Information may be inserted in column 3, or information in it may be edited, in any published version of the Act.

Clause 3 Schedules

7. This section provides that legislation specified in a Schedule to the Act is amended or repealed as set out in the applicable items in the Schedule concerned. This section also provides for that any other item in a Schedule to the Act has effect according to its terms.

SCHEDULE 1 MAIN AMENDMENTS

Migration Act 1958

Item 1 Subsection 5(1)

8. This item inserts a definition for the new term "removal concern country" into subsection 5(1). The expression "removal concern country" is defined to mean a country designated as such by the Minister under new subsection 199F(1) (inserted by the amendment in item 3 of this Schedule).

9. The item also inserts a definition for the new term "removal pathway direction" into subsection 5(1). This term means a direction given under new subsection 199C(1) or (2) (inserted by the amendment in item 3 of this Schedule).

10. Finally, the item inserts a definition for the new term "removal pathway non-citizen". This term has the meaning given by new subsection 199B(1) (inserted by the amendment in item 3 of this Schedule).

Item 2 At the end of paragraph 46(1)(e)

11. This item makes a consequential amendment to paragraph 46(1)(e) of the Migration Act, inserting new subparagraph 46(1)(e)(vi) at the end of paragraph 46(1)(e).

12. New subparagraph 46(1)(e)(vi) refers to new section 199G (visa applications by certain nationals of a removal concern country), as inserted by the amendment in item 3 of this Schedule. This amendment makes clear that an application for a visa made by a non-citizen at a time when the non-citizen is outside Australia and is a national of one or more removal concern countries is invalid (subject to the exceptions outlined in new subsection 199G(2)).

Item 3 At the end of Division 8 of Part 2

13. This item inserts new Subdivision D at the end of Division 8 of Part 2 of the Migration Act.

14. New Subdivision D is titled "Duty to cooperate in relation to removal and removal concern countries". This new Subdivision includes new sections 199A, 199B, 199C, 199D, 199E, 199F and 199G. The provisions in this Subdivision collectively strengthen the existing legislative framework in the Migration Act in relation to removal, by establishing new powers to address circumstances in which certain non-citizens who are on a removal pathway, and who have no valid reason to remain in Australia, are not cooperating with removal efforts.

Section 199A - Reason for Subdivision

15. New subsection 199A(1) sets out a clear legislative expectation in relation to the behaviour of a removal concern non-citizen.

16. This subsection makes clear that a removal pathway non-citizen is expected to leave Australia voluntarily. If the non-citizen does not do so, they are expected to cooperate with steps taken under the Migration Act for the purposes of arranging their lawful removal from Australia—and will not attempt to obstruct or frustrate their lawful removal.

17. Subsection 199A(2) would set out the Parliament's expectation that a foreign country will cooperate with Australia to facilitate the lawful removal from Australia of a non-citizen who is a national of that country.

Section 199B - Removal pathway non-citizens

Removal pathway non-citizens

18. Subsection 199B(1) provides that a removal pathway non-citizen includes:

- an unlawful non-citizen who is required to be removed from Australia under section 198 as soon as reasonably practicable;
- a lawful non-citizen who holds a Subclass 070 (Bridging (Removal Pending)) visa (BVR);
- a lawful non-citizen who holds a Subclass 050 (Bridging (General)) visa and at the time the visa was granted, satisfied a criterion for the grant relating to the making of, or being subject to, acceptable arrangements to depart Australia; and
- a lawful non-citizen who holds a visa prescribed for the purposes of that paragraph.

19. The definition of "removal pathway non-citizen" is broader than just those unlawful non-citizens who are required to be removed from Australia under section 198 of the Migration Act. Many non-citizens who were released from immigration detention following the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 were granted BVRs. The intention is that lawful non-citizens who hold a BVR should be required to cooperate with efforts to facilitate their removal, or to determine whether there is a real prospect of their removal becoming practicable in the reasonably foreseeable future.

20. There is also a longstanding practice of granting Subclass 050 (Bridging (General)) visas to certain non-citizens who are on a removal pathway. To facilitate the removal of this cohort, the definition of removal pathway non-citizen also includes lawful non-citizens who were granted this visa and who, at the time the visa was granted, satisfied a criterion relating to them making acceptable arrangements to depart Australia. This is a reference to the criterion currently set out by subclause 050.212(2) of Schedule 2 to the Migration Regulations. Paragraph 199B(1)(c) is not intended to capture other holders of the Subclass 050 (Bridging (General)) visa, which is also used for a variety of purposes other than as a final step before departure.

21. Paragraph 199B(1)(d) is intended to provide the Government with flexibility to prescribe categories of visa holders who could be brought under the meaning of removal pathway non-citizen, if necessary to do so in the future. Any regulations made for the purposes of this paragraph would be a disallowable legislative instrument for the purposes of the *Legislation Act 2003*, and appropriately subject to parliamentary scrutiny. The same safeguards in relation to the exercise of the Minister's power under new section 199C—including those set out in new section 199D—would apply in relation to the holder of any visa prescribed for the purposes of this paragraph. A direction cannot be given to a removal pathway non-citizen who is subject to a protection finding to do a thing in relation to a country if the non-citizen could not be removed to that country under the Migration Act. A direction also cannot be given to a removal pathway non-citizen who has applied for a protection visa (where that application is not yet finally determined, within the meaning of the Act). New section 199D also sets out other circumstances in which the Minister must not give a removal pathway direction.

Removal pathway non-citizens for whom protection findings have been made

22. Subsection 199B(2) provides, to avoid doubt, that a removal pathway non-citizen for whom a protection finding has been made within the meaning of subsection 197C(4), (5), (6) or (7) of the Migration Act may be given a direction by the Minister under section 199C (unless section 199D provides that the Minister must not do so). Paragraph 199B(2)(b) also states, to avoid doubt, that such a removal pathway non-citizen may commit an offence of refusing or failing to comply with the direction, under new section 199E.

23. The note at the end of subsection 199B(2) directs the reader to new section 199AD, which sets out the circumstances in which the Minister must not give a removal pathway direction.

24. Subsection 199B(3) makes clear the interaction between this section, section 198 of the Migration Act and subsection 197C(3) of the Migration Act. Subsection 199B(3) provides that to avoid doubt, nothing in sections 199C or 199D authorises or requires the removal of an unlawful non-citizen under section 198 to a country to which the non-citizen could not be removed because of subsection 197C(3).

Section 199C - Minister may give removal pathway directions

25. New section 199C permits the making of specific directions to do a range of enumerated things. It also confers a broad power, which does not limit the power to make specific directions.

Directions powers

26. New subsection 199C(1) provides that the Minister may, by written notice given to a removal pathway non-citizen, direct the non-citizen to do one or more of the things mentioned in paragraphs 199C(1)(a) to (e).

27. Paragraph 199C(1)(a) specifies completing, signing and submitting (which includes doing and providing all things required for the application process by the relevant person or authority to whom it is to be submitted) a passport, a travel-related document within the meaning of the A*ustralian Passports Act 2005*, and/or a foreign-travel document within the meaning of the *Foreign Passports (Law Enforcement and Security) Act 2005*.

28. Paragraph 199C(1)(b) specifies completing, signing and submitting any other document or form required for travel (including doing and providing all things required for submission by the relevant person or authority to whom it is to be submitted).

29. Paragraph 199C(1)(c) specifies providing documents or information to an officer or a person specified in the direction.

30. Paragraph 199C(1)(d) specifies attending an interview or appointment with an officer or another person specified in the direction.

31. Paragraph 199C(1)(e) specifies reporting in person to an officer in accordance with instructions specified in the direction.

32. New subsection 199C(2) provides that the Minister may, by written notice given to a removal pathway non-citizen, direct the non-citizen to do or not do a thing, if the Minister is satisfied that the direction is reasonably necessary to determine whether there is a real prospect

of the removal of the non-citizen from Australia under section 198 becoming practicable in the reasonably foreseeable future; or to facilitate the removal of the non-citizen from Australia under that section.

33. The power in subsection 199C(2) does not limit the power under subsection 199C(1). The Minister's decision to give a removal pathway non-citizen a removal pathway direction is not subject to merits review. The power is intended to facilitate appropriate and lawful efforts to remove a removal pathway non-citizen from Australia.

34. The note at the end of subsection 199C(2) directs the reader to cross reference with section 199D for determining the circumstances in which the Minister must not give a direction under subsections 199C(1) and (2).

35. Subsection 199C(3) provides that the Minister may, by written notice given to a removal pathway non-citizen, revoke a removal pathway direction.

36. The intention is that the Minister may give a written notice given under subsection 199C(1), (2) or (3) to the non-citizen by any method the Minister considers appropriate, in accordance with section 494A of the Migration Act. This may include one of the methods specified in section 494B or by a method prescribed for the purposes of giving documents to a person in immigration detention.

Period for compliance

37. New subsection 199C(4) sets out certain things that a removal pathway direction must specify. Paragraph 199C(4)(a) provides that the direction must specify the period within which the non-citizen must do or not do a specified thing. Paragraph 199C(4)(b) provides that the notice must specify the period during which the non-citizen must not do the thing, where the direction relates to not doing a thing.

38. A notice given under section 199AC is not of legislative character, and is not a legislative instrument.

Consequence of non-compliance

39. New subsection 199C(5) provides that a removal pathway direction must state that a non-citizen who refuses or fails to comply with the direction may commit an offence under new section 199E.

Interaction with monitoring conditions on certain bridging visas

40. New subsection 199C(6) explains, to avoid doubt, the interaction between new section 199C and the monitoring conditions on certain bridging visas. The subsection clarifies that a refusal or failure by a non-citizen mentioned in paragraph 199B(1)(b) to comply with a direction does not constitute a failure to comply with a requirement of a monitoring condition for the purposes of paragraph 76B(1)(d) of the Migration Act. Paragraph 199B(1)(b) refers to a lawful non-citizen who holds a BVR.

Multiple and concurrent directions

41. New subsection 199C(7) clarifies that a removal pathway non-citizen may be given more than one removal pathway direction. That is, a non-citizen may be given a further direction during the period they have been given to comply with an earlier direction.

42. New subsection 199C(8) places certain limits on the Minister's power to give directions, by providing that the Minister must not give a direction to a removal pathway non-citizen to do something that is the subject of a direction previously given by the Minister to the non-citizen, and for which the period specified in the direction has not ended.

Section 199D - Circumstances in which Minister must not give a removal pathway direction

43. New section 199D sets out the circumstances in which the Minister must not give a removal pathway direction under new section 199C to a removal pathway non-citizen.

Non-citizens subject to a protection finding

44. New subsection 199D(1) provides that the Minister must not give a removal pathway direction to a removal pathway non-citizen to do, or not do, a thing in relation to a particular country if (in the case of an *unlawful* non-citizen) they could not be removed to that country because of subsection 197C(3); or if (in the case of a *lawful* non-citizen) the non-citizen could not be removed to that country because of that subsection if the non-citizen were an unlawful non-citizen.

45. The intention of subsection 199D(1) is to ensure that a non-citizen in relation to whom a protection finding has been made cannot be directed to do a thing to facilitate their removal to the country in relation to which the protection finding was made. It also ensures that the non-citizen cannot be directed to do a thing to facilitate their removal to a third country, where doing that thing would necessitate doing a thing in relation to the country in relation to which the protection finding was made. However, subsection 199B(2) makes clear that a non-citizen in relation to whom a protection finding has been made can be the subject of a removal pathway direction where the circumstances outlined in section 199D do not apply.

Non-citizens who have applied for protection visas

46. New subsection 199D(2) provides that the Minister must not give a removal pathway direction to a removal pathway non-citizen if the non-citizen has made a valid application for a protection visa that is not yet finally determined.

47. The Minister's power under section 199C to give a removal pathway direction to a removal pathway non-citizen is not intended to be used, and cannot be used, to pre-empt the outcome of a valid application for a protection visa.

Interaction with monitoring conditions on certain bridging visas

48. New subsection 199D(3) provides that the Minister must not give a removal pathway direction under section 199C to a removal pathway non-citizen in certain circumstances, where that non-citizen holds a BVR subject to certain monitoring conditions (within the meaning of subsection 76B(4) of the Migration Act) and where there would be overlap between a removal pathway direction and an instruction or specification given under the monitoring condition.

49. This provision clarifies interactions between the offences in new section 199E and current section 76B, so that potentially affected individuals understand the operation of offences, their obligations and the potential consequences of non-compliance.

Children

50. New subsections 199D(4) and (5) place constraints around the Minister's powers under new section 199C as they relate to a child who may be a removal pathway non-citizen.

51. Subsection 199D(4) expressly precludes the Minister from giving a direction under section 199C to a removal pathway non-citizen who is a child under the age of 18.

52. However, subsection 199D(5) allows the Minister to give a removal pathway direction in relation to the child, to the parent or guardian of the child who is a removal pathway non-citizen, if the parent or guardian of the child is also a removal pathway non-citizen.

53. This means both the child and parent or guardian must be a removal pathway non-citizen for a removal pathway direction to be given by the Minister. The Minister may not give a direction to any person under the age of 18 years. However, the Minister may give a direction to the parent or guardian of a child to do something on the child's behalf.

Court or tribunal proceedings

54. New subsection 199D(6) provides that the Minister must not give a removal pathway direction to a removal pathway non-citizen directing the non-citizen:

- not to commence, or to discontinue, court or tribunal proceedings; or
- to take or not take particular steps in the conduct of such proceedings; or
- not to make a visa application under the Migration; or
- to withdraw a visa application made under the Migration Act.

55. Subsection 199D(6) does not prevent the Minister from directing a non-citizen to apply for a visa for any other country.

Section 199E - Offence for non-compliance with removal pathway direction

56. New section 199E creates an offence for non-compliance with a removal pathway direction.

57. Subsection 199E(1) provides that a person commits an offence if:

- the person is a removal pathway non-citizen; and
- the person is given a removal pathway direction under section 199C; and
- the direction has not been revoked; and
- the person refuses or fails to comply with the direction.

58. The offence carries an available penalty of 5 years' imprisonment or 300 penalty units or both.

59. New subsection 199E(2) provides for a mandatory minimum sentence of 12 months' imprisonment for a person convicted of an offence under subsection 199E(1).

