FEDERAL COURT OF AUSTRALIA

AJL20 v Commonwealth of Australia [2020] FCA 1305

File numbers:	VID 1193 of 2019 VID 355 of 2020
Judgment of:	**BROMBERG J**
Date of judgment:	11 September 2020
Catchwords:	**CONSTITUTIONAL LAW –** restraints upon administrative detention flowing from Chapter III of the *Constitution* discussed. **MIGRATION** – *Migration Act 1958* (Cth) ss 189, 196 and 198 – whether applicant's immigration detention unlawful – whether the detention of an unlawful non-citizen under the Act is authorised and lawful "until" one or other of the events listed in s 196(1) occurs or alternatively, whether detention is unlawful once there is a departure from the permissible purpose of the detention – whether detention under the Act is lawful only if it is for a permissible purpose – where permissible purpose of the detention is the removal of the unlawful non-citizen from Australia, whether a failure to pursue or carry into effect the removal "as soon as reasonably practicable" (s 198) entails a departure from the permissible purpose of the detention and renders the detention unlawful – onus of proof where order in the nature of a writ of habeas corpus is sought – whether there was a departure from the removal purpose of the applicant's detention in circumstances where there was a failure to pursue removal of the applicant to applicant's country of nationality – whether that failure may be justified or explained by reference to protection obligation not to refoul applicant to applicant's country of nationality in light of the requirement under s 197C that non-refoulement obligations are irrelevant to the obligation to remove an unlawful non-citizen under s 198 – whether an order in the nature of habeas corpus appropriate to alleviate unlawful detention – whether s 189 would permit immediate re-detention of applicant if released – application allowed – order made that applicant be released from detention. **TORTS** – false imprisonment – whether detention of applicant unlawful and applicant falsely imprisoned – liability found.

Legislation:	*Aviation Transport Security Regulations 2005* (Cth) *Migration Act 1958* (Cth) *War-time Refugees Removal Act 1949* (Cth) Migration Amendment (Duration of Detention) Bill 2003 (Cth) Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)
Cases cited:	*Al-Kateb v Godwin* (2004) 219 CLR 562 *ASP15 v Commonwealth* (2016) 248 FCR 372 *Attorney-General (Vict.) (Ex rel. Dale) v The Commonwealth (*1945) 71 CLR 237 *Burgess v Commonwealth* [2020] FCA 670 *Chan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 308 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 *CMA19 v Minister for Home Affairs* [2020] FCA 736 *Coco v The Queen* (1994) 179 CLR 427 *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 52 *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576 *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36 *Guo v Commonwealth of Australia* (2017) 258 FCR 31 *Koon Wing Lau v Caldwell* (1949) 80 CLR 533 *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394 *NAES v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 2 *NAGA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 224 *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 *Plaintiff M76/2013 v Minister for Immigration and Border Protection* (2013) 251 CLR 322 *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582

	Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1 *SHFB v Goodwin* [2003] FCA 294 *SHFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 29 *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625
Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	178
Date of hearing:	14 and 17 July 2020
Counsel for the Applicant:	Mr N Wood with Mr J Hartley
Solicitor for the Applicant:	Human Rights for All
Counsel for the Respondent:	Mr G Kennett SC with Mr C Tran
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

VID 355 of 2020

BETWEEN:	**AJL20** Applicant
AND:	**COMMONWEALTH OF AUSTRALIA** Respondent

ORDER MADE BY:	**BROMBERG J**
DATE OF ORDER:	**11 SEPTEMBER 2020**

THE COURT ORDERS THAT:

1. The Respondent release the Applicant from detention forthwith.
2. Unless the Respondent makes an application opposing the making of an order for costs within 7 days hereof, the Respondent pay the Applicant's costs of the proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

VID 1193 of 2019

BETWEEN:	**AJL20** Applicant
AND:	**COMMONWEALTH OF AUSTRALIA** Respondent

ORDER MADE BY:	**BROMBERG J**
DATE OF ORDER:	**11 SEPTEMBER 2020**

THE COURT ORDERS THAT:

1. The proceeding be listed for a case management hearing at 9.30 am on 29 September 2020.

[Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*]

REASONS FOR JUDGMENT

BROMBERG J:

1 There are two proceedings before the Court which these reasons address. The first in time is a proceeding commenced in this Court on 9 April 2020 in which the applicant claims damages for having been falsely imprisoned by the respondent ("**Commonwealth**"). The second proceeding was commenced in the Federal Circuit Court of Australia and transferred to this Court by an order made by that Court on 27 May 2020. By that proceeding the applicant seeks relief requiring the Commonwealth to release him from detention.

2 In each proceeding, the applicant asserts that his detention by the Commonwealth since 26 July 2019 has been and remains unlawful. The Amended Statement of Claim in the proceeding commenced in this Court and the Statement of Claim in the proceeding commenced in the Federal Circuit Court, are relevantly identical in asserting that the applicant's detention has been unlawful. Likewise, the responding Defences filed by the Commonwealth are relevantly identical. In referring to the pleadings, there is no need to distinguish between the two proceedings and I will not do so.

3 In relation to the proceeding which raises false imprisonment, the only issue for determination presently is whether the applicant's detention since 26 July 2019 has been unlawful. It is not in contest that if the applicant's detention was unlawful he was falsely imprisoned and liability for that tortious conduct will be established: see *Guo v Commonwealth of Australia* (2017) 258 FCR 31 at [83] (Jagot J). Should I determine that the applicant's detention was unlawful, an assessment of any damage suffered by the applicant will be the subject of a further hearing.