60. The objective of a mandatory minimum sentence for this offence is to provide a strong deterrent to non-cooperation by non-citizens with a direction given by the Minister under proposed section 199C. The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* has been considered in relation to this offence, and particularly in relation to the appropriate penalty. The maximum available penalty of 5 years' imprisonment is intended to provide an effective deterrent to the

commission of the offence in section 199E. It reflects the seriousness of the offence in the context of the integrity of Australia's migration system, where a removal pathway non-citizen does not cooperate with, or otherwise frustrates, legitimate and lawful efforts to remove them under the Migration Act. The mandatory minimum term of 12 months' imprisonment on conviction for the offence is also appropriate, where the Migration Act, as amended, makes clear the expectation that a removal pathway non-citizen will voluntarily leave Australia, and that if they do not leave voluntarily, they will cooperate with removal efforts and not attempt to obstruct or frustrate their lawful removal.

61. The standard 'default' fault elements under the Criminal Code apply to an offence under subsection 199E(1).

62. New subsection 199E(3) provides that a person does not commit an offence under subsection 199E(1) if the person has a reasonable excuse.

63. The note at the end of subsection 199E(3) provides that the defendant bears the evidential burden in relation to the matter in this subsection. The note refers the reader to subsection 13.3(3) of the Criminal Code.

64. There are restrictions in section 199D on the giving of a removal pathway direction to a non-citizen in relation to whom a protection finding has been made where the direction relates to the country with respect to which the finding was made, or who has made an application for a protection visa that is not finally determined. Those are matters that constrain the Minister's power to make a direction. However, where no such limitation is engaged, subsection 199E(4) makes it clear that certain subjectively-held fears do not amount to a 'reasonable excuse' for the purposes of subsection 199E(3).

65. New subsection 199E(4) sets out certain matters that cannot be relied on by a person as a 'reasonable excuse' defence. It is not a reasonable excuse that the person:

- has a genuine fear of suffering persecution or significant harm if the person were removed to a particular country; or
- is, or claims to be, a person in respect of whom Australian non-refoulement obligations, or
- believes that, if the person complied with the removal pathway direction, the person would suffer other adverse consequences.

66. A person's subjective fear could be, but is not limited to, the factors listed in section 36(4)(a) of the Migration Act. Subsection 199E(4) makes it clear that such subjective fear is not a reasonable excuse for the purposes of subsection 199E(3).

67. The note at the end of subsection 199E(4) directs the reader to subsections 199D(1) and (2) which sets out the restrictions on giving directions to non-citizens who are subject to a protection finding, or who have applied for a protection visa.

No continuing offence

68. Subsection 199AE(6) provides that section 4K of the *Crimes Act 1914* (continuing offences) does not apply in relation to an offence under subsection 199E(1).

Section 199F - Designation of removal concern country

69. New section 199F empowers the Minister to designate a removal concern country by legislative instrument, if the Minister thinks it is in the national interest to do so. This is a personal power of the Minister. This section also imposes certain pre-conditions on the exercise of the power, and sets out requirements to provide for accountability to the Parliament by tabling a copy of the designation and a related statement of reasons.

70. New subsection 199F(1) provides that the Minister may, by legislative instrument, designate a country as a "removal concern country" if the Minister thinks it is in the national interest to designate the country to be a removal concern country.

71. New subsection 199F(2) provides that before designating a country under subsection 199F(1), the Minister must consult with the Prime Minister and the Minister administering the *Diplomatic Privileges and Immunities Act 1967* (the Minister for Foreign Affairs). This condition on the exercise of the Minister's power under subsection 199F(1) ensures that the Minister's consideration of the national interest and thinking in relation to making the designation is appropriately informed by Australia's national interest and the national and international implications of the exercise of the power and its effect, including under new section 199G.

72. New subsection 199F(3) provides that if the Minister designates a country under subsection 199F(1), the Minster may, by legislative instrument, revoke the designation.

73. The Minister is not required to consult the Prime Minister or any other minister in deciding to revoke the designation. However, as the revocation must be done by legislative instrument, the Minister must in any case be satisfied that there has been undertaken any consultation that the Minister considers to be appropriate and that is reasonably practicable to undertake, in accordance with section 17 of the *Legislation Act 2003.*

74. New subsection 199F(4) provides that the power to designate a country as a removal concern country, and the power to revoke a designation, are conferred personally on the Minister and cannot be delegated. This appropriately reflects the significance of the power and the Minister's role as a member of the Executive Government—and where the power may only be exercised following consultation with the Prime Minister and Foreign Minister as required under subsection 199F(2).

75. New subsection 199F(5) clarifies that the rules of natural justice do not apply to the exercise of the power under subsections 199F(1) or (3). This is consistent with the characterisation of the power as a legislative rather than administrative power, and is consistent with other powers enabling the Minister to make a legislative instrument. The tabling requirements in new subsections 199F(6) to (8) also provide for appropriate accountability to the Parliament following the exercise of this legislative power.

76. New subsection 199F(6) provides that if the Minister designates a country as a removal concern country under subsection 199F(1), the Minister must cause to be laid before each House of the Parliament a copy of the designation and a statement of the Minister's reasons for thinking it is in the national interest to designate the country.

77. New subsection 199F(7) provides that the Minister must comply with the tabling requirement under subsection 199F(6) within 2 sitting days of each House of the Parliament after the day on which the designation is made.

78. New subsection 199F(8) provides that a failure to comply with subsections 199F(6) or (7) does not affect the validity of the designation.

79. New subsection 199F(9) defines a country for the purposes of this section to include a colony, overseas territory or protectorate of a foreign country and an overseas territory for the international relations of which a foreign country is responsible.

Section 199G - Visa applications by certain nationals of a removal concern country

80. New section 199G sets out the effect of the designation of a removal concern country in relation to new visa applications by nationals of that country who are outside Australia, as well as certain exceptions.

81. Subject to subsection 199G(2) below, subsection 199G(1) provides that an application for a visa by a non-citizen is not a valid application if, at the time the application is made, the non-citizen is a national of one or more removal concern countries and the non-citizen is outside Australia.

Exceptions to bar on visa application

82. New subsection 199G(2) provides for exceptions to the bar on making a valid application under subsection 199G(1), by providing that subsection 199G(1) does not apply in relation to an application for a visa by a non-citizen under one of the circumstances set out by paragraphs 199G(2)(a) through (f).

83. Paragraph 199G(2)(a) provides that subsection 199G(1) does not apply in relation to an application for a visa by a non-citizen who is a national of a country (within the meaning of subsection 199F(9)) that is not a removal concern country and holds a valid passport issued by that country (that is, a passport that is in force). This covers certain circumstances in which a non-citizen who is a national of a removal concern country is a dual national – so long as the non-citizen's other nationality is not also of a designated removal concern country, and only if they hold a valid passport issued by that other country.

84. Paragraph 199G(2)(b) provides that subsection 199G(1) does not apply in relation to an application for a visa made by a non-citizen who is the spouse, de facto partner or dependent child (within the meaning of the regulations) of an Australian citizen, the holder of a permanent visa that is in effect, or a person who is usually resident in Australia and whose continued presence in Australia is not subject to a limitation as to time imposed by law. Regulation 1.05A of the *Migration Regulations 1994* sets out the meaning of 'dependent'.

85. Paragraph 199G(2)(c) provides that subsection 199G(1) does not apply in relation to an application for a visa made by a non-citizen who is the parent of a child who is under 18 and in Australia.

86. Paragraph 199G(2)(d) provides that subsection 199G(1) does not in apply in relation to an application for a Refugee and Humanitarian (Class XB) visa (within the meaning of section 39A of the Migration Act).

87. Paragraphs 199G(2)(e) and (f) provide that subsection 199G(1) does not apply in relation to a non-citizen who is included in a class of persons determined in an instrument made under subsection 199G(3); nor to an application for a visa of a class determined in an instrument made under subsection 199G(3).

88. Subsection 199G(3) provides that the Minister may, by legislative instrument, determine a class (or classes) of persons for the purposes of paragraph 199G(2)(e), and/or a class (or classes) of visa for the purposes of paragraph 199G(2)(f).

89. In the event that a country is designated under subsection 199F(1) as a removal concern country, it is envisaged that a legislative instrument made under subsection 199G(3) for the purposes of paragraphs 199G(2)(d) and/or (e) could specify a range of additional classes of persons or classes of visas to ensure that the exercise of the designation power does not conflict with Australia's international obligations, or for any other purpose. For example, the legislative instrument power could be used to specify the Diplomatic (Temporary) (Class TF) visa or the Return (Residence) (Class BB) visa.

Minister may determine bar on visa application does not apply

90. Subsection 199G(4) provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a non-citizen, determine that the bar on visa applications in subsection 199G(1) does not apply to an application by the non-citizen for a visa of a class specified in the determination.

91. Subsection 199G(5) provides that a determination under subsection 199G(4) may provide that it has effect only for the period specified in the determination and, if it does so, the determination ceases to have effect at the end of the specified period.

92. Subsection 199G(6) provides that the Minister may, by written notice given to a non-citizen, vary or revoke a determination made under subsection 199G(4) in relation to the non-citizen if the Minister thinks it is in the public interest to do so.

93. Subsection 199G(7) provides that the powers under subsections 199G(4) and (6) are non-delegable powers and therefore can only be exercised by the Minister personally.

94. Subsection 199G(8) clarifies that the Minister's powers under subsections 199G(4) and (6) are non-compellable. That is, the Minister does not have a duty to consider whether to exercise the power under subsections 199G(4) or (6) in respect of any non-citizen, whether the Minister is requested to do so by the non-citizen or by any other person, or in any other circumstances.

Item 4 Paragraph 474(7)(a)

95. This item amends paragraph 474(7)(a) of the Migration Act to include a reference to section 199G. Section 474 of the Migration Act provides for the meaning and effect of a 'privative clause decision'. Subsection 474(7) provides, to avoid doubt, that certain decisions are privative clause decisions within the meaning of subsection 474(2). This now includes a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under section 199G.

Item 5 Application of amendments

96. This item inserts an application provision. This provides that paragraphs 199B(1)(b) and (c) of the Migration Act, as inserted by this Schedule, apply in relation to a non-citizen who holds a visa whether the visa was granted before, on or after the commencement of this item.

SCHEDULE 2 OTHER AMENDMENTS

Migration Act 1958

Item 1 Subsection 76E(2)

97. This item amends subsection 76E(2) of the Migration Act. Instead of "For the avoidance of doubt"', this provision now begins with "To avoid doubt"'. This is a technical amendment to ensure consistency with the expression in new subsection 76E(6), as well as other provisions of the Migration Act that use the expression "to avoid doubt".

Item 2 At the end of section 76E

98. This item inserts new subsection 76E(6) at the end of section 76E.

99. New subsection 76E(6) clarifies the operation of current section 76E. To avoid doubt, subsection 76E(6) confirms that nothing in section 76E prevents the grant without application, from time to time, of a Subclass 070 (Bridging (Removal Pending)) visa to an NZYQ-affected non-citizen. This makes clear that the Minister may grant a further Subclass 070 (Bridging (Removal Pending) visa to a non-citizen from time to time, regardless of whether the Minister has given an invitation to the non-citizen to make representations in accordance with paragraph 76E(3)(b) in relation to the imposition of certain prescribed conditions imposed on a BVR already granted to the non-citizen.

Item 3 Subsections 197C(4), (5), (6) and (7)

100. This item amends subsections 197C(4), (5), (6) and (7) of the Migration Act.

101. This item provides for the substitution of the words "For the purposes of subsection (3), a" with simply "A" in each of the subsections 197C(4) to (7). This amendment is intended to make clear that the meanings of the term 'protection finding' in subsections 197C(4), (5), (6) and (7) may be used otherwise than for the purposes of subsection 197C(3).

102. This change is consequential to the amendments to section 197D below.

Item 4 Subsection 197D(1)

103. This item repeals and replaces current subsection 197D(1). The new subsection 197D(1) provides that section 197D applies in relation to a non-citizen if:

- the non-citizen is an unlawful non-citizen or a lawful non-citizen of a kind mentioned in paragraphs 199B(1)(b), (c) or (d) (see above); and
- the non-citizen has made a valid application for a protection visa that has been finally determined; and

- in the course of considering that application, a protection finding was made with respect to a country (whether or not the protection visa was refused, or granted and subsequently cancelled).

104. Current section 197D applies only to unlawful non-citizens to whom section 198 applies, reflecting the link to current subsection 197C(3), which prevents the removal of a non-citizen to whom it applies.

105. Section 197D has been amended by items 4-7 of this Schedule so as to enable the revisitation of a protection finding in relation to a broader range of non-citizens. As well as unlawful non-citizens to whom section 198 applies, amended section 197D now applies to removal pathway non-citizens, including holders of Subclass 070 (Bridging (Removal Pending)) visas and Subclass 050 (Bridging (General)) visas granted on 'final departure' grounds. Where the circumstances of the person or the country in relation to which a protection finding has been made have changed, it may be necessary to revisit the protection finding. If under subsection 197D(2) a decision is made to set aside the protection finding, the removal of the non-citizen will, or would, no longer be prevented by subsection 197C(3).

106. A protection finding made with respect to a non-citizen who is not a removal pathway non-citizen will not be able to be revisited. The focus of this amendment, and this Bill, is on facilitating the lawful removal of non-citizens who are on a removal pathway, and apply only in circumstances where a protection finding has not been made in relation to the non-citizen, or where the Minister determines that a non-citizen is no longer a person in respect of whom any protection finding would be made.

Item 5 Subsection 197D(2)

107. This item amends subsection 197D(2) by omitting reference to "an unlawful non-citizen to whom paragraphs 197C(3)(a) and (b) apply in relation to a valid application for a protection visa" and substituting it with "the non-citizen". This enables a decision under subsection 197D(2) to be made with respect to certain lawful non-citizens, specifically those who are removal pathway non-citizens.

Item 6 After subsection 197D(2)

108. This item inserts new subsection 197D(2A) after subsection 197D(2). New subsection 197D(2A) provides that a decision made under subsection 197D(2) is a decision of a kind referred to in subparagraph 197C(3)(c)(ii), whether it is made in relation to an unlawful non-citizen or a lawful non-citizen of a kind mentioned in paragraphs 199B(1)(b), (c) or (d).

Item 7 Subsections 197D(3) and (4)

109. This item amends subsections 197D(3) and (4) by omitting references to "an unlawful non-citizen" and substitutes it with "a non-citizen". This is consequential to the amendments made to subsections 197D(1) and (2).