4 The applicant is a citizen of Syria. In around 1996, the applicant's mother immigrated to Australia. Subsequently, in around May 2005, the applicant was granted a Child (Class AH) (Subclass 101) visa and arrived in Australia. On or about 2 October 2014, the Minister for Immigration and Border Protection ("**Minister**") cancelled the applicant's visa on "character" grounds under s 501(2) of the *Migration Act 1958* (Cth) ("**the Act**"). On his visa being cancelled, the applicant became an "unlawful non-citizen" within the meaning of the Act. On 8 October 2014, the applicant was detained by an officer on behalf of the Commonwealth under s 189(1) of the Act and has remained in administrative detention or what the Act refers to as "immigration detention" (see the definition of "detain" in s 5) since that time.

5 As I will later detail, officers of the Department of Immigration and Border Protection ("**Department**") have determined, and the Minister has accepted, that Australia has protection obligations in relation to the applicant, being an obligation not to refoul the applicant to Syria. Despite that acceptance, the Minister has refused to grant the applicant a protection visa and, on or before 25 July 2019, the Minister declined to consider granting the applicant a visa under s 195A of the Act. It is accepted that by 26 July 2019, s 198(6) of the Act had been engaged and that from that time an officer of the Commonwealth was obliged to remove the applicant from Australia "as soon as reasonably practicable".

6 Broadly stated, the applicant contended that, *first*, immigration detention of an unlawful non-citizen under the Act is lawful only if it is for a permissible purpose under the Act, the relevant purpose in relation to the applicant's detention since 26 July 2019 being the applicant's removal from Australia. *Second*, by reason of the requirement made by s 198 of the Act, the purpose of the removal of an unlawful non-citizen from Australia must be pursued or carried into effect "as soon as reasonably practicable". *Third*, a departure from that requirement entails a departure from the purpose of the detention and renders the detention unlawful because the detention is no longer for a permissible purpose. *Fourth*, since 26 July 2019, the removal of the applicant from Australia has not been pursued or carried into effect as soon as reasonably practicable and it follows that the applicant's detention since that time has not been for the purpose of his removal from Australia and unlawful. *Fifth*, and because of the unlawfulness of his detention, the applicant was falsely imprisoned and is entitled to damages and to an order in the nature of habeas corpus commanding the Commonwealth to release him from detention.

7 The Commonwealth did not contest that since 26 July 2019 the purpose of the applicant's detention has been his removal from Australia. The Commonwealth accepts that, from 26 July 2019, an officer of the Commonwealth was obliged by s 198 of the Act to remove the applicant from Australia as soon as reasonably practicable. The Commonwealth rejected that the duty to do so was a condition of the lawfulness of the applicant's detention. The Commonwealth contended that s 196(1) of the Act rendered the applicant's detention lawful "until" he is in fact removed from Australia irrespective of whether or not that removal is effectuated as soon as reasonably practicable. It contended that the applicant's removal from Australia has been and is being effectuated as soon as reasonably practicable and, if that was not so, the only remedy available to the applicant is an order for mandamus requiring that the applicant be removed from Australia as soon as reasonably practicable.

8 The resolution of the applicant's contentions about the Act's scheme for lawful detention requires consideration of the critical provisions of the Act, being ss 189, 196 and 198, construed in light of constitutional limitations upon administrative detention. That matter is addressed under the heading "The Proper Construction of the Provisions of the Act Authorising Detention". My reasons will then turn to apply the Act's criteria for lawful detention to the facts and circumstances of the applicant's detention. In so doing, I will adopt the separation made by the submissions of the parties of that part of the applicant's period of detention said to be unlawful into two periods: *first*, 26 July 2019 – 27 November 2019 ("**first period**"), during which the Commonwealth accepted that no active steps were taken by it to effect the applicant's removal from Australia, and *second*, 28 November 2019 to the date of judgment ("**second period**") during which the Commonwealth pursued the possibility of Lebanon (but not Syria) receiving the applicant.

9 My concluding observations address the relief claimed by the applicant.

10 In summary, I have accepted that the construction of the Act contended for the applicant is consistent with the preponderant weight of authority and should be accepted. I have held that since 26 July 2019, the removal of the applicant from Australia has not been undertaken or carried into effect as soon as reasonably practicable and that that was so principally because no steps at all have been taken to remove the applicant to Syria, the country of his nationality. Whilst that failure was based on a recognition of Australia's obligation not to refoul the applicant to Syria, the terms of s 197C of the Act required that Australia's non-refoulement obligations in respect of the applicant be treated as irrelevant for the purpose of his removal from Australia as soon as reasonably practicable in accordance with s 198 of the Act. I have concluded that the applicant has, since 26 July 2019, been unlawfully detained by the Commonwealth and that an order directed to the Commonwealth should be made commanding it to release the applicant from detention forthwith.

THE PROPER CONSTRUCTION OF THE PROVISIONS OF THE ACT AUTHORISING DETENTION

11 Relying on *Plaintiff **S4**/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, the applicant contended that, on the proper construction of the scheme of the Act providing for administrative detention, his detention by or on behalf of the Commonwealth would only be lawful if it were for one of the following three or possibly four purposes:

(a) removing the applicant from Australia;

(b) receiving, investigating and determining an application for a visa by the applicant to enter and remain in Australia;

(c) determining whether to permit the applicant to make a valid application for a visa; or

(d) possibly, determining whether to grant the applicant a visa without an application by him.

12 Given the factual position as at 26 July 2019 described above, it is accepted that s 198(6) of the Act was engaged, thereby requiring that the applicant be removed from Australia "as soon as reasonably practicable". It is therefore not in contest that, if any of the four purposes specified above apply to the applicant's detention as and from 26 July 2019, it could only be the purpose of removal. It was the applicant's case that, because s 196 of the Act must be read together with s 198, it was only if his removal was being pursued and carried into effect as soon as reasonably practicable that his administrative detention could be lawful. The applicant further contended that a writ of habeas corpus or an order in the nature of such a writ was the available and appropriate remedy to alleviate his unlawful detention.

13 The Commonwealth denied that it is a requirement for the lawfulness of administrative detention of an "unlawful non-citizen" under the Act that the actions of its officers must have attributed to them one of the purposes contended for by the applicant and, specifically in the applicant's situation, the purpose of removal simpliciter or removal as soon as reasonably practicable. The Commonwealth contended that the detention of an unlawful non-citizen under the Act is authorised, and in that sense lawful, until:

(a) a detaining officer no longer holds the relevant reasonably suspicion referred to in s 189 that the person is an unlawful non-citizen; or

(b) one of the events in s 196(1) of the Act occurs, namely:

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

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

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

    (c) he or she is granted a visa.

14 The Commonwealth accepted that the obligation under s 198 to remove an unlawful non-citizen as soon as reasonably practicable imposes a duty upon its officers and that, in the case of the applicant, s 198(6) required that the applicant be removed from Australia "as soon as reasonably practicable". However, the Commonwealth contended that, whilst any failure to

perform that duty was amenable to an order for mandamus, the requirement imposed by s 198(6) that an unlawful non-citizen be removed as soon as reasonably practicable is not a necessary condition of the lawfulness of the detention of the unlawful non-citizen. As the absence of that condition does not result in the detention being unauthorised or unlawful, the Commonwealth contended that a writ of habeas corpus is not available to enforce the release of an unlawful non-citizen in detention. Accordingly and at the level of legal principle, the Commonwealth contended that the applicant's claim that he should be released by an order of this Court must fail.

15 The contest between the parties principally raises for determination the proper construction of s 196 of the Act which deals with the duration of administrative detention authorised by the Act. I will commence that constructional exercise by addressing the applicable principles of construction.

16 *First*, s 196 must be construed by reference to its terms, but the statutory context and in particular that given by ss 189 and 198 as well as the object of the Act specified in s 4, needs to be brought into account because s 196 must be construed by reference to the whole of the Act and the scheme of which it forms part. As the High Court (French CJ, Hayne, Crennan, Kiefel and Keane JJ) said in *S4* at [42] by reference to the observations of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] and [70] (references omitted):

> "[t]he meaning of [a] provision must be determined 'by reference to the language of the instrument viewed as a whole'". And an Act must be read as a whole "on the prima facie basis that its provisions are intended to give effect to harmonious goals". Construction should favour coherence in the law.

17 *Second*, it will be necessary to construe s 196 in light of the constitutional constraints upon administrative detention which flow from Chapter III of the *Constitution* ("**Chapter III**"), which provides for the separation of judicial power from the executive and legislative powers. That is because (as all parties accept), ss 189, 196 and 198 of the Act should be interpreted "so far as its language permits, so as to bring it within the application" of constitutional power: *Chu Kheng **Lim** v Minister for Immigration* (1992) 176 CLR 1 at 68 (McHugh J) citing *Attorney-General (Vict.) (Ex rel. Dale) v The Commonwealth* (1945) 71 CLR 237 at 267 (Dixon J); see also *Lim* at 14 (Mason CJ).

18 *Third*, the principle of legality operates to impose a presumption or rule of construction which, as expressed by Mason CJ in *Lim* at 12 (when considering the predecessor scheme to that now

in issue) provides that "[u]nless a clear and unambiguous intention to do so appears from a statute, it should not be construed so as to infringe the liberty of the subject". Dealing with the legislative provisions here in issue, and by reference to *Coco v The Queen* (1994) 179 CLR 427 and *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [30], Gleeson CJ in ***Al-Kateb*** *v Godwin* (2004) 219 CLR 562 at [19] expressed the principle of legality as providing that (references omitted):

> Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases. It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that "[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness".

19 As Besanko J recently discussed in ***Burgess*** *v Commonwealth* [2020] FCA 670 at [91]-[94] by reference to the authorities there cited, the principle of legality should not be pushed beyond its limits and its application may be more limited where the extent of the encroachment on personal liberty is the issue raised by the issue of construction.

20 Division 7 of Pt 2 of the Act (ss188-197AG) provides for the detention of unlawful non-citizens. Division 8 (ss 197C-199) provides for the removal of unlawful non-citizens. The text of those provisions critical to the determination of the issue at hand is as follows:

> **Section 189 - Detention of unlawful non-citizens**
>
> (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
>
> …
>
> **Section 196 - Duration of detention**
>
> (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until:
>
> (a) he or she is removed from Australia under section 198 or 199; or
>
> (aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or
>
> (b) he or she is deported under section 200; or
>
> (c) he or she is granted a visa.
>
> (2) To avoid doubt, subsection (1) does not prevent the release from immigration

detention of a citizen or a lawful non-citizen.

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

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

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

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

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

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

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

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

(7) In this section:

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

Section 198 - Removal from Australia of unlawful non-citizens

Removal on request

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

…

Removal of unlawful non-citizens in other circumstances

….

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

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

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

(c) one of the following applies:

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

been finally determined;

(ii) the visa cannot be granted; and

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

21 My consideration of the issue at the heart of the contest, namely, whether s 196 authorises the ongoing detention of an unlawful non-citizen when the removal purpose of that detention is no longer being carried into effect as soon as reasonably practicable, is assisted by High Court authority. Relevant authorities address the constitutional limitations upon administrative detention and the proper construction of the critical provisions providing for the current scheme for administrative detention under the Act (ss 189, 196 and 198) as well as predecessor provisions which provided for administrative detention pending the deportation of an alien whose presence in Australia was unauthorised.