Item 8 Paragraph 411(1)(e)

110. This item amends paragraph 411(1)(e) of the Migration Act by substituting the expression "an unlawful non-citizen" with "a non-citizen". This amendment seeks to clarify that a decision by the Minister under section 197D that a protection finding is no longer

required could apply to a non-citizen, regardless of whether they are a lawful non-citizen or unlawful non-citizen. Section 411 of the Migration Act sets out the meaning of the term 'Part 7-reviewable decision'.

Item 9 Application of amendments

111. This item is an application provision. It provides that section 197D of the Migration Act, as amended by this Schedule, applies in relation to a protection finding, whether the protection finding is made before, on or after the commencement of this item.

Attachment A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Removal and Other Measures) Bill 2024

This Bill is compatible in most respects with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

Effecting the removal from Australia of non-citizens who do not, or no longer, have permission to remain in Australia is an integral part of a well-managed migration system. Non-citizens who have exhausted their options for remaining in Australia lawfully on a substantive visa and are on a removal pathway are expected to depart voluntarily or cooperate in efforts to ensure their prompt removal and lawful from Australia.

In its *Conclusion on international cooperation from a protection and solutions perspective No. 112*[1], the Executive Committee of the Programme of the United Nations High Commissioner for Refugees (UNHCR):

> *... note[d] that well-functioning asylum systems and international protection systems as a whole depend on efficient and expeditious return in safety and dignity to countries of origin of persons found not to be in need of international protection, recall[ed] the obligations of States to receive back their own nationals, and call[ed] for strengthened international support and cooperation to this end.*

The Government is taking action to strengthen the legislative framework in the *Migration Act 1958* (the Migration Act) to improve and strengthen the integrity of the migration system to address the situation where non-citizens who are on a removal pathway are not cooperating with removal efforts, as well as addressing certain other barriers to removal.

The Migration Amendment (Removal and Other Measures) Bill 2024 (the Bill) amends the Migration Act to set out clear legislative expectations in relation to the behaviour of non-citizens who are on a removal pathway. As amended, the Act will make clear that a non-citizen who is on a removal pathway is expected to voluntarily leave Australia, and will cooperate with steps taken under the Migration Act for the purposes of arranging the non-citizen's lawful removal from Australia. A non-citizen who is on a removal pathway should not attempt to obstruct or frustrate the non-citizen's lawful removal from Australia.

The Bill would amend the Migration Act to introduce the following key measures which have human rights implications:

- A duty for non-citizens on a removal pathway to cooperate with removal – through a power to issue a 'removal pathway direction' to that non-citizen to take certain actions, non-compliance with which would carry mandatory minimum criminal penalties

[1] https://www.refworld.org/policy/exconc/excom/2016/en/11534?prevDestination=search

- A power for the Minister to designate a country as a 'removal concern country' with the effect of preventing new visa applications by most nationals of that country while they are outside Australia
- An ability to reconsider the protection findings of those non-citizens on a removal pathway who hold certain types of bridging visas.

These are explained in more detail below.

The Bill would also make a minor amendments to clarify that a new bridging visa may be issued at any time, regardless of whether the Minister has invited a bridging visa holder to make comments in accordance with section 76E of the Migration Act.

Duty to cooperate with removal

The amendments seek to impose a positive duty on non-citizens to cooperate with removal efforts by providing a discretionary power for the Minister (or delegate) to direct, by way of a 'removal pathway direction', a non-citizen who is on a removal pathway, to do specified things relating to their removal. A failure to comply with a direction will be a criminal offence carrying a mandatory minimum sentence of 12 months' imprisonment, and a maximum available sentence of five years' imprisonment or 300 penalty units, or both.

The power is available in relation to 'removal pathway non-citizens' who are defined to include unlawful non-citizens, as well as holders of a Subclass 070 (Bridging (Removal Pending)) visa (BVR) or a Subclass 050 (Bridging (General)) visa where the grant related to the making of, or having, acceptable arrangements to depart Australia. These bridging visas are those which are most commonly issued to maintain a person's lawful status while they are on a removal pathway. A power to prescribe other visa classes has been included to ensure that persons on a removal pathway are captured in instances where another visa type may be granted to them.

The power to issue a removal pathway direction is discretionary and will be used to compel removal pathway non-citizens to take actions within their control that would enable them to be removed from Australia, such as applying for a passport or attending an interview with consular officials for the purpose of identifying them or resolving other issues that may be a barrier to the person's removal.

Such persons are on a removal pathway following the refusal of an application for, or the expiry or cancellation of, a substantive visa to remain in Australia. Some have previously applied for a protection visa but because they were found not to be at risk of the types of harm that give rise to Australia's *non-refoulement* obligations, no 'protection finding' (within the meaning of section 197C of the Migration Act) was made. Others may have had a protection finding made in the course of considering a previous protection visa application, but have had their application refused or their visa subsequently cancelled on character or security grounds. Individuals with a protection finding may not be involuntarily removed to the country in relation to which that finding was made, but are subject to removal to a safe third country.

A person in respect of whom a protection finding has been made cannot be required to interact with the country to which that finding relates, nor to take any actions to facilitate their removal to that country. Such a person may however be directed to comply with a direction that would help facilitate their removal to a third country, if for example their removal to a third country was a viable option and would be compliant with international human rights and *non-refoulement* obligations.

The power to issue a removal pathway direction is also not available with respect to a person who has applied for a protection visa but where that visa application has not yet been finally determined.

In addition, a removal pathway direction cannot be issued to a child under 18, although it can be issued to a parent or guardian if both the child and the parent/guardian are removal pathway non-citizens, to enable the removal of family units together.

Further, a removal pathway direction must not require a person to not commence, discontinue or take or not take particular steps in the conduct of court or tribunal proceedings. Nor can a removal pathway direction require a person not to make, or to withdraw, a visa application made under the Migration Act.

In addition to the standard defences that are available under the *Criminal Code Act 1995* (Criminal Code), the amendments provide for a defence of reasonable excuse, with the defendant bearing an evidential burden in relation to this matter. However, the amendments also provide that it is not a reasonable excuse that the person has a subjective fear of persecution or significant harm, claims to be a person who otherwise engages Australia's *non-refoulement* obligations or believes that they would suffer other adverse consequences if they complied with the removal pathway direction

The intention of this provision is to ensure that where a person's protection claims have already been considered as part of a protection visa process, and found not to engage Australia's *non-refoulement* obligations, including because their fears of being subjected to harm are not well-founded, the person should not be able to rely on claiming that they still fear harm to excuse their non-cooperation with removal. As noted by the UNHCR, 'well-functioning asylum systems and international protection systems as a whole depend on efficient and expeditious return in safety and dignity to countries of origin of persons found not to be in need of international protection'. As noted above, a removal pathway direction cannot be issued that compels a person to interact with a country in relation to which a protection finding has been made, or during an ongoing protection visa process.

The Bill provides that Section 4K (continuing offences) of the *Crimes Act 1914* does not apply in relation to the offence. The effect of this provision is that the offence is not a continuing offence. If a person is issued with a direction that specifies a particular time period, for each day of non-compliance the person would not be deemed to have committed multiple offences. This position is appropriate given that the penalty for non-compliance is significant.

Designation of countries

As noted by the UNHCR, it is important that other countries comply with their duty to readmit their nationals, including those who are being removed or deported from another country following the exhaustion of avenues to remain lawfully in that country. Some countries are reluctant to issue travel documents to allow the return of their nationals who are being removed involuntarily, while others may unreasonably delay accepting their nationals for return.

The Bill would amend the Migration Act to introduce a power for the Minister to designate such a country as a 'removal concern country'. The effect of such a designation would be to, subject to a range of exceptions, prevent new visa applications from being made by nationals of those countries where those individuals are outside Australia. The designation would not prevent:

- Nationals of a removal concern country who are in Australia from lodging further visa applications while in Australia

- Nationals of a removal concern country who already hold a visa for Australia from being able to travel to Australia on that visa
- Nationals of a removal concern country having any existing visa applications being processed.

The purpose of this power would be to reinforce the concerns of the Australian Government with the government of the removal concern country, encourage that country to cooperate with Australia's efforts to remove their nationals following the end of their lawful stay in Australia, and, as a side effect, to reduce the number of people arriving in Australia who may then prove difficult to remove in the future.

The power would be exercisable by the Minster personally, acting in the national interest, and following consultation with the Prime Minister and the Minister for Foreign Affairs. The Bill also provides the power for the Minister to revoke the designation.

The Bill provides for a range of exceptions where the designation will not prevent visa applications being made, both included in the Bill and by allowing further exceptions to be prescribed by legislative instrument. The exceptions include applications made by a national of a removal concern country where:

- the person is in Australia; or
- the person is a national of at least one other country which is not a removal concern country; or
- the person is the spouse, de facto partner or dependent child of an Australian citizen or permanent resident or another person entitled to indefinite stay in Australia; or
- the person is the parent of an under-18 child who is in Australia; or
- the person is applying for a Refugee and Humanitarian Visa to allow for their resettlement in Australia.

The power to prescribe other classes of persons and visas will permit exceptions to be made where they are necessary to meet a range of Australia's international obligations and commitments, including those relating to international trade, diplomatic officers and other persons accorded privileges and immunities, the re-entry of certain long-term residents, and persons who hold a valid Refugee Convention Travel Document issued by Australia, as well as other cohorts whose entry to Australia may still need to be facilitated.

In addition, the Bill provides a mechanism for the Minister, acting personally, to allow a national of a removal concern country to make a valid visa application despite a designation being in place, if the Minister thinks it is in the public interest to do so. An example of a situation where the Minister could consider using this power would be for a person wishing to travel to Australia for the funeral of a close family member.

<u>Ability to reconsider previous protection findings for those on a removal pathway</u>

Subsection 197C(3) of the Migration Act provides that removal of an unlawful non-citizen is not required or authorised in respect of a particular country if a 'protection finding' was made in respect of that country in the course of considering an application for a protection visa which has been finally determined.

The term 'protection finding' as used in section 197C of the Act reflects the circumstances in which Australia has *non-refoulement* obligations under international law in respect of a person.

Subsection 197C(3) does not prevent the removal of an unlawful non-citizen to the country in respect of which the protection finding was made if: the decision in which the protection

finding was made has been quashed or set aside; a subsection 197D(2) decision by the Minister in relation to the non-citizen is complete within the meaning of subsection 197D(6) of the Act, that is, following the completion of merits review of that decision; or the non-citizen has asked to be removed to that country.

Section 197D of the Migration Act establishes a mechanism whereby, for unlawful non-citizens only, a protection finding can in effect be revisited for the purposes of section 197C of the Act. If the Minister is satisfied that an unlawful non-citizen to whom paragraphs 197C(3)(a) and (b) of the Act apply in relation to a valid application for a protection visa 'is no longer a person in respect of whom any protection finding … would be made', the Minister may make a decision to that effect.

This power might be exercised if, for example, there is a change in country conditions which means that a person in respect of whom a protection finding has been made would no longer have that protection finding made should the issue now be considered. Broadly, a change in circumstances concerning the country, and/or the person, may mean that a protection finding would no longer be made, and hence the person's removal to that country could be effected consistently with Australia's *non-refoulement* obligations.

Similarly, there are lawful non-citizens who are on a removal pathway who have a protection finding, which may have been made a long time ago and the situation in the country may have improved or the circumstances of the individual have changed. However, the current legislative framework prevents the circumstances of those persons being reassessed to see if they still engage Australia's *non-refoulement* obligations while they remain on a bridging visa. This is because a person on a bridging visa is not an unlawful non-citizen and therefore not subject to the existing s197D(2) power.

The Bill would therefore amend the Migration Act to allow a protection finding to also be revisited for a limited cohort of persons who are the holders of a BVR or of a bridging visa which, at the time that bridging visa was granted, satisfied a criterion for the grant relating to the making of, or having, acceptable arrangements to depart Australia. The affected persons are those who are on a removal pathway following the refusal or cancellation of a protection visa, usually on character or security grounds, and have, in most cases, completed merits review and judicial review of those decisions. The Bill does not provide a mechanism to reconsider the protection findings of current protection visa holders, or former protection visa holders who now hold visas such as Resolution of Status Visas or Resident Return Visas.

Where a decision can be made under amended section 197D that a removal pathway non-citizen is no longer a person in respect of whom any protection finding would be made, this would be mean that the person could be removed from Australia to the relevant country consistently with Australia's *non-refoulement* obligations once their bridging visa ceases and any relevant review periods have been exhausted.

Human rights implications

These amendments engage the following rights:

- The right to liberty and freedom from arbitrary detention in Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR)
- The right to a fair trial and minimum guarantees in criminal proceedings in Article 14 of the ICCPR
- Rights relating to families and children, including those in Articles 17 and 23 of the ICCPR and Articles 3 and 10 of the *Convention on the Rights of the Child* (CRC)

- *Non-refoulement* obligations arising in respect of Articles 6 and 7 of the ICCPR and in Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)
- The right to privacy in Article 17 of the ICCPR
- Rights in relation to the expulsion of aliens in Article 13 of the ICCPR
- The right to freedom of movement in Article 12 of the ICCPR
- The rights of equality and non-discrimination in Articles 2 and 26 of the ICCPR.

Right to liberty and freedom from arbitrary detention

Article 9(1) of the ICCPR states:

> *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.*

Article 9(1) requires that detention must be in accordance with procedures established under domestic law and must not otherwise be arbitrary.

The proposed offence provision for non-compliance with a removal pathway direction engages this right. A failure to comply with a direction will be a criminal offence carrying a mandatory minimum sentence of 12 months' imprisonment, and a maximum available sentence of five years' imprisonment or 300 penalty units, or both.

The proposed offence and associated penalty is intended to ensure that non-citizens remain appropriately engaged and cooperate with arrangements to facilitate their removal from Australia. Non-cooperation with removal processes demonstrates a disregard for Australian laws. This behaviour is contrary to the Australian community's expectations that a non-citizen should engage with the process to resolve their migration status and to effect their removal from Australia where required by law.

Given that the offence will be established under Australian domestic legislation – and therefore subject to standard criminal procedures and safeguards – detention as a result of non-compliance with a removal pathway direction would be authorised by, and operate in accordance with, the amendments proposed to be made by the Bill. Accordingly, it complies with the requirement in Article 9(1) that deprivation of liberty not occur except in accordance with grounds and procedures prescribed by law.