22 Each of the judgments of the High Court in *Plaintiff **M76**/2013 v Minister for Immigration and Border Protection* (2013) 251 CLR 322, *Al-Kateb*, *S4* and *Plaintiff **M96A**/2016 v Commonwealth* (2017) 261 CLR 582 include observations relevant to the proper construction of the current scheme. As will become apparent, the observations made by the High Court (French CJ, Hayne, Crennan, Kiefel and Keane JJ) in *S4* about the operation of that scheme and the criteria for the lawful detention of an unlawful non-citizen are on point and should be followed. Some of the key observations in *S4* are referred to with apparent approval by the most recent High Court authority in which that scheme has been considered: *M96A* at [8], [21], [22], [27] and [29]. I will discuss those observations shortly. Before doing so, it is convenient to identify two further High Court authorities of relevance because of the reliance placed upon those seminal authorities in the more recent cases.

23 *Lim* was decided in December 1992, in the same month that ss 189, 196 and 198 were inserted into the Act. However, those provisions did not come into force until 1 September 1994. The regime established by ss 189, 196 and 198 was therefore not in force and not under consideration in *Lim*. In *Lim*, a declaration was sought that ss 54L, 54N and 54R of the Act were beyond the legislative power of the Commonwealth Parliament. The relevant provisions at issue were set out in the judgment of the plurality (Brennan, Deane and Dawson JJ) at 16-19. The provisions considered in *Lim* can, as Hayne J said in *Al-Kateb* at [209], "be seen to follow the same pattern" as the critical provisions of the current Act. Broadly speaking s 54L of the Act as considered in *Lim* corresponds to s 196 of the Act in its current form. Section 54N

corresponds with s 189, s 54P(1) corresponds with s 198(1) of the Act in its present form and s 54P(3) with the current s 198(6). The significance of *Lim* is that the Court considered the validity of those provisions in light of the constitutional limitations on administrative detention which flow from Chapter III. In that context what I later describe as the "seminal holding in *Lim*" is of significance to the constructional issues here raised.

24 *Koon Wing Lau v* ***Caldwell*** (1949) 80 CLR 533 should be introduced next. The issue before the High Court in that case was whether the *War-time Refugees Removal Act 1949* (Cth) ("**WRR Act**") was a valid exercise of the legislative powers of the Commonwealth Parliament. Relevantly, the Court held that s 7 of the WRR Act did not confer a power to keep a deportee in custody for an unlimited period without relation to the purpose of the deportation. The terms of s 7(1) of the WRR Act which empowered administrative detention and the meaning of "deportee" are set out in the judgment of Dixon J at 581. The reasoning in *Caldwell* was significant to the approach to construction adopted by Hayne J (with whom Heydon J agreed and with whom, on the construction of the Act, McHugh J agreed) in *Al-Kateb* (see at [224]-[233]).

25 *S4* concerned the validity of a short-term visa and a temporary visa granted to the plaintiff non-citizen which had the effect of denying that person a capacity to apply for a permanent protection visa. The visas were granted in circumstances where, immediately prior to their issue, the plaintiff's detention had been prolonged for some two years for the purpose of the Minister deciding whether, pursuant to s 46A(2) of the Act, to lift the bar and permit the plaintiff to make a valid application for a permanent protection visa. It was not in contest that the plaintiff had been lawfully taken into administrative detention or that he was thereafter lawfully detained for the purpose of the Minister deciding whether he should be permitted to make a valid application for a protection visa. Nevertheless, as the Court said at [21], central to the resolution of the issues raised in *S4* "is an understanding of what follows from the observation that the plaintiff's detention for the purposes of the Minister considering whether to exercise [the power to permit the plaintiff to make a valid application for a protection visa] was lawful".

26 For that purpose, as the Court observed at [22], it was useful to do what the Court ultimately did and that was "to identify when detention under the Act is authorised". In so doing the High Court stated the construction of the provisions of the Act which authorise detention under the Act. It is true, as the Commonwealth contended and as already stated, *S4* did not involve any

challenge to the lawfulness of the detention of the plaintiff in that case, however, that does not diminish the force of the observations made by a unanimous High Court about the proper construction of the provisions authorising administrative detention under the Act.

27 The High Court's discussion commenced at [22] with the observation that "the Act does not authorise detention at the unconstrained discretion of the Executive". The power given to the Executive is the power "to detain non-citizens in the context, and for the purposes, of the Executive's statutory power to remove from Australia an alien who is an unlawful non-citizen". The Court then stated that "[t]he statutory power to remove an unlawful non-citizen is coupled with the statutory obligation (s 198) to effect that removal 'as soon as reasonably practicable'" (at [23]).

28 The Court (at [25] and [26]) then turned to consider the holding in *Lim*. It was regarded as important that in *Lim* (at 33 Brennan, Deane and Dawson JJ; at 53 Gaudron J and at 65-66 McHugh J) it was held that, on the basis of the limitations imposed by Chapter III "the provisions of the Act which then authorised mandatory detention of certain aliens were valid laws if the detention which those laws required and authorised was limited to what was reasonably capable of being seen as necessary for the purposes of deportation or to enable an application for permission to enter and remain in Australia to be made and considered": *S4* at [26]. The seminal nature of that holding in *Lim* has been acknowledged on many occasions: see *M96A* at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

29 From the holding in *Lim* (which for convenience I will call "**the seminal holding**"), the Court in *S4* stated that "[i]t follows that detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected" (at [26]). The Court then explained that, lawfully, the purpose of detention under the Act must be one of the three purposes identified earlier (at (a), (b) and (c) of [11] above) including, relevantly, the purpose of the removal of the detainee from Australia. Each of those observations were endorsed in *M96A* at [22]. At [28], the Court in *S4* then said this (emphasis added):

> Because detention under the Act can only be for the purposes identified, *the purposes must be pursued and carried into effect as soon as reasonably practicable.* That conclusion follows from the purposive nature of detention under the Act. But it is a conclusion that is reinforced by consideration of the text and structure of the Act, understood against the background of fundamental principle.