Whether detention is arbitrary involves consideration of whether it pursues a legitimate aim and is reasonable, necessary and proportionate in light of the circumstances. The objective of the offence provision is to facilitate the removal of non-citizens from Australia, especially in situations that require some action on their part, such as filling out a passport application form. Removal of non-citizens can reasonably be considered to be a legitimate aim, especially given that, as a sovereign State, Australia has the right to regulate migration and effect the removal of persons who do not, or no longer have the right to remain in Australia, including after a finding that they do not engage Australia's *non-refoulement* obligations, consistent with the observations of the UNHCR Executive Committee.

A number of safeguards have been included to limit the circumstances in which a removal pathway direction can be issued and hence an offence committed if the person does not comply. These include that the person has to be an unlawful non-citizen or the holder of one of certain types of bridging visas that are issued to persons who are on a removal pathway. A direction cannot be made to compel the person to provide information to, or otherwise interact with, the

authorities of a country in relation to which a protection finding has been made, while the person has a protection visa application on foot, or if the person is a child under 18.

Further, the power to issue a direction is discretionary, and operational guidance will be put in place to help ensure that directions are issued only when it is reasonable to do so in the circumstances of the individual.

The objective of a mandatory minimum sentence for this offence is to provide a strong deterrent to non-cooperation by removal pathway non-citizens with a direction given by the Minister under the proposed amendments. If a non-citizen understands that they are facing a minimum term of imprisonment for non-cooperation then it is more likely they will comply with a direction to cooperate with efforts to remove them.

In addition to standard defences, the defence of reasonable excuse will be available, with some limitations on what this can comprise.

Nevertheless, the inability of a court to impose a period of imprisonment of less than 12 months, or a pecuniary penalty only, if the person is convicted, may mean there could be a risk of incompatibility with the right in Article 9 of the ICCPR in some circumstances.

Right to a fair trial and minimum guarantees in criminal proceedings

Article 14 of the ICCPR relevantly provides:

> *(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…*
>
> *…*
>
> *(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
>
> **…**
>
> *(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*
>
> *…*
>
> *(7) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

The Government considers it appropriate to criminalise non-compliance with a direction that is aimed at facilitating the removal of a non-citizen from Australia who has exhausted options to remain in Australia lawfully and is on a removal pathway.

Any charges brought as a result of this offence will be subject to existing criminal procedures and safeguards and subject to judicial determination.

A person will not commit this offence if they have a reasonable excuse, subject to some limitations on the scope of what can be a reasonable excuse. Existing standard defences in the Criminal Code will also apply.

The offence carries a maximum penalty of 5 years imprisonment, or 300 penalty units, or both. The purpose of the maximum penalty available for the offences is to reflect the seriousness with which the Government views these offences and the need to make clear the importance of a removal pathway non-citizen complying with removal efforts. The maximum available

penalty provides flexibility for courts to consider individual circumstances and treat different cases differently, according to the circumstances of the offending. Factors such as the nature and severity of the non-compliance, the degree of steps taken to remediate non-compliance, or ensure future compliance with the requirement, are examples of factors that the courts may wish to take into consideration.

If convicted of this offence, the court must impose a sentence of imprisonment of at least 12 months. This mandatory minimum sentence if convicted following a fair hearing before a court reflects the seriousness of the offending, the need for a strong deterrent to non-compliance with removal efforts for persons on a removal pathway and the importance the Government places on the integrity of the migration system.

It is the Government's view that breach of the proposed offence constitute a serious offence in the context of a removal pathway non-citizens has no other ongoing entitlement to be in Australia. A penalty of 12 months' mandatory minimum imprisonment provides for greater certainty. Any shorter duration would be unlikely to indicate that the offence is a serious one. The penalty is intended to provide an effective deterrent to the commission of the offence, and reflects the serious and damaging consequences to the integrity of the managed migration program. In particular, it is noted that disengagement from the removal process severely hampers the Government's ability to effect the removal of the individual.

There is a risk that mandatory minimum sentencing is incompatible with the right to have a sentence reviewed by a higher tribunal according to law under Article 14(5) of the ICCPR because mandatory sentencing prevents judicial discretion in relation to the severity or correctness of a minimum sentence.

The removal pathway non-citizen accused of non-compliance with a direction will bear the evidential burden in relation to whether they have a reasonable excuse for their non-compliance. This is reasonable and necessary in circumstances where the removal pathway non-citizen will have the knowledge of the circumstances of their non-compliance, such that the removal pathway non-citizen is best placed to furnish to the court the details of the reasonable excuse.

Consequently, the reverse burden in relation to the reasonable excuse provision does not violate the right to the presumption of innocence, as it is reasonable, necessary and proportionate in circumstances where the removal pathway non-citizen is best placed to provide the evidence of their reasonable excuse.

There is a possibility that non-citizens who refuse to facilitate their removal and are found guilty of the offence will continue to refuse to comply with a subsequent direction, even after having served their sentence. Upon serving their term, if the individual was issued with another direction to do (or not to do) a thing, continued to refuse to facilitate their removal from Australia, and were to be prosecuted and imprisoned under the proposed offence for each act of refusal, this may risk inconsistency with Article 14(7). This will depend on the facts of each individual's case.

In light of the penalty for the offence, including the mandatory minimum penalty, and the possibility of repeated non-compliance being considered a form of double jeopardy, there is a risk that the offence proposed in the amendments is incompatible with the rights in Article 14 of the ICCPR.

Rights relating to families and children

Article 17(1) of the ICCPR states:

> *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

Article 23 (1) of the ICCPR states:

> *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

Article 3(1) of the CRC states:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Article 10(1) of the CRC states that:

> *In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.*

A removal pathway direction cannot be issued to a child under 18 which means children under 18 are not subject to the penalties for non-compliance. A removal pathway direction can be issued to a parent or guardian if both the child and the parent/guardian are removal pathway non-citizens, to enable the removal of family units together.

A person may argue that they have not complied with a removal pathway direction because removal would separate them from family members. In many cases, the impact of the person's removal from Australia on their family members, including consideration of the best interests of children, would have already been considered as part of the decision to refuse or cancel their substantive visa on character or other discretionary grounds. Where such consideration has not taken place, or the person's family circumstances have changed since the last such consideration, there may be opportunities for that consideration to take place as part of a ministerial intervention consideration and/or in the exercise of the discretion to issue a removal pathway direction. Consideration of these issues in existing visa and ministerial intervention processes for a person who is a removal pathway non-citizen would ensure that that any interference with the family as a result of the person's removal would not be arbitrary in the individual circumstances of the case.

The measure relating to the designation of removal concern countries also engages rights relating to families and children. The exceptions to the effect of the designation have been included to allow Australia to meet its obligations towards families and children, particularly the right in Article 10 of the CRC, by ensuring that applications for visas that would allow for the reunification of a child and their parent(s) can continue to be made. The exceptions more broadly support the right in Article 23 of the ICCPR, by allowing visa applications by spouses, partners, and dependent children (defined more broadly than children under 18) of Australian citizens and permanent residents to continue to be made despite a designation. Further, the designation does not affect visa applications made by persons who are already in Australia, including by those who are family members of other persons who are in Australia. In addition, the Bill provides for a power to exempt individuals from the operation of the designation where

the Minister considers it in the public interest to do so, and this power could be used in other situations affecting children and/or family units.

The measure relating to the reconsideration of protection findings for certain bridging visa holders who are already on a removal pathway does not directly engage rights relating to families and children. However, as it may mean a person holding such a bridging visa may be able to be removed if it is determined that a protection finding would no longer be made for that person, this may affect the rights of their family members in Australia. In many cases, similarly to any non-citizen who claims that removal would separate them from their family members as explained above, the impact of the person's removal from Australia on their family members, including consideration of the best interests of children, would have already been considered as part of the decision to refuse or cancel their protection visa on character grounds. Where such consideration has not yet taken place, or the person's family circumstances have changed since the last such consideration, there may be opportunities for that consideration to take place as part of a ministerial intervention consideration. Consideration of these issues in existing visa and ministerial intervention processes for a person who is a removal pathway non-citizen would ensure that that any interference with the family as a result of the person's removal would not be arbitrary in the individual circumstances of the case.

Non-refoulement obligations

Article 6 of the ICCPR states:

> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 7 of the ICCPR states:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

Article 3(1) of the CAT states:

> *No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

Australia remains committed to its international obligations concerning *non-refoulement*.

The Migration Act (subsection 197C(3)) ensures that removal to the country by reference to which a 'protection finding' was made in the course of considering the person's most recent protection visa application is not required or authorised unless the decision in which the protection finding was made is quashed or set aside, the person requests voluntary removal or the person is found, under section 197D of the Migration Act, to no longer be a person in respect of whom a protection finding be made in respect of the relevant country. This could be in circumstances where, for example, country conditions have significantly improved such that the person no longer faces a real risk of the relevant harm. Removal to the country by reference to which a 'protection finding' was made is also not authorised or required while merits review of a decision under section 197D of the Migration Act is ongoing.

Since a 'protection finding' reflects the circumstances in which Australia's *non-refoulement* obligations are engaged, removal pathway non-citizens who have a 'protection finding' will not be removed from Australia in breach of Australia's *non-refoulement* obligations. For any removal pathway non-citizen who does not have a 'protection finding' but makes protection

claims, there will be opportunity to have those claims considered though a protection visa process or through consideration of ministerial intervention pathways where relevant.

With respect to the measure relating to the duty to cooperate, the amendments make clear that persons who have been found to engage Australia's *non-refoulement* obligations through the making of a protection finding in a protection visa decision cannot be required to cooperate with the making of arrangements for their departure from Australia to the country in respect of which the protection finding was made. Removal to that country will remain prevented by subsection 197C(3) of the Migration Act. In addition, a person in respect of whom a protection finding has been made cannot be required to take actions in relation to the country to which that finding relates, even for the purposes of a removal to a third country.

Further, the amendments prevent the Minister from issuing a direction to an individual who has made a valid application for a protection visa which has not been finally determined. If *non-refoulement* obligations are found to be engaged in the protection visa process, subsection 197C(3) of the Migration Act ensures that the person would not be subject to removal in breach of those obligations.

Operational guidance will also ensure that, where a person makes credible new protection claims in relation to a country they have previously been assessed against and had no protection finding made, or in relation to another country to which they may be removed, a removal pathway direction is not issued while those claims are being assessed.

The measure relating to the designation of removal concern countries does not engage or limit Australia's *non-refoulement* obligations as it does not affect persons who are in Australia or their ability to make a protection visa application and to have it assessed.

The measure relating to the reconsideration of protection findings for persons who hold certain bridging visas engages but does not limit Australia's *non-refoulement* obligations. As noted above, some removal pathway non-citizens have a 'protection finding' and section 197D of the Migration Act provides a power to make a decision that an *unlawful* non-citizen is no longer a person in respect of whom any protection finding would be made. As also noted above, this could be in circumstances where, for example, country conditions have significantly improved such that the person no longer faces a real risk of the relevant harm.

The Bill would expand the situations in which a decision under section 197D can be made, that a person is no longer a person in respect of whom any protection finding would be made, to encompass persons who hold certain bridging visas as defined in new section 199AB, in addition to persons who are unlawful non-citizens. As such persons are on a removal pathway following the refusal or cancellation of a substantive visa, usually on character or security grounds, and a protection finding may be a key barrier to their removal from Australia, it is appropriate that reconsideration of their circumstances, to see if they continue to engage Australia's *non-refoulement* obligations, can take place. The Bill does not provide a mechanism to reconsider the protection findings of current protection visa holders, or former protection visa holders who now hold visas such as Resolution of Status Visas or Resident Return Visas.

Consideration under section 197D follows natural justice processes and includes a merits review right, as well as being subject to judicial review. Therefore a decision that a person, including a person who holds the specified type of bridging visa, is no longer a person in respect of whom any protection finding would be made will ensure that the person can be removed, consistently with Australia's *non-refoulement* obligations, once their bridging visa ceases.

As such, the amendments in the Bill do not affect Australia's commitment to complying with its *non-refoulement* obligations in relation to Articles 6 and 7 of the ICCPR and Article 3 of the CAT.

Right to privacy

Article 17(1) of the ICCPR states:

> *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

Pursuant to Article 17(1) of the ICCPR, any interference with an individual's privacy must have a lawful basis, and be in accordance with the provisions, aims and objectives of the ICCPR, and should be reasonable in the particular circumstances.

In its Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information[2], the UNHCR made the following observations:

> *Regarding persons found not to be in need of international protection (that is, rejected cases after exhaustion of available legal remedies), the limited sharing of personal data with the authorities of the country of origin is legitimate in order to facilitate return, even if this is without the consent of the individuals concerned. Such cases usually arise when nationality is in question and/or the individual has no national travel or identification documents. However, disclosure should go no further than is lawful and necessary to secure readmission, and there should be no disclosure that could endanger the individual or any other person, not least disclosure of the fact that the individual has applied for asylum. Moreover, in the first instance everything should be done to secure the voluntary nature of return.*

The amendments provide for a power to direct a removal pathway non-citizen to take certain actions, such as applying for a passport or attending an interview with a specified person, with a criminal penalty for non-compliance. These actions will involve the provision of information by the person, in some cases directly to the authorities or consular officials of the relevant country and in some cases to the Department.

The person cannot, however, be directed to provide information to, or otherwise interact with, a country in relation to which a protection finding has been made in respect of the person or where their protection claims are under consideration in a protection visa application that has not been finally determined.

In addition, as noted in the overview, a direction cannot be issued to a child under 18, although it can be issued to a parent or guardian in relation to the child if both the child and the parent/guardian are removal pathway non-citizens, to enable the removal of family units together.

Where information is provided to the Department, the collection, use and disclosure of that information, will be in accordance with the requirements of the *Privacy Act 1988* and, where relevant, provisions of other relevant legislation such as the Migration Act and the *Australian Border Force Act 2015*.

Where a person is providing information directly to their country of nationality, it is reasonable to expect that the country will already have at least some of the relevant information, such as

[2] https://www.refworld.org/jurisprudence/amicus/unhcr/2005/en/93151

the person's name, date of birth and details of previous passports. The re-provision of that information would therefore be unlikely to constitute an interference with the person's privacy. However in other cases the information may be information the other country or relevant entity does not already have or the information is being provided to a third country for the purposes of that country accepting the person.