30 The Court continued at [29] (emphasis added, references omitted):

> *The duration of any form of detention, and thus its lawfulness, must be capable of being*

> *determined at any time and from time to time.* Otherwise, the lawfulness of the detention could not be determined and enforced by the courts, and, ultimately, by this Court. And because immigration detention is not discretionary, but is an incident of the execution of particular powers of the Executive, it must serve the purposes of the Act *and its duration must be fixed by reference to what is both necessary and incidental to the execution of those powers and the fulfilment of those purposes.* These criteria, against which the lawfulness of detention is to be judged, are set at the start of the detention. No doubt, the facts to which these criteria are to be applied may, and often will, vary according to the course of inquiries and decisions that are made along the way. In cases like the present, where inquiries were made about whether to permit the plaintiff to apply for a protection visa, application of the criteria which fix the duration of detention varies according to such matters as whether the detainee is found to be a refugee within the meaning of Art 1 of the Refugees Convention. But the criteria to be applied at any time during the currency of the detention in determining its lawfulness do not, and may not, vary.

31 Further, relevant observations were made in the context of the Court's application of the criteria it had identified to the particular circumstances of the plaintiff in *S4*. At [33], the Court said that "[t]he duration of the plaintiff's lawful detention under the Act was thus ultimately bounded by the Act's requirement to effect his removal as soon as reasonably practicable". Further still, and of central importance to the issues that arise here, at [34] the Court stated that the purpose for the plaintiff's detention "had to be carried into effect as soon as reasonably practicable" or, in other words "had to be undertaken as soon as reasonably practicable" and stated that (emphasis added):

> *Departure from that requirement would entail departure from the purpose for his detention* and could be justified only if the Act were construed as permitting detention at the discretion of the Executive. *The Act is not to be construed as permitting detention of that kind.*

32 At [35] the Court re-iterated that the plaintiff's detention "had to be brought to an end by his removal from Australia as soon as reasonably practicable" stating that "[o]therwise, the plaintiff's detention would be unlawful".

33 A helpful outline of what the Court relevantly stated in *S4* was recently given by Besanko J in *Burgess* at [132]:

> In [*S4*] at [25]–[29], the High Court made the point that detention under and for the purposes of the Act is limited by the purpose for which the detention is being effected and therefore in considering whether the detention is justified, it will always be necessary to identify the purpose of the detention. There are three permissible purposes of detention under the Act and they are: (1) removal from Australia; (2) receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; and (3) determining whether to permit a valid application for a visa. The Court also said that the purposes must be pursued and carried into effect as soon as reasonably practicable and that the duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time …

34 The applicant relies upon the following principles which he contended are apparent from the discussion in *S4*:

(a) *first*, where the Executive seeks to justify detention on the basis that it is for the permissible purpose of removal from Australia (*S4* at [26]), that purpose must be "carried into effect as soon as reasonably practicable" (*S4* at [34]–[35]);

(b) *second*, if that purpose is not carried into effect as soon as is reasonably practicable, that "entail[s] departure from the purpose for … detention" (*S4* at [34]), in which case the Act does not "permit" that detention (*S4* at [34]), and it is therefore "unlawful" (*S4* at [35]);

(c) *third*, these propositions represent the proper construction of the Act; they also reflect fundamental constitutional limitations on the Executive's power to detain (*S4* at [26]);

(d) *fourth*, it is not the case that the Act authorises the continued detention of a person "until" the "event" of removal is effected, irrespective of whether the purpose of removal is in fact being pursued. But if the Act were to be so construed (as the Commonwealth submits) it would authorise "departure from [a valid] purpose" of detention, and would be to that extent unconstitutional; and

(e) *fifth*, the lawfulness of a person's detention is capable of being scrutinised by the Court from time to time, and custody that commences as lawful may become unlawful in the event that the purpose of detention is not carried into effect as soon as reasonably practicable (*S4* at [28], [34] and [35]).

35 The applicant also relied upon what Mason CJ said in *Lim* at 11-12 as follows:

> What initially begins as lawful custody under Div. 4B may cease to be lawful by reason of the failure of the Executive to take steps to remove a designated person from Australia in conformity with Div. 4B. Thus, a failure to remove a designated person from Australia "as soon as practicable" pursuant to s. 54P(1), after that person has asked the Minister in writing to be removed, would, in my view, deprive the Executive of legal authority to retain that person in custody. So also would a failure to remove a designated person from Australia pursuant to the terms of s. 54P(2) and (3).

As earlier discussed s 54P(3), to which Mason CJ referred, corresponds with s 198(6) of the Act in its current form.

36 Reliance was also placed by the applicant on *M76*:

(a) *first*, upon the observation made by French CJ at [30] that the continuing detention of the unlawful non-citizen dealt with in that case "would only have been lawful while

steps were being taken to arrange for her removal as soon as reasonably practicable from Australia to Sri Lanka"; and

(b) *second*, on the following observations of Crennan, Bell and Gageler JJ at [139] made by reference to what I have called the seminal holding in *Lim* (emphasis in original and references omitted from original):

> The necessity referred to in that holding in *Lim* is not that detention *itself* be necessary for the purposes of the identified administrative processes but that the *period* of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified. The temporal limits and the limited purposes are connected such that the power to detain is not unconstrained. So much is clear from their Honours' separate observations that Ch III is not contravened by laws which require or authorise the executive to detain non-citizens in custody "in the context and for the purposes of", and in that sense as an "incident of", processes allowing for application for, and consideration of, the grant of permission to remain in Australia, and providing for deportation or removal if permission is not granted.

37 The Commonwealth accepted that by reason of the Chapter III limitations upon administrative detention the Act could only validly confer a power on the Executive to detain, where that power is for a permissible purpose including, relevantly, the purpose of removing the detainee from Australia. However, the Commonwealth contended that whilst (by reason of s 198) there was a statutory obligation to bring about removal as soon as reasonably practicable, that requirement was not reflective of any constitutional limitation. Alternatively, what I understand the Commonwealth to have been contending is that there is no temporal restraint referable to the purpose of the detention imposed by Chapter III on laws providing for administrative detention. In that respect, the Commonwealth contended that the existence of s 198 as providing an end point for the removal of a detainee was sufficient to bring the scheme of the Act within the seminal holding in *Lim*.

38 Both the primary and the alternative contentions of the Commonwealth must be rejected. They are both denied by the authorities which have already been discussed. The temporal restraint imposed by Chapter III is acknowledged in the observations of Crennan, Bell and Gageler JJ in *M76* (set out at [36] above) made by reference to the seminal holding in *Lim*. As their Honours explained (emphasis added) "[t]he temporal limits and the limited purposes [of detention] are *connected* such that the power to detain is not unconstrained". In *S4* the Court (at [26]) referred to the constitutional requirement expressed in the seminal holding in *Lim* and referred to its temporal dimension at [29] where their Honours said that the detention "must serve the purposes of the Act and its duration must be fixed by reference to what is both

necessary and incidental to the execution of those powers and the fulfilment of those purposes". That observation identified, in terms similar to those referred to in *M76*, the connection between the constitutionally required purpose of administrative detention and the constitutionally required limitation upon the period of such detention.

39 The discussion in *M96A* at [33] refers to the connection between "the temporal limits of detention" and "the limited permissible purposes of administrative detention" and assumes that connection to be a necessary condition of the validity of administrative detention. That the Chapter III limitations are both purposive and temporal in nature and the latter relational to the former is also apparent from the following observation of Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ in *M96A* at [21] as follows (emphasis added, references omitted):

> As has been reiterated on a number of occasions in this Court, the majority in [*Lim*] said that laws with respect to aliens within s 51(xix) of the *Constitution*, which authorise or require the Executive to detain non-citizens in custody, will not contravene Ch III of the *Constitution* if, and only if, "the detention which they require and authorise 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". This requires two matters to be considered. First, *it requires the purpose of the detention to be identified*. Secondly, it requires *consideration of the time necessarily involved in the particular case* to deport the non-citizen or to receive, investigate, consider, and determine an application for permission to remain in Australia.

40 The constitutional constraints upon administrative detention must be reflected in the Act for the Act to validly confer upon the Executive the power to administratively detain an unlawful non-citizen. Those constraints, as explained already, are constraints upon both the purpose and the duration of detention, the two being connected because the duration of detention must be fixed by what is necessary and incidental to the execution of the power to detain and the fulfilment of its purpose (*S4* at [29]).

41 The High Court in *S4* considered that the Act was valid. As the Court said at [22] "the Act does not authorise detention at the unconstrained discretion of the Executive". That conclusion could only have been made if the Court was satisfied that the Chapter III constraints upon conferral upon the Executive of a power to detain were reflected in the Act. It is ss 189 and 196 which confer upon the Executive the power to detain. The Court recognised that the Executive's power to detain a non-citizen was conferred upon the Executive by the Act "in the context, and for the purposes, of the Executive's statutory power to remove from Australia an alien who is an unlawful non-citizen" (at [23]). The judgment in *S4* proceeds on the basis that the requisite constitutional temporal limitation is reflected in the requirement made by s 198 that the

detainee be removed from Australia "as soon as reasonably practicable". The requisite constitutional connection between what Crennan, Bell and Gageler JJ in *M76* referred to as "the temporal limits and the limited purposes" is only reflected in the Act if ss 189 and 196 are each connected in their purposive operation to s 198 so that the temporal limitation in s 198 is fixed by reference to the fulfilment of the purpose of the detention authorised by either ss 189 or 196.

42 That the Court in *S4* regarded the s 198 temporal limitation of removal "as soon as reasonably practicable" to be connected in operation to the purpose of the powers conferred by the Act to detain is apparent from the following observations which although set out and emphasised already, are worthy of repeating:

- Because detention under the Act can only be for the purposes identified, the purposes must be pursued and carried into effect as soon as reasonably practicable (at [28]).
- The duration of the plaintiff's lawful detention under the Act was thus ultimately bounded by the Act's requirement to effect his removal as soon as reasonably practicable (at [33]).
- The purpose for his detention had to be carried into effect as soon as reasonably practicable. That is, consideration of whether a protection visa may be sought by or granted to the plaintiff had to be undertaken and completed as soon as reasonably practicable (at [34]).

43 The importance of the maintenance of the connection between purpose and duration, including for constitutional validity, can be seen in what followed at [34]. As the Court observed at [34] a "departure" from the requirement that the purpose of the detention (that is removal) be carried into effect as soon as reasonably practicable "would entail departure from the purpose [of the] detention and could be justified only if the Act were construed as permitting detention at the discretion of the Executive". As their Honours went on to state (at [34]), detention of that kind is not permitted and, after again emphasising that "detention had to be brought to an end by…removal from Australia as soon as reasonably practicable", the Court concluded that if it were otherwise the detention would be "unlawful" (at [35]).

44 Once it is recognised, as I consider the judgment in *S4* does recognise, that the obligation imposed by s 198 is necessary to fulfil and does fulfil the constitutional requirement that the duration of the detention must be fixed by reference to what is both necessary and incidental to the execution of the power to detain and the fulfilment of its purpose, it is not possible to read the directive in s 196(1)(a) as authorising detention "until" the fact or the event of the removal of the detainee from Australia, as the Commonwealth contended.

45 Whilst the phrase "until…he or she is removed from Australia" is capable of supporting the existence of a temporal restraint upon the duration of the detention, those words alone are not capable of supporting the requisite restraint referrable, as it is, not to the fact of removal but to the time and effort necessary, as a matter of reasonable practicability, to effectuate the purpose of the detention.