Whether the information is provided to the Department or directly to the relevant country, compelling the provision of personal information for the purpose of facilitating a non-citizen's removal from Australia would be reasonable, necessary and proportionate to achieve the intended purpose of facilitating the removal of a non-citizen who has exhausted avenues to remain lawfully in Australia on a substantive visa and assisting other countries to identify such a person for the purpose of accepting their return and issuing the necessary travel documents. It is in the public interest that non-citizens on a removal pathway not be enabled to refuse to provide the personal information required by foreign countries in an attempt to frustrate their lawful removal from Australia. Further, it supports the legitimate objective of protecting the integrity of the migration system through removing non-citizens who no longer have the right to remain in Australia.

Since not complying with a direction will be a criminal offence, operational guidance will be developed to ensure that directions to compel the provision of information are reasonable in the circumstances of the person. Since a person cannot be directed to provide information to a protection finding country, or while there protection visa application is on foot, the guidance could, for example, deal with the situation where a person has made credible new claims in respect of that country that are under consideration. Existing guidance about identity interviews with consular officials will also be reviewed to ensure that the interviewer limits their questions to issues directly relevant to facilitating the removal and does not ask questions about whether the person had made protection claims in Australia, even where those claims did not result in a protection finding, in accordance with the UNHCR's guidance.

Any interference with the privacy of non-citizens by directing them to provide required personal information, is compatible with Article 17 of the ICCPR.

Expulsion of aliens

Article 13 of the ICCPR states:

> *An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

Under international law, Australia has the right to take reasonable steps to control the entry and stay of aliens.

The measure relating to the duty to cooperate and the measure relating to the consideration of protection findings for certain visa holders both engage the rights relating to the expulsion of aliens lawfully in the territory because they apply to lawful non-citizens holding certain bridging visas, albeit those who are already on a removal pathway.

A person who is on a removal pathway will have had the opportunity to submit reasons against their expulsion in the context of the refusal or cancellation of their substantive visa, and to have that decision reviewed, thought merits review and/or judicial review avenues. Where the result of the person complying with a direction made under the proposed amendments is that the

person's removal is able to be effected, there may need to be an additional decision to cease the person's BVR. That decision is subject to natural justice processes and judicial review.

As a decision under section 197D of the Migration Act that the person is no longer a person with respect to whom any protection finding would be made may mean that a person becomes available for removal once their bridging visa ceases, the person is able to submit reasons why a protection finding should still be made as part of the section 197D decision-making process and have that decision reviewed by a merits review tribunal pursuant to existing provisions of the Act. In addition, where a decision is made to cease a BVR because the person may be able to be removed following a section 197D decision, that decision, as noted above, is subject to natural justice processes and judicial review.

Right to enter one's own country

Article 12(4) of the ICCPR states:

No one shall be arbitrarily deprived of the right to enter his own country.

'Own country' in Article 12(4) is not limited to citizens of a country, but can include long term residents with strong ties to Australia and where ties to the country of nationality may have been severed.

The measure to designate removal concern countries will have no impact on the ability of Australian citizens and existing visa holders to travel to and from Australia. However, former visa holders who find themselves outside Australia without a visa to return and are a national of removal concern country may be unable to apply for a visa to return to Australia unless they come within one of the exceptions provided for by the Bill. It is intended that the power to prescribe additional classes of visa and persons who would not be subject to the designation will prescribe Resident Return Visas. These visas allow permanent residents, as well as former citizens, to return to Australia if the travel facility on their permanent visa has ceased, which generally occurs 5 years after their permanent visa was granted. Permanent residents are encouraged to apply for these visas before departing Australia and the designation would not affect those applications made in Australia. However in some cases a person may forget or not have time to apply prior to their departure, and prescribing these visas will allow applications for those visas to continue to be made by persons outside Australia, thus helping ensure that persons for whom Australia is their own country are able to re-enter Australia consistently with the right in Article 12(4).

The measures relating to the duty to cooperate with removal and to reconsider protection findings for removal pathway non-citizens do not directly engage Article 12(4). However some persons who are removal pathway non-citizens may be long-term residents of Australia who had their substantive visa cancelled on character grounds. The strength, nature and duration of the person's ties to Australia would have already been considered as part of the decision to cancel their substantive visa on character grounds, or to not revoke a mandatory visa cancellation. Consideration of these issues in those earlier visa processes would help ensure that either Australia was not the person's 'own country' or that deprivation of their right to enter their own country was not arbitrary having regard to the risk they posed to the Australian community, prior to them becoming removal pathway non-citizens.

Non-discrimination

Article 2(1) of the ICCPR states:

> *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 26 of the ICCPR states:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

In its General Comment 18, the UN Human Rights Committee (UNHRC) stated that:

> *The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].*

The ICCPR does not give a right for non-citizens to enter or reside in Australia. The UNHRC, in its General Comment 15 on the position of aliens under the ICCPR, stated that:

> *The [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the [ICCPR] even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*
>
> *Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the [ICCPR].*

As such, Australia is able to set requirements for the entry and stay of non-citizens in Australia, and does so on the basis of reasonable and objective criteria.

Differential treatment must be aimed at achieving a legitimate purpose, based on reasonable and objective criteria and proportionate to the aim to be achieved. The amendments will allow for differential treatment of persons who are removal pathway non-citizens, as they can be issued with a removal pathway direction and face criminal penalties for non-compliance, compared to both citizens and to non-citizens who are not removal pathway non-citizens.

Articles 12 and 13 of the ICCPR make it clear that State Parties have the right under international law to control the residence, entry and expulsion of aliens. Further, the criteria for differentiation under the proposed offence in the amendments is objective because it is clearly ascertainable. It is an unremarkable and universal practice among States Parties to treat citizens and non-citizens differently in relation to immigration measures.

This difference in treatment is for the legitimate purposes of protecting the national interest and maintaining the integrity of Australia's migration system in relation to non-citizens who

have exhausted options to remain in Australia lawfully on a substantive visa, are on a removal pathway, and may be able to be removed if they were to cooperate with efforts to remove them.

Targeting the direction power, and the associated offence, at this particular cohort of non-citizens is reasonable in light of this purpose.

The designation of a removal concern country may engage rights relating to discrimination, as it will operate to prevent applications being made by nationals of a designated country who are outside Australia, which may also mean that persons of particular national origins are disproportionately affected. However, the designation would not affect applications made by people already in Australia, the processing of existing visa applications or travel by existing visa holders nor affect the making of visa applications in a range of circumstances that may involve Australia's international obligations and commitments.

The Minister would exercise the power to designate a removal concern country in the national interest following consultations with the Prime Minister and the Foreign Minister. As noted in the overview, the purpose of a designation would be to reduce the number of people arriving in Australia from the removal concern country who may then prove difficult to remove in the future, and to encourage those countries to cooperate with Australia's efforts to remove their nationals following the end of their lawful stay in Australia. The designation would therefore be reasonable, necessary and proportionate to the legitimate aim of maintaining the integrity of the migration system and helping ensure that other countries readmit their nationals.

Conclusion

To the extent that the measures in this Bill limit human rights, they do so in order to maintain the integrity of the migration system.

The Hon Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs

HIGH COURT OF AUSTRALIA

28 November 2023

NZYQ v MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS & ANOR
[2023] HCA 37

On 8 November 2023, the High Court answered questions of law reserved for its consideration in a special case to the effect that ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) ("the Act"), on their proper construction, authorised the plaintiff's detention as at 30 May 2023 and 8 November 2023, but the sections are beyond the legislative power of the Commonwealth Parliament insofar as they applied to the plaintiff as at those dates. The order was announced as having been agreed to by "at least a majority" of the Court. Today, the High Court published its unanimous reasons for that order.

Section 189(1) imposes a duty on an "officer" (as defined under the Act) to detain a person who the officer "knows or reasonably suspects ... is an unlawful non-citizen". The duration of detention required by s 189(1) is governed by s 196(1), which provides that an unlawful non-citizen "must be kept in immigration detention until" the occurrence of one of several specified events, relevantly the grant of a visa or removal from Australia under s 198.

The plaintiff is a stateless Rohingya Muslim born in Myanmar. In 2012, he arrived in Australia by boat and was taken into immigration detention under s 189 of the Act. In 2014, he was granted a bridging visa and released from immigration detention. In 2016, he pleaded guilty to a sexual offence against a child and was sentenced to five years' imprisonment with a non-parole period of three years and four months. Upon his release from criminal custody on parole in 2018, the plaintiff was taken again into immigration detention under s 189(1) of the Act. In 2020, a delegate of the first defendant found the plaintiff to be a refugee in respect of whom Australia had protection obligations, but refused his application for a protection visa. Officers were then obliged under s 198 of the Act to remove the plaintiff from Australia as soon as reasonably practicable. The plaintiff also requested to be removed to another country. As at 30 May 2023, there was no real prospect of his removal from Australia in the reasonably foreseeable future.

The plaintiff commenced proceedings in the original jurisdiction of the High Court claiming that his continuing detention was not authorised by ss 189(1) and 196(1) of the Act. He argued that to be the result of the proper construction of those provisions ("the statutory construction issue"), and alternatively that those provisions contravened Ch III of the *Constitution*, which vests in Ch III courts the exclusively judicial function of adjudging and punishing criminal guilt ("the constitutional issue"). The plaintiff sought leave to reopen this Court's decision in *Al-Kateb v Godwin* (2004) 219 CLR 562, which held, by majority, that: ss 189(1) and 196(1) applied to require the continuing detention of an unlawful non-citizen in respect of whom there was no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future; and those sections as so applied did not contravene Ch III of the *Constitution*.

The High Court unanimously held that the plaintiff failed on the statutory construction issue but succeeded on the constitutional issue. The Court declined to reopen the statutory construction holding in *Al-Kateb*. The Court reopened and overruled the constitutional holding in *Al-Kateb*. The Court held that ss 189(1) and 196(1), as applied to the plaintiff, contravened Ch III of the *Constitution* because the plaintiff's detention was not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose in circumstances where there was no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

NZYQ PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS & ANOR DEFENDANTS

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs
[2023] HCA 37
Date of Hearing: 7 & 8 November 2023
Date of Order: 8 November 2023
Date of Publication of Reasons: 28 November 2023
S28/2023

ORDER

The questions stated for the opinion of the Full Court in the further amended special case filed on 31 October 2023 be answered as follows:

Question 1: *On their proper construction, did sections 189(1) and 196(1) of the* Migration Act 1958 *(Cth) authorise the detention of the plaintiff as at 30 May 2023?*

Answer: *Yes, subject to section 3A of the* Migration Act 1958 *(Cth).*

Question 2: *If so, are those provisions beyond the legislative power of the Commonwealth insofar as they applied to the plaintiff as at 30 May 2023?*

Answer: *Yes.*

Question 3: *On their proper construction, do sections 189(1) and 196(1) of the* Migration Act 1958 *(Cth) authorise the current detention of the plaintiff?*

Answer: *Yes, subject to section 3A of the* Migration Act 1958 *(Cth).*

Question 4: *If so, are those provisions beyond the legislative power of the Commonwealth insofar as they currently apply to the plaintiff?*

Answer: *Yes.*

Question 5: *What, if any, relief should be granted to the plaintiff?*

Answer: *The following orders should be made:*

(1) *It is declared that, by reason of there having been and continuing to be no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future:*

(a) *the plaintiff's detention was unlawful as at 30 May 2023; and*

(b) *the plaintiff's continued detention is unlawful and has been since 30 May 2023.*

(2) *A writ of habeas corpus issue requiring the defendants to release the plaintiff forthwith.*

Question 6: *Who should pay the costs of the further amended special case?*

Answer: *The defendants.*

Representation

C L Lenehan SC and F I Gordon KC with J S Stellios and T M Wood for the plaintiff (instructed by Allens)

S P Donaghue KC, Solicitor-General of the Commonwealth, and P D Herzfeld SC with Z C Heger and A M Hammond for the defendants (instructed by Australian Government Solicitor)

P M Knowles SC with M F Caristo for the Australian Human Rights Commission, appearing as amicus curiae (instructed by Australian Human Rights Commission)

R C A Higgins SC with A M Hochroth, J R Murphy and K E W Bones for the Human Rights Law Centre and the Kaldor Centre for International Refugee Law, appearing as amici curiae (instructed by Human Rights Law Centre)

CATCHWORDS

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs

Constitutional law (Cth) – Judicial power of Commonwealth – Immigration detention – Indefinite detention without judicial order – Where plaintiff stateless Rohingya Muslim having well-founded fear of persecution in Myanmar – Where plaintiff's bridging visa cancelled following criminal conviction – Where following release from criminal custody plaintiff taken into immigration detention under s 189 of *Migration Act 1958* (Cth) ("Act") – Where plaintiff's application for protection visa refused and finally determined – Where ss 198(1) and 198(6) of Act imposed duty upon officers of Department administering Act to remove plaintiff from Australia as soon as reasonably practicable – Where s 196(1) of Act required plaintiff to be kept in immigration detention until removed from Australia, deported, or granted visa – Where attempts by Department to remove plaintiff from Australia unsuccessful as at date of hearing – Where no real prospect of removal of plaintiff from Australia becoming practicable in reasonably foreseeable future – Where plaintiff sought writ of habeas corpus requiring release from detention forthwith – Whether application for leave to reopen constitutional holding in *Al-Kateb v Godwin* (2004) 219 CLR 562 should be granted – Whether constitutional holding in *Al-Kateb* should be overruled – Whether detention of plaintiff punitive contrary to Ch III of *Constitution* – Whether separation of plaintiff from Australian community pending removal constitutes legitimate and non-punitive purpose – Whether detention of plaintiff reasonably capable of being seen as necessary for legitimate and non-punitive purpose.

Immigration – Unlawful non-citizens – Detention pending removal from Australia – Where no real prospect of removal of plaintiff from Australia becoming practicable in reasonably foreseeable future – Whether detention of plaintiff authorised by ss 189(1) and 196(1) of Act – Whether application for leave to reopen statutory construction holding in *Al-Kateb* should be granted.

Words and phrases – "alien", "conservative cautionary principle", "deportation", "deprivation of liberty", "executive detention", "habeas corpus", "indefinite detention", "judicial function", "judicial power of the Commonwealth", "legitimate and non-punitive purpose", "*Lim* principle", "penal", "power to exclude", "practicable", "punishment", "punitive", "real prospect", "reasonably capable of being seen as necessary", "reasonably foreseeable future", "removal from Australia", "separation from the Australian community", "unlawful non-citizen".