46 Once that is realised, the word "until" does not have the force for which the Commonwealth contended. Nor, when s 196 is read together with s 198, as for the reasons indicated above it must be, does the word "until" provide the insurmountable textual impediment to the construction for which the applicant contends, a construction which, for the reasons indicated, is consonant with the construction adopted by all members of the Court in *S4*. That ss 189, 196 and 198 "interact", must be read together and in context is also apparent from the analysis undertaken by Hayne J (with whom Heydon J agreed and with whom, on the construction of the Act, McHugh J agreed) in *Al-Kateb* (see at [223]-[225] and [237]). Reading the provisions together, Hayne J concluded (at [225]) that:

> The present legislation, prescribing the period of detention as it does, may therefore be read as providing for detention for the purposes of processing any visa application and removal…Here the period of detention is governed by the requirement to effect removal ''as soon as reasonably practicable''.

47 The need to read ss 196 and 198 relationally was also the approach to construction adopted by Gleeson CJ (in dissent) in *Al-Kateb* where (at [22]) his Honour said that in s 196 the period of detention of the appellant is defined by reference to the fulfilment of the purpose of removal under s 198. That observation is consistent with his Honour's view in *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1 at [4] where his Honour said "[t]he period of detention required by s 189 of the Act is prescribed by s 196, which must be read together with s 198". That the proper approach to construction requires ss 189 and 196 to be read in context with and relationally to s 198 is evident from each of the judgments in *Al-Kateb* irrespective of whether the judge concerned formed part of the majority.

48 That ss 196 and 198 must be read together, the latter imposing a condition on the operation of the former, is also apparent from the reasoning in *M96A.* At [19] Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ set out that s 196(1) provides that an unlawful non-citizen must be kept in immigration detention until the happening of one of the four events listed in s 196(1). At [20] and in relation to the first event dealt with by s 196(1)(a), namely removal from

Australia under s 198, their Honours said that "it is a *condition* that removal must occur as soon as reasonably practicable" (emphasis added).

49 The Commonwealth's contention that by reason of s 196(1) detention is unlawful "until" the detainee is in fact removed from Australia also faces the difficulty that s 196(4) read, as it has to be, with s 196(5)(a), contemplates that detention can be unlawful prior to the detainee being removed from Australia as a consequence of there being no real likelihood of the detainee being removed from Australia in the reasonably foreseeable future. The terms of those provisions are set out above. The extrinsic material of relevance is discussed by Besanko J in *Burgess* at [109]-[113]. Of particular relevance is a passage in the Explanatory Memorandum to the Migration Amendment (Duration of Detention) Bill 2003 (Cth) which dealt with the insertion of subss (4)-(7) into s 196 of the Act. In relation to what became s 196(5)(a), the Explanatory Memorandum said this (in relation to Sch 1 and at [11]):

> [196(5)(a)] would cover circumstances where a court finally determines that there is no real likelihood that an unlawful non-citizen will be removed from Australia in the reasonably foreseeable future, and therefore the detention is unlawful.

50 A Full Court of this Court (Robertson, Griffiths and Bromwich JJ) considered *S4* in ***ASP15*** *v Commonwealth* (2016) 248 FCR 372. The appellants claimed that an unreasonable delay in the Minister considering whether they should be granted a visa had resulted in their unlawful detention. After the primary judge handed down his decision, the appellants were released and the issue of their continued detention became moot. However, the appellants maintained their claim for damages for false imprisonment. In that context, the Full Court considered the lawfulness of the administrative detention of the appellants and held that even if there had been an unreasonable delay in the Minister determining their application for a visa, their detention had not been unlawful.

51 The Commonwealth relied upon *ASP15* and submitted that I am bound to apply an aspect of it to which I will return. The applicant also relied on *ASP15* contending, as I accept, that it favours his case and not that of the Commonwealth.

52 The Full Court in *ASP15* held that, unlike the position of the plaintiff in *S4*, the appellants' applicable circumstances had not engaged s 198 and the obligation to remove them from Australia had not been enlivened. It was for that reason that the Full Court came to the view that (assuming the existence of unreasonable delay) the detention of the appellants had not been unlawful. In distinguishing *S4*, the Full Court at [35] said this:

> The effect of the High Court's decision was that because the removal obligation had been enlivened under s 198(2), it applied to all other pending steps. To find otherwise would be inconsistent with the dominant statutory obligation to remove "as soon as reasonably practicable" in s 198(2) and would also be inconsistent with the confined statutory authorisation for detention pending such removal. This context is essential to understand the passages in *Plaintiff S4* at [28]-[29] and at [35] which were relied upon by the appellants.

53 At [38], the Full Court again emphasised that it was only in the context of s 198 having been triggered in the circumstances considered in *S4* "that detention beyond the s 198(2)-sourced requirement to make the decision under s 46A(2) 'as soon as reasonably practicable' could become unlawful".

54 For an alternative submission I need not address, the applicant did contend that the Full Court had wrongly confined the holding in *S4* to circumstances in which s 198 had been engaged. However, given that s 198 was engaged in relation to his own circumstances and that the obligation to remove him was enlivened as of 26 July 2019, the applicant correctly contended that the observations in *ASP15* support the conclusion that his detention became unlawful if his removal from Australia was not effected as soon as reasonably practicable.

55 The approach to construction taken by the Full Court in *ASP15* confirms my own view of how the relevant provisions were construed in *S4*. In particular, as the Full Court's discussion at [39] reveals, s 196 must be read with s 198 and where s 198 is engaged, it has "effect" on the operation of s 196, the effect being that the purpose of the detention authorised by s 196 is conditioned by the requirement in s 198 for removal "as soon as reasonably practicable".