Constitution, s 51(xix), Ch III.
Migration Act 1958 (Cth), ss 3A, 189, 196, 198.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. The plaintiff is a stateless Rohingya Muslim. He was born in Myanmar between 1995 and 1997. He arrived in Australia by boat in 2012 and was taken into immigration detention on arrival under s 189 of the *Migration Act 1958* (Cth) ("the Migration Act"). He was granted a bridging visa in 2014.

2 In 2016, the plaintiff pleaded guilty in the District Court of New South Wales to a sexual offence against a child. He was sentenced to imprisonment for five years with a non-parole period of three years and four months. Upon his release from criminal custody on parole in 2018, he was taken again into immigration detention under s 189(1) of the Migration Act.

3 Whilst still in criminal custody, the plaintiff had applied for a protection visa. His application was considered by a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ("the Minister") in 2020. The delegate found him to have a well-founded fear of persecution in Myanmar. On that basis, the delegate found him to be a refugee in respect of whom Australia had protection obligations. Having regard to his conviction, however, the delegate found there to have been reasonable grounds for considering him a danger to the Australian community. On the basis of that finding, the delegate found that the plaintiff failed to satisfy the criterion for a protection visa set out in s 36(1C)(b) of the Migration Act and for that reason refused to grant him a protection visa.

4 The Administrative Appeals Tribunal affirmed the decision of the delegate following which the Federal Court of Australia dismissed an application for judicial review of the decision of the Tribunal in 2022. That final determination of his visa application engaged the duty imposed on officers of the Department of Home Affairs ("the Department") by s 198(6) of the Migration Act to remove the plaintiff from Australia as soon as reasonably practicable. Also in 2022, the plaintiff wrote to the Minister requesting his removal. That request engaged another duty imposed on officers of the Department by s 198(1) of the Migration Act to remove the plaintiff from Australia as soon as reasonably practicable.

5 By reason of the finding that the plaintiff had a well-founded fear of persecution, and in the absence of any relevant change of circumstances, the operation of s 197C(3) of the Migration Act was such that s 198(1) and (6) did not require or authorise an officer to remove him to Myanmar. In any event, he does not have any right of entry to or residence in Myanmar. The plaintiff had relatives in Saudi Arabia and in Bangladesh. But there was no real prospect of him being provided with a right to enter or reside in either of those countries. No country in

the world has an established practice of offering resettlement to persons in Australia who have been convicted of sexual offences against children and the Department had never successfully removed from Australia any person convicted of a sexual offence against a child to a country other than a country which recognised the person as a citizen.

6 Against that background, on 5 April 2023 the plaintiff commenced a proceeding against the Minister and the Commonwealth of Australia in the original jurisdiction of the High Court under s 75(v) of the *Constitution* and s 30 of the *Judiciary Act 1903* (Cth). The plaintiff claimed in the proceeding that his continuing detention was not authorised by ss 189(1) and 196(1) of the Migration Act. He claimed that to be the result of the proper construction of those provisions. He claimed in the alternative that those provisions contravened Ch III of the *Constitution*.

7 By a Further Amended Special Case ("the special case") in the proceeding pursuant to r 27.08 of the *High Court Rules 2004* (Cth), the parties agreed on stating questions of law for the consideration of the Full Court of the High Court. The special case was heard by the Full Court on 7 and 8 November 2023. At the hearing, the position of the plaintiff was supported by the Australian Human Rights Commission, the Human Rights Law Centre, and the Kaldor Centre for International Refugee Law, each of which was granted leave to appear amicus curiae.

8 At the end of the hearing on 8 November 2023, the Full Court made an order stating answers to each of the questions of law stated for its consideration in the special case. The order was announced as having been agreed to by "at least a majority" because two members of the Court (Gleeson and Jagot JJ) did not agree that the Court should make orders without publishing reasons and, in any event, required further time to consider the matter. Having considered the matter, Gleeson and Jagot JJ agree with the order made on 8 November 2023.

9 The answers to the questions stated in the order made clear that the plaintiff failed in his claim that his continuing detention was not authorised on the proper construction of ss 189(1) and 196(1) of the Migration Act but succeeded in his claim that his continuing detention contravened Ch III of the *Constitution* with the result that those provisions lacked valid application to him. The answers went on to specify the relief to which the plaintiff was entitled. The relief included a declaration to the effect that his continuing detention had been unlawful since 30 May 2023 and continued to be unlawful by reason of there having then been,

and continuing to be, no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future. The relief also included a writ of habeas corpus requiring his immediate release.

10 These are our reasons for having joined in the order made on 8 November 2023 or, after consideration, for agreeing with the order made.

Al-Kateb

11 Since they were inserted on 1 September 1994,[1] Divs 7 and 8 of Pt 2 of the Migration Act have provided for the mandatory detention and mandatory removal from Australia of an "unlawful non-citizen", being someone who is not an Australian citizen and who does not hold a valid visa permitting them to travel to and enter Australia or to remain in Australia.[2] The basic structure and the text of the critical provisions of Divs 7 and 8 have not altered since then. The critical provisions operate by imposing duties on "officers", including officers of the Department.[3]

12 Within Div 7, s 189(1) imposes a duty on an officer to detain a person who the officer "knows or reasonably suspects ... is an unlawful non-citizen". Critically, the duration of the detention authorised and required by s 189(1) is governed by s 196(1), which provides that the unlawful non-citizen "must be kept in immigration detention until" the occurrence of one of several specified events. One of those events, specified in s 196(1)(c), is that "he or she is granted a visa". Another, specified in s 196(1)(a), is that "he or she is removed from Australia under [s] 198".

13 Within Div 8, s 198 imposes duties on an officer to remove an unlawful non-citizen from Australia "as soon as reasonably practicable" in a range of specified circumstances. Section 198(1) imposes such a duty in respect of an unlawful non-citizen "who asks the Minister, in writing, to be so removed".

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1 By the *Migration Reform Act 1992* (Cth) as amended by the *Migration Laws Amendment Act 1993* (Cth). See also the *Migration Legislation Amendment Act 1994* (Cth).

2 See ss 14(1) and 29(1) of the Migration Act.

3 See s 5(1) of the Migration Act (definition of "officer").

Section 198(6) imposes such a duty in respect of an unlawful non-citizen in immigration detention who has applied for a visa which has been refused and whose application has been finally determined. As has been noted, both of those duties were engaged in respect of the plaintiff in 2022. Each of those duties would be compellable by a writ of mandamus under s 75(v) of the *Constitution* were removal of the plaintiff reasonably practicable. But a writ of mandamus compelling performance of those duties would be futile if there were no real prospect of removal becoming practicable in the reasonably foreseeable future and understandably that remedy has not been sought by the plaintiff in the proceeding.

14 Ten years after the insertion of Divs 7 and 8 of Pt 2 into the Migration Act, in *Al-Kateb v Godwin*,[4] the High Court examined the application of ss 189(1) and 196(1) to an unlawful non-citizen in respect of whom there was no real prospect of removal under s 198(1) or s 198(6) becoming practicable in the reasonably foreseeable future. The ratio decidendi comprised two holdings. First, by majority (McHugh, Hayne, Callinan and Heydon JJ, Gleeson CJ, Gummow and Kirby JJ dissenting), the Court held that ss 189(1) and 196(1) on their proper construction applied to require the continuing detention of such a person. Secondly, and also by majority (McHugh, Hayne, Callinan and Heydon JJ, Gummow J dissenting, Gleeson CJ and Kirby J not deciding), the Court held that ss 189(1) and 196(1) as so applied did not contravene Ch III of the *Constitution*. *Al-Kateb* was immediately applied to uphold the continuing detention of an unlawful non-citizen in materially identical circumstances in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*.[5]

15 Unless and except to the extent *Al-Kateb* was to be reopened and overruled, *Al-Kateb* stood as an implacable obstacle to the plaintiff's claims. The plaintiff therefore needed leave to reopen *Al-Kateb* and appropriately sought that leave. The arguments of the parties and of the amici curiae on the hearing of the special case were primarily directed to whether the leave to reopen *Al-Kateb* sought by the plaintiff should be granted and, if so, whether *Al-Kateb* should be overruled. It was common ground that leave to reopen *Al-Kateb* should be considered separately for each of the two holdings of the majority.

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4 (2004) 219 CLR 562.

5 (2004) 219 CLR 664.

16 This was not the first time that the reopening and overruling of *Al-Kateb* had been argued before the Court. This was, however, the first time that there was shown to be a state of facts which made questions about reopening and overruling *Al-Kateb* necessary to be addressed by the Court in order to determine the rights of the parties in issue before it. In *Plaintiff M47/2012 v Director-General of Security*,[6] two members of the Court (Gummow and Bell JJ) expressed the view that the statutory construction holding in *Al-Kateb* should be reopened and overruled; another (Heydon J) expressed the view that it should not. In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*,[7] two members of the Court (Kiefel and Keane JJ) expressed the view that the statutory construction holding in *Al-Kateb* should not be reopened; another (Hayne J) emphasised that *Al-Kateb* had not been overruled and reiterated his view that *Al-Kateb* had been correctly decided. In neither of those cases did other members of the Court address *Al-Kateb*. In *Plaintiff M47/2018 v Minister for Home Affairs*,[8] reopening and overruling *Al-Kateb* was again argued. Again, the arguments were found unnecessary to be addressed in order to resolve the controversy before the Court.

17 The considerations which inform when it can be appropriate for the Court to reopen and reconsider its own earlier decisions may have different weight, are incapable of exhaustive definition, and have been examined on numerous occasions.[9] The evaluation of such considerations as may bear on the appropriateness of reopening a given decision in given circumstances was said by French CJ in *Wurridjal v The Commonwealth*[10] to be "informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken".

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6 (2012) 251 CLR 1.

7 (2013) 251 CLR 322.

8 (2019) 265 CLR 285.

9 See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350-353 [65]-[71].

10 (2009) 237 CLR 309 at 352 [70].

18 Informed by that strongly conservative cautionary principle, the applicable considerations weigh against reopening of the statutory construction holding in *Al-Kateb* but in favour of reopening of its constitutional holding.

No reopening of the statutory construction holding in *Al-Kateb*

19 Despite Gummow and Bell JJ's criticism in *Plaintiff M47/2012* of the construction of ss 189(1) and 196(1) adopted by the majority in *Al-Kateb*, the process of reasoning which led the majority in *Al-Kateb* to that construction cannot be said to have overlooked any principle of statutory construction on which the minority in *Al-Kateb* relied or on which the plaintiff and amici placed emphasis in argument on the special case. The difference between the majority and minority in *Al-Kateb* was in the application of those principles of statutory construction to the enacted text of ss 189(1) and 196(1), and in particular the weight to be given to textual considerations in ascertaining the meaning, which Hayne J in the majority described as "intractable".[11]

20 In *Plaintiff M76/2013*,[12] Kiefel and Keane JJ observed that any suggestion that the majority's construction of ss 189(1) and 196(1) in *Al-Kateb* failed to give effect to the will of the Commonwealth Parliament had become difficult to sustain by 2013. Not only had the Parliament refrained from altering the critical text of those provisions despite making numerous amendments to the Migration Act in the ten years which had then elapsed since *Al-Kateb*, but the Parliament had also, in 2005,[13] inserted other provisions into the Migration Act which assumed the correctness of the construction of ss 189(1) and 196(1) adopted in *Al-Kateb* and which were designed to ameliorate the harshness of the operation of those provisions, so construed. Kiefel and Keane JJ referred to s 195A, which was explained at the time of insertion as providing the Minister with "the flexibility to grant any visa that is appropriate ... where the detainee has no right to remain in Australia but removal is not practicable in the foreseeable future".[14] Their Honours

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11 (2004) 219 CLR 562 at 643 [241].

12 (2013) 251 CLR 322 at 382-383 [194]-[197].

13 *Migration Amendment (Detention Arrangements) Act 2005* (Cth).

14 Australia, House of Representatives, *Migration Amendment (Detention Arrangements) Bill 2005*, Explanatory Memorandum at 3 [10].

might also have referred to Subdiv B of Div 7 of Pt 2, which provides for the Minister to make a residence determination permitting a person required to be detained under s 189(1) to reside at a specified place instead of being detained at a place of detention, and Pt 8C, which provides for periodic assessment by the Commonwealth Ombudsman of the appropriateness of detention arrangements for a person who has been in immigration detention for two years or more.

21 In 2021, the considerations of legislative reliance and implicit legislative endorsement identified by Kiefel and Keane JJ in 2013 were reinforced by the Parliament's assumption as to the correctness of the *Al-Kateb* construction which informed the insertion of s 197C(3) by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth).[15]

22 To all of those considerations of legislative reliance and implicit legislative endorsement must now also be added the decision in *The Commonwealth v AJL20*.[16] There the majority (Kiefel CJ, Gageler, Keane and Steward JJ) endorsed key aspects of the reasoning of the majority on the issue of statutory construction in *Al-Kateb*. The majority did so in referring to the statutory construction holding in *Al-Kateb*, and saying that the word "until" in conjunction with the word "kept" in s 196(1) indicates that detention under s 189(1) is "an ongoing or continuous state of affairs that is to be maintained up to the time that the event (relevantly, the grant of a visa or removal) *actually occurs*".[17]

23 The cumulation of these considerations leads inexorably to the conclusion, reflected in the answers stated in the order made at the end of the hearing of the special case, that leave to reopen the statutory construction holding in *Al-Kateb* should not be granted.

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15 See Australia, House of Representatives, *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021*, Explanatory Memorandum, Attachment A (Statement of Compatibility with Human Rights) at 13.

16 (2021) 273 CLR 43 at 66 [33]-[34].

17 (2021) 273 CLR 43 at 72 [49] (emphasis in original).

Reopening of the constitutional holding in *Al-Kateb*

24 The facts of *AJL20* did not raise whether, on the construction of ss 189(1) and 196(1) of the Migration Act adopted in *Al-Kateb* and endorsed in *AJL20*, those provisions have valid application to an unlawful non-citizen in respect of whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. The majority in *AJL20*[18] specifically recorded that the correctness of the constitutional holding in *Al-Kateb* did not arise for consideration.

25 Twelve years before *Al-Kateb* and two years before the insertion of Divs 7 and 8 of Pt 2 of the Migration Act, the Court decided *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[19] There it was necessary to determine the constitutional validity of two earlier and then recently inserted[20] sections of the Migration Act[21] which authorised and required the detention of a person who was within a category of non-citizens who had entered Australia unlawfully by boat. The detention was required to continue unless and until the person was either removed from Australia or granted an entry permit,[22] but the maximum period of detention was capped at 273 days[23] and the person was required to be removed from Australia "as soon as practicable" if the person asked for that to occur.[24] The impugned sections were held to be supported by s 51(xix) and not to contravene Ch III of the *Constitution*.

26 The reasoning of three members of the Court (Brennan, Deane and Dawson JJ), with whom a fourth (Mason CJ) agreed, that the impugned sections

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18 (2021) 273 CLR 43 at 64 [26].

19 (1992) 176 CLR 1.

20 By the *Migration Amendment Act 1992* (Cth).

21 Sections 54L and 54N of the Migration Act.

22 Section 54L of the Migration Act.

23 Section 54Q of the Migration Act.

24 Section 54P of the Migration Act.

did not contravene Ch III of the *Constitution* contained three statements of background principle which have come to be regarded as authoritative.

27 The first principle was that "any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of ... an alien [subject to qualification in the case of an enemy alien in a time of war] without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision".[25] That was a more specific statement of the fundamental and long-established principle that no person – alien or non-alien – may be detained by the executive absent statutory authority or judicial mandate.[26]

28 The second principle was that the effect of Ch III is that, exceptional cases aside, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[27] That statement of principle reflects that Ch III is concerned with substance and not mere form, and that it is the involuntary deprivation of liberty itself that ordinarily constitutes punishment.[28] It also recognised that it is not sufficient merely that detention be in consequence of an exercise of judicial power; other than in exceptional cases, it is necessary that the detention be in consequence of the performance of the "exclusively judicial function of adjudging and punishing criminal guilt".[29] Although the statement of principle in *Lim* referred to a "citizen", the principle has been held to apply to an alien albeit that an alien's status, rights

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25 (1992) 176 CLR 1 at 19. See *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 230-231 [24]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 101-102 [147]-[149], 105-106 [162]-[163], 158 [372].

26 See *Williams v The Queen* (1986) 161 CLR 278 at 292; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-521, 528.

27 (1992) 176 CLR 1 at 27. See *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 90-91 [18]-[19], 108 [65], 130-131 [130]-[134], 159-160 [207]-[208].

28 (1992) 176 CLR 1 at 27-28.

29 See *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 110-111 [71].

and immunities under the law differ from those of a non-alien in a number of important respects.[30]

29 The third principle was that the relevant difference between a non-alien and an alien for the purposes of Ch III "lies in the vulnerability of the alien to exclusion or deportation".[31] The plurality in *Lim* observed that this vulnerability flows from both the common law and the *Constitution*, referring also to matters of territorial sovereignty and international law.[32]

30 Adherence to these background principles led in *Lim* to a formulation of constitutional principle which provided the criterion to determine the validity of the sections of the Migration Act impugned in that case. That constitutional principle was formulated in the following terms:[33]

> "In the light of what has been said above, the two sections *will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered*. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates."

31 The constitutional principle so formulated and applied in *Lim* was not disavowed by the majority in *Al-Kateb*. But the insistence in *Lim* that the detention

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30 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 344 [33], 346 [39]-[40]; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 110 [71].

31 (1992) 176 CLR 1 at 29.

32 (1992) 176 CLR 1 at 29-32.

33 (1992) 176 CLR 1 at 33 (emphasis added).

of an alien must be limited to a period that is "reasonably capable of being seen as necessary" for one or other of two legitimate and non-punitive purposes, identified in terms of removing the alien from Australia or enabling an application by the alien for permission to remain in Australia to be made and considered, is difficult to reconcile with the constitutional holding in *Al-Kateb* that ss 189(1) and 196(1) of the Migration Act have valid application to an unlawful non-citizen in respect of whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. The statements of background principle in the reasoning in *Lim* are also difficult to reconcile with some passages in the reasoning of the majority in *Al-Kateb* which can be read as suggesting that Ch III of the *Constitution* has diminished application to the detention of an alien pursuant to a law of the Commonwealth Parliament enacted under s 51(xix) of the *Constitution*.[34]

32 The tension between *Al-Kateb* and *Lim* was highlighted by McHugh J in *Re Woolley; Ex parte Applicants M276/2003*.[35] Addressing the potential for ss 189(1) and 196(1) of the Migration Act to result in indefinite detention, McHugh J nevertheless said in *Re Woolley*:[36]

> "In *Lim*, Brennan, Deane and Dawson JJ regarded the prescribed maximum time limit on detention for which the Act then provided as one element that rendered the Executive's powers of detention under the Act reasonably capable of being seen as necessary for the purpose of making and considering entry applications ... No doubt cases may also arise where the connection between the alleged purpose of detention and the length of detention becomes so tenuous that it is not possible to find that the purpose of the detention is to enable visa applications to be processed pending the grant of a visa. If the law in question has such a tenuous connection, the proper inference will ordinarily be that its purpose is punitive. The fact that the law may also have a non-punitive purpose will not save it from invalidity."

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34 (2004) 219 CLR 562 at 582-583 [39], [42], 584 [45], 648-649 [255]-[258], 649 [261]-[262], 650-651 [266]-[267], 658 [289], 659 [291].

35 (2004) 225 CLR 1 at 23-32 [54]-[77].

36 (2004) 225 CLR 1 at 36-37 [88].

33 Nothing said in *Al-Kateb* has been taken subsequently to detract from the significance of *Lim*. To the contrary, in *Plaintiff M76/2013*,[37] Crennan, Bell and Gageler JJ restated and reaffirmed the constitutional principle for which *Lim* remained authority after *Al-Kateb* in terms that "conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted, is consistent with Ch III if, but only if, the detention in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes".

34 During the 20 years since *Al-Kateb*, the *Lim* principle has been repeatedly acknowledged and frequently applied.[38] The principle was most recently applied in *Alexander v Minister for Home Affairs*,[39] in *Benbrika v Minister for Home Affairs*[40] and in *Jones v The Commonwealth*.[41]

35 The consequence is that the constitutional holding in *Al-Kateb* has come increasingly to appear as an outlier in the stream of authority which has flowed from *Lim*. In language used by French CJ in *Wurridjal*,[42] deriving from that of Dixon CJ in *Attorney-General (Cth) v Schmidt*,[43] the authority of the constitutional holding in *Al-Kateb* has been "weakened" by later decisions to a degree that weighs strongly in favour of its reopening. To reopen the constitutional holding in *Al-Kateb*, and to do so on the first occasion on which the facts of a case squarely engage the constitutional holding, involves no disrespect for the approach of the

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37 (2013) 251 CLR 322 at 370 [140]-[141].

38 See *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 593 [21] and the cases there cited; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343-344 [29].

39 (2022) 96 ALJR 560; 401 ALR 438.

40 [2023] HCA 33.

41 [2023] HCA 34.

42 (2009) 237 CLR 309 at 353 [71].

43 (1961) 105 CLR 361 at 370.

majority in *Al-Kateb*. Using again the language of French CJ in *Wurridjal*, reopening *Al-Kateb* "does not require the taxonomy of 'truth' and 'error'" but rather reflects "an evolving understanding of the *Constitution* albeit subject to the conservative cautionary principle referred to earlier".[44]

36 Having regard to the importance of continuity and consistency in the application of fundamental constitutional principle, the legislative reliance and implicit legislative endorsement which weighed in favour of not reopening the statutory construction holding in *Al-Kateb* necessarily assumes less significance in considering reopening of its constitutional holding. The same is true of administrative inconvenience. Adapting what was said by Dixon CJ, McTiernan, Fullagar and Kitto JJ in *R v Kirby; Ex parte Boilermakers' Society of Australia*,[45] whilst considerations of legislative reliance and administrative inconvenience are appropriately treated as considerations having weight, "it is necessary to stop short of treating them as relieving this Court of its duty of proceeding according to law in giving effect to the Constitution which it is bound to enforce".

37 The weight of the consideration of continuity and consistency in the application of constitutional principle ultimately compels the conclusion that leave to reopen the constitutional holding in *Al-Kateb* should be granted.

Reconsidering *Al-Kateb* in light of the *Lim* principle

38 The question whether the constitutional holding in *Al-Kateb* should be overruled is to be determined by reference to the consistency of that holding with the *Lim* principle as stated in *Lim* itself and as understood and applied in subsequent cases.

39 Expressed at an appropriate level of generality, the principle in *Lim* is that a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the *Constitution* unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive

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44 (2009) 237 CLR 309 at 353 [71] (footnote omitted).

45 (1956) 94 CLR 254 at 295.

purpose. In other words, detention is penal or punitive unless justified as otherwise.[46]

40 The purpose of the law in this context, as elsewhere in constitutional discourse, must be identified at an appropriate level of generality.[47] So identified at the appropriate level of generality, the purpose is that which the law is designed to achieve in fact.[48] For an identified legislative objective to amount to a legitimate and non-punitive purpose, the legislative objective must be capable of being achieved in fact. The purpose must also be both legitimate *and* non-punitive. "Legitimate" refers to the need for the purpose said to justify detention to be compatible with the constitutionally prescribed system of government. Consistently with the principle in *Lim*, the legitimate purposes of detention – those purposes which are capable of displacing the default characterisation of detention as punitive – must be regarded as exceptional.[49]

41 Consistency with the *Lim* principle accordingly entails that "a Commonwealth statute which authorises executive detention must limit the duration of that detention to what is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose which is reasonably capable of being achieved".[50]

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46 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 611-612 [98]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 342 [24], 344 [33]; *Benbrika v Minister for Home Affairs* [2023] HCA 33 at [35], [63]; *Jones v The Commonwealth* [2023] HCA 34 at [43], [78], [153].

47 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 584 [103], 612 [242]; 401 ALR 438 at 462, 498-499.

48 *Brown v Tasmania* (2017) 261 CLR 328 at 392 [209]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171].

49 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-28.

50 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 625 [374]. See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 111 [184], 163 [392].

42 It is appropriate to identify the point of departure between our reasoning and the reasoning of the majority in *Al-Kateb* in support of the constitutional holding. In *Al-Kateb*,[51] McHugh J observed:

> "A law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive."

43 This Court is unanimous in concluding that this is an incomplete and, accordingly, inaccurate statement of the applicable principle. Two different approaches are taken to that conclusion. The first approach is taken by six of us and set out below. The second approach is taken by Edelman J.

The approach of six members of the Court

44 This statement of the scope of the power to detain aliens differs from that in *Lim*, which, as noted, has become authoritative. The application of the principle in *Lim*, although ultimately directed to a single question of characterisation (whether the power is properly characterised as punitive), requires an assessment of both means and ends, and the relationship between the two.[52] Applying that principle in circumstances where there is no real prospect of the removal of the alien from Australia becoming practicable in the reasonably foreseeable future, it cannot be said that, objectively determined, the "purpose of the detention is to make the alien available for deportation" or "to prevent the alien from entering Australia or the Australian community" pending the making of a decision as to whether or not they will be allowed entry.

45 Therein lies the reason why the constitutional holding in *Al-Kateb*, having been reopened, must be overruled. The *Lim* principle would be devoid of substance were it enough to justify detention, other than through the exercise of judicial power in the adjudgment and punishment of guilt, that the detention be designed

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51 (2004) 219 CLR 562 at 584 [45]. See also at 584-586 [45]-[48], 648 [255], 649 [262], 650-651 [266]-[267], 658 [289], 662-663 [303].

52 *Jones v The Commonwealth* [2023] HCA 34 at [43], [78], [154]-[155], [188].

to achieve an identified legislative objective that there is no real prospect of achieving in the reasonably foreseeable future.

46 Translated to the case at hand, if the only purposes peculiarly capable of justifying executive detention of an alien are, as was said in *Lim*, removal from Australia or enabling an application for permission to remain in Australia to be made and considered, then the absence of any real prospect of achieving removal of the alien from Australia in the reasonably foreseeable future refutes the existence of the first of those purposes.

47 Faced with that fundamental difficulty, the primary submission of the defendants was that a legitimate and non-punitive purpose of detention of an alien can be properly identified as separation from the Australian community pending removal (if ever). The defendants sought to support that submission by reference to passages in the reasoning of the majority in *AJL20*.[53] Recalling that the majority in *AJL20* specifically recorded that the correctness of the constitutional holding in *Al-Kateb* did not arise for consideration,[54] none of those passages can be read as having been directed to that constitutional issue.

48 The purpose of separation of an alien from the Australian community is outside the limited range of legitimate purposes identified in *Lim*, and repeatedly affirmed in cases following *Lim*.[55] The separation of an alien from the Australian community by means of executive detention was identified in *Lim* as permissible not as an element of some more expansive purpose but only as an "incident" of the implementation of one or other of the two legitimate purposes of considering whether to grant the alien permission to remain in Australia and deporting or removing the alien if permission is not granted. To the extent that reasoning of the

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53 (2021) 273 CLR 43 at 65 [28], 70-71 [44]-[45].

54 (2021) 273 CLR 43 at 64 [26].

55 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369-370 [138]-[140]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [26]; *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 593-594 [21]; *The Commonwealth v AJL20* (2021) 273 CLR 43 at 64-65 [27]-[28], 85-86 [85], 102-103 [128]-[129].

majority in *Al-Kateb* might be read as supportive of the legitimacy of the more expansive identified purpose,[56] that reasoning was in tension with *Lim*.

49 The principle in *Lim* necessitates that the purpose of detention, in order to be legitimate, must be something distinct from detention itself. The terms in which the defendants couched the postulated purpose demonstrated its constitutional illegitimacy. If "separation from the Australian community" is equated with separation from the Australian community by means of detention, as was necessarily implicit in the defendants' formulation, then the postulated purpose impermissibly conflates detention with the purpose of detention and renders any inquiry into whether a law authorising the detention is reasonably capable of being seen to be necessary for the identified purpose circular and self-fulfilling. The submission that the detention of an alien can be justified by reference to a purpose which includes detention of an alien amounted to a submission that detention is justified consistently with Ch III of the *Constitution* if the detention is for the purpose of detention.

50 The defendants' attempt to rely on references in *Lim*[57] to the detention of aliens being permissible as an incident of the executive power to exclude aliens as supportive of the postulated legitimate purpose of separation of an alien from the Australian community is misconceived. As Gleeson CJ explained in *Re Woolley*:[58]

> "Plainly [the plurality in *Lim*] did not contemplate that it is essential for a person to be in custody in order to make an application for an entry permit, or that it is only possible for the Executive to consider such an application while the applicant is in custody. They were referring to the time necessarily involved in receiving, investigating and determining an application for an entry permit. In a particular case, that time may be brief, or, depending upon the procedures of review and appeal that are invoked, it may be substantial. If a non-citizen enters Australia without permission, then the power to

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56 (2004) 219 CLR 562 at 584-586 [45]-[49], 646-647 [251], 648 [255], 649 [261]-[262], 650-651 [266]-[267], 658-662 [289]-[299].

57 (1992) 176 CLR 1 at 26, 29, 32.

58 (2004) 225 CLR 1 at 14 [26], cited with approval in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [139].

exclude the non-citizen extends to a power to investigate and determine an application by the non-citizen for permission to remain, and to hold the non-citizen in detention for the time necessary to follow the required procedures of decision-making. The non-citizen is not being detained as a form of punishment, but as an incident of the process of deciding whether to give the non-citizen permission to enter the Australian community. Without such permission, the non-citizen has no legal right to enter the community, and a law providing for detention during the process of decision-making is not punitive in nature."

The approach of Edelman J

51 The approach of Edelman J is slightly different, although perhaps only because it disaggregates the concept of punishment as used in *Lim*, an approach which has not yet been recognised by this Court. His approach begins with the premise that *Lim* uses the concept of punishment in two different senses. The core instance of the first sense is where harsh consequences are imposed based upon classic criminal notions of just desert. Chapter III of the *Constitution* extends beyond these classic criminal notions of punishment based upon just desert to other, analogous instances of "protective punishment".[59] The purpose of a law which is concerned with executive punishment in this sense would be illegitimate.

52 A second, and separate, sense of punishment was also recognised in *Lim*.[60] The separate sense is a novel conception of punishment which concerns forms of detention that have been described as "prima facie" punitive,[61] or which have been deemed to be punitive,[62] because the detention imposed is disproportionate to, in the sense of being not reasonably capable of being seen as necessary for, a

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59 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 155-159 [197]-[204], 161-164 [210]-[214].

60 See *Jones v The Commonwealth* [2023] HCA 34 at [149].

61 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 98 [37], 133 [140]. See also at 113 [78].

62 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.

legitimate purpose.[63] In this sense, the law is treated as punitive because it employs means that are disproportionate to its legitimate purpose.

53 The approach of Edelman J treats the relevant purpose of ss 189(1) and 196(1) as legitimate. His Honour would express the purpose by adapting the phrase used by the Solicitor-General of the Commonwealth, based on words of Dixon J[64] – "detention pending removal" – to what the provisions are designed to achieve in fact. As so expressed, the purpose is detention pending removal to ensure that the unlawful non-citizen will remain "available for deportation when that becomes practicable".[65] It is possible for Parliament to enact a law which seeks to achieve a purpose by measures which, at the boundaries, might have very little, or no, effect in advancing the purpose. In this respect, parliamentary purposes are no different from those of other groups. If a specialist sports squad implements a program with a purpose of training to reach the Olympics, that remains a genuine purpose even if under that program some members of the squad have no real prospect of achieving that goal in the reasonably foreseeable future. There is a difference between a purpose and its implementation. It is a difference between ends and means.

54 The problem, for Edelman J, with the decision of their Honours in the majority in *Al-Kateb* does not arise from their recognition of the purpose of ss 189(1) and 196(1) as legitimate but arises because they either ignored or paid insufficient attention to the proportionality requirement of *Lim*. As McHugh J said in *Re Woolley*,[66] "[n]one of the Justices in the majority in [*Al-Kateb*] applied the 'reasonably capable of being seen as necessary' test as the determinative test for ascertaining whether the purpose of the detention was punitive". For instance, Hayne J in *Al-Kateb*[67] focused only on the first sense of punishment in *Lim* and did "not consider that the Ch III question which is said now to arise can be answered

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63 *Jones v The Commonwealth* [2023] HCA 34 at [149].

64 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 581.

65 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45], approved in *The Commonwealth v AJL20* (2021) 273 CLR 43 at 64 [25].

66 (2004) 225 CLR 1 at 30-31 [71].

67 (2004) 219 CLR 562 at 650 [265]-[266].

by asking whether the law in question is ... 'reasonably capable of being seen as necessary' to the purpose of processing and removal of an unlawful non-citizen".[68] More specifically, if there is no real prospect of removal of some unlawful non-citizens becoming practicable in the reasonably foreseeable future, it is not reasonably capable of being seen as necessary to detain them to ensure that they are available for removal when practicable.

Expressing the constitutional limitation

55 For the reasons already given, expressing the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia as coming to an end when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future follows directly from the principle in *Lim*. This is the appropriate expression of the applicable constitutional limitation under a statutory scheme where there is an enforceable duty to remove an alien from Australia as soon as reasonably practicable.

56 Nevertheless, there is a need to explain why variations of the expression of the applicable constitutional limitation proffered by the defendants and by certain amici must be rejected.

57 The defendants, as a fallback from their primary submission, submitted that the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia should be simply expressed as coming to an end when there is no real prospect of the removal of the alien from Australia. The notions of practicability and of the reasonably foreseeable future were said to be unnecessary distractions. They are not. They are essential to anchoring the expression of the constitutional limitation in factual reality.

58 At the other extreme, the Human Rights Law Centre and the Kaldor Centre for International Refugee Law submitted that the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia should be expressed as coming to an end at any point when it can be determined to be more probable than not that the alien will not be removed from Australia in the foreseeable future. Quite apart from this leaving the constitutional limitation to have an unstable operation as probabilities of removal

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68 (2004) 219 CLR 562 at 648 [256].

fluctuate, expression of the constitutional limitation in those terms would uncouple the limitation from its underlying constitutional justification. Demanding compliance with a limitation expressed in those terms would go beyond merely ensuring that the non-punitive purpose of detention remains a purpose capable of being achieved in fact. It would also go beyond merely ensuring that the detention is limited to what is reasonably capable of being seen as necessary for the purpose of removal.

Applying the constitutional limitation

59 If *Al-Kateb* was to be reopened and overruled, the defendants made a correct and important concession. The plaintiff having discharged an initial evidential burden of establishing that there was reason to suppose that his detention had ceased to be lawful by reason that it transgressed the applicable constitutional limitation on his detention, the defendants conceded that they bore the legal burden of proving that the constitutional limitation was not transgressed. The concession was correct having regard to the coincidence of two fundamental principles. The first, a principle of common law reflected in the traditional procedure for obtaining a writ of habeas corpus, is that where a person in the detention of another adduces sufficient evidence to put the lawfulness of that detention in issue, the legal burden of proof shifts to the other to establish the lawfulness of that detention.[69] The second, a principle of constitutional law, is that "it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation".[70]

60 To establish that ss 189(1) and 196(1) of the Migration Act validly applied to authorise continuation of the plaintiff's detention, the defendants were accordingly required to prove that there existed a real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future. Whilst the proof was required to be to a standard sufficient to support the making of a finding

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69 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 299-300 [39]; *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 at 619-620 [60], 663 [273]; *Sami v Minister for Home Affairs* [2022] FCA 1513 at [36].

70 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 222. See also *Unions NSW v New South Wales* (2019) 264 CLR 595 at 622 [67] and the cases there cited.

of fact to the level of satisfaction appropriate in a civil proceeding where individual liberty is in issue, the prospective and probabilistic nature of the fact in issue (that is, the fact of a real prospect of the plaintiff's removal from Australia becoming practicable in the reasonably foreseeable future) would have the potential to be confused were the standard of proof to be "on the balance of probabilities".[71]

61 The notions of the practicability and the foreseeability of removal embedded in the expression of the constitutional limitation accommodate "the real world difficulties that attach to such removal".[72] The real world context also entails that proof of a real prospect must involve more than demonstration of a mere un-foreclosed possibility.

62 The special case recorded the agreement of the parties as to the fact that the plaintiff had complied with requests for information made by officers of the Department and had otherwise assisted the Department with its inquiries. This was not a case of a person in immigration detention having contributed to the frustration of the pursuit of lines of inquiry by officers of the Department attempting to bring about the person's removal.[73] Nor was it a case where officers of the Department remained in the process of pursuing lines of inquiry based on circumstances peculiar to the person in detention.[74]

63 The special case further recorded the agreement of the parties as to two important facts as at 30 May 2023 (being the date when the original form of the special case was agreed). One was that the plaintiff could not then be removed from Australia. The other was that there was then no real prospect of the plaintiff being removed from Australia in the reasonably foreseeable future.

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71 See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282-283. Contra *Sami v Minister for Home Affairs* [2022] FCA 1513 at [157].

72 *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625 at [59].

73 Compare *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285. See at 297 [30]-[33], 301-302 [47].

74 Compare *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322. See at 334-335 [4], 368 [135].

64 The parties were in dispute about the significance of certain inquiries undertaken by officers of the Department after 30 May 2023. Those inquiries were in one respect ongoing at the time of the hearing of the special case. They were the subject of affidavit and documentary evidence tendered at the hearing.

65 The evidence showed that recent inquiries by officers of the Department had been triggered by an instruction which the Minister gave to the Department on 29 August 2023. The instruction then given was to inquire into the potential for the plaintiff to be removed to one of the "Five Eyes" countries: the United States, the United Kingdom, Canada or New Zealand. In compliance with the instruction, inquiries were promptly made through diplomatic channels of officials in each of those "Five Eyes" countries. The responses of officials in the United Kingdom, Canada and New Zealand quickly made clear that none of those countries would accept the plaintiff.

66 However, an inquiry made through the Australian embassy in Washington of an official within the United States Department of State led to a response on 30 September 2023 that the Department of State would "consider" the plaintiff's case and "have a hard look" but would require detail about the plaintiff's criminal offending and would need to confer with the Department of Homeland Security and the United States Citizenship and Immigration Services. The official advised that, if the United States were to progress acceptance of the plaintiff's case, it would likely need to receive the case through the United Nations High Commissioner for Refugees or the United States embassy in Canberra and would seek to interview the plaintiff through its embassy in Thailand or Malaysia. The requested details of the plaintiff's offending were provided on 6 October 2023. Despite frequent follow-up contact, the Department of State had provided no further substantive response by the time of the commencement of hearing of the special case on 7 November 2023 and still had provided no further substantive response by the time the hearing of the special case ended the following day.

67 By affidavit dated 26 October 2023, the First Assistant Secretary, International Division, within the Department of Home Affairs explained that she was aware of only two other cases in which an approach had been made to the United States for third country removal of a specific individual and that both of those other approaches had been quickly rejected. She opined that the response of 30 September 2023 that the Department of State would "consider" the plaintiff's case and "have a hard look" made the plaintiff's case unique. She opined that it was impossible for her to predict the prospects of the plaintiff being accepted for

resettlement by the United States or to describe any set process or pathway that might be followed in respect of the plaintiff.

68 Evidence of law and practice in the United States adduced on behalf of the plaintiff indicated that acceptance of the plaintiff into the United States could not occur without the exercise of multiple statutory discretions by multiple agencies within the United States including some discretions involving waiver of statutory prohibitions. The evidence did not allow for the making of any meaningful assessment either of the likelihood of those discretions being exercised or of the timeframes within which those discretions might be exercised.

69 The position at the end of the hearing on 8 November 2023 was therefore that, although removal of the plaintiff to the United States remained a possibility, the evidence failed to establish that the prospect of removal to the United States occurring in the foreseeable future was realistic. Neither party submitted that the position at the end of the hearing was in any other respect different from that which had been agreed as at 30 May 2023.

70 The necessary conclusion of fact is that by the end of the hearing there was, and had been since 30 May 2023, no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future. It followed from that conclusion of fact that ss 189(1) and 196(1) of the Migration Act did not validly apply to authorise the continuation of the plaintiff's detention then and had not validly applied to authorise the plaintiff's detention since 30 May 2023.

Consequence of invalidity for the liberty of the plaintiff

71 The consequence of ss 189(1) and 196(1) of the Migration Act not validly applying[75] to authorise the continuation of the plaintiff's detention at the end of the hearing on 8 November 2023 is that the sole statutory basis relied on by the defendants for the continuation of his detention fell away and the plaintiff was entitled to his common law liberty.

72 Release from unlawful detention is not to be equated with a grant of a right to remain in Australia. Unless the plaintiff is granted such a right under the Migration Act, the plaintiff remains vulnerable to removal under s 198. Issuing of

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75 Section 3A of the Migration Act. Cf s 15A of the *Acts Interpretation Act 1901* (Cth).

a writ of habeas corpus would not prevent re-detention of the plaintiff under ss 189(1) and 196(1) of the Migration Act in the future if, and when, a state of facts comes to exist giving rise to a real prospect of the plaintiff's removal from Australia becoming practicable in the reasonably foreseeable future. Nor would grant of that relief prevent detention of the plaintiff on some other applicable statutory basis, such as under a law providing for preventive detention of a child sex offender who presents an unacceptable risk of reoffending if released from custody.

73 For completeness, it should be recorded that there was no issue between the parties that the invalidity of ss 189(1) and 196(1) of the Migration Act in their application[76] to authorise the plaintiff's detention in circumstances found to contravene the applicable constitutional limitation cannot affect the validity of those provisions in their application to authorise detention in other circumstances.

Formal answers to questions reserved

74 For these reasons, the order made at the conclusion of the hearing of the special case formally answered the questions reserved as follows:

Question 1: On their proper construction, did ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) authorise the detention of the plaintiff as at 30 May 2023?

Answer: Yes, subject to s 3A of the *Migration Act 1958* (Cth).

Question 2: If so, are those provisions beyond the legislative power of the Commonwealth insofar as they applied to the plaintiff as at 30 May 2023?

Answer: Yes.

Question 3: On their proper construction, do ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) authorise the current detention of the plaintiff?

Answer: Yes, subject to s 3A of the *Migration Act 1958* (Cth).

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76 Section 3A of the Migration Act.

Question 4: If so, are those provisions beyond the legislative power of the Commonwealth insofar as they currently apply to the plaintiff?

Answer: Yes.

Question 5: What, if any, relief should be granted to the plaintiff?

Answer: The following orders should be made:

1. It is declared that, by reason of there having been and continuing to be no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future:

   (a) the plaintiff's detention was unlawful as at 30 May 2023; and

   (b) the plaintiff's continued detention is unlawful and has been since 30 May 2023.

2. A writ of habeas corpus issue requiring the defendants to release the plaintiff forthwith.

Question 6: Who should pay the costs of the further amended special case?

Answer: The defendants.