56 There are further submissions made by the Commonwealth which need to be considered. The Commonwealth relied on a number of passages in the authorities to support its contention that detention is lawful until one or other of the events specified in s 196(1) occurs. To take one example, the Commonwealth relied on [30] of *S4*. However, that paragraph, where what s 196(1) provides for is described by reference to the terms of that provision, is to be read in context. When so read, it should only be understood as descriptive of the events specified by s 196(1), rather than conclusive as to the lawfulness of detention pending one or other of those events occurring. What the Court said about the lawfulness of detention is extensively dealt with elsewhere in the judgment and specifically in those observations to which reference has already been made. Other observations from other authorities to the effect that s 196(1) provides for detention until one of the events it specifies occurs relied upon by the Commonwealth must also be read in context, the observations made by Hayne J at [226] in *Al-Kateb* being another example. What was there said in the first two sentences (upon which

the Commonwealth relies) must be read with the remainder of the paragraph, including that it is only so long as the time for performance of the duty under s 198 "has not expired, [that] s 196 in terms provides that the non-citizen must be detained".

57 The observations relied upon by the Commonwealth which, in my view, run most strongly against the construction which the authorities relied upon by the applicant support, are those made by Kiefel and Keane JJ in *M76* at [182]-[183] as follows:

> The scheme of the Act contemplates that only those aliens who hold a visa are entitled to be at large in the Australian community. In this context, the absence of an express limitation upon continued detention where removal is not practicable within a reasonable time is not "silence" on the part of the legislature. The circumstance that the language of ss 189, 196 and 198 is not qualified by any indication that the mandate requiring detention depends upon the reasonable practicability of removal within any time frame is eloquent of an intention that an unlawful non-citizen should not be at large in the Australian community: the mandate in s 189 is unqualified in its terms, and the operation of the mandate in s 196(1) is, in terms (subject only to the possibility of the Minister making a "residence determination" under s 197AB of the Act), *until* the unlawful non-citizen is removed from Australia under s 198 or the unlawful non-citizen is granted a visa.
>
> It has been said that the authority to detain conferred by s 196(1) is constrained under s 198(2) by the purpose of removal within a reasonable time, and that where this purpose is presently incapable of fulfilment, the authority to detain expires. But to say that is to fail to recognise that ss 196 and 198 are parts of a legislative scheme which includes s 189. Even if it were to be accepted that s 196(1) ceased to authorise the continuing detention of an unlawful non-citizen, and the detainee were released, s 189 would then be engaged to require immediate detention in order to serve the evident purpose of preventing unauthorised entry into the Australian community.

58 One of the issues before the Court in that case was whether the continued detention of the plaintiff was authorised by ss 189, 196 and 198 of the Act. The plaintiff's circumstances raised for determination the same issue that had been raised in *Al-Kateb* of whether (as expressed by Crennan, Bell and Gageler JJ at [142]) administrative detention under the Act is lawful when there is no real prospect that removal of the non-citizen will be practicable in the reasonably foreseeable future. The majority of the Court determined that the plaintiff's detention was authorised without reconsidering the holding in *Al-Kateb*. Justices Kiefel and Keane did consider the correctness of *Al-Kateb* (as did Hayne J in a separate judgment). The observations made by them and set out above form part of that consideration. Whilst obviously commanding great respect, those observations do not form part of the *ratio* of the judgment in *M76.*

59 The difficulty in accepting that those observations should govern the proper construction of ss 189, 196 and 198 is that they are not readily reconciled with the preponderance of High Court authority, including *Al-Kateb* itself.

60 The minority in *Al-Kateb* did not contemplate that s 189 would operate to require the immediate detention of a non-citizen who has been released from detention. The minority favoured the plaintiff's release into the Australian community in circumstances where his continued detention was regarded as unlawful.

61 The majority in *Al-Kateb* did not regard the plaintiff's detention to have been unlawful. However, in what Kiefel and Keane JJ themselves recognised as the leading judgment of the majority in *Al-Kateb* (see *M76* at [175]), Hayne J was clear that discharge from detention was the only available disposition if detention was unlawful (at [243]). There was no room in that conclusion for s 189 to have the operation which the observations of Kiefel and Keane JJ set out above are founded upon. Indeed, Hayne J went so far as to doubt that once released, a capacity to detain would revive (at [243]).

62 The observations of Hayne J in *Al-Kateb*, in particular at [236] and [237] are suggestive of the need to construe s 189 coherently with the way in which s 196 is construed. Both s 189 and 196 authorise detention. Both provisions must be similarly constrained by the limitations imposed by Chapter III. Both must be read with s 198, at least where s 198 has been engaged. So much may be seen from the observations made by Gageler J in *M96A* at [42]-[45] that s 189 is conditioned by s 198 in the same way in which s 196(1) is conditioned by that provision. It is therefore not correct to say, as the Commonwealth contended, that release can only lead to immediate re-detention of a non-citizen because of the requirement made by s 189 of the Act (and see further [175] below).

63 Including by reference to the observations made by Kiefel and Keane JJ in *M76*, the Commonwealth contended that the scheme of the Act only contemplated the binary outcomes of entry into Australia on the grant of a visa or, alternatively, removal from Australia. It must be accepted, including by reference to the object in s 4 of the Act upon which the Commonwealth also relied, that the scheme of the Act intends that a non-citizen will either be permitted to enter and remain in Australia by the issue of a visa or must be removed from Australia where his or her presence in Australia is not permitted by the Act. However, those binary outcomes are the ultimate outcomes that the scheme provides. There are temporary dispositions pending those ultimate dispositions being effectuated that the scheme contemplates. Detention is one such temporary disposition. A "residence determination" made by the Minister under s 197AB of the Act, which involves a non-citizen residing outside of a detention centre, is another available temporary disposition. It may be accepted that these are

the sum of the temporary dispositions contemplated by the Act where the powers and processes provided for by the Act are lawfully engaged. But the Act also recognises that the powers provided to detain an unlawful non-citizen may not be lawfully exercised and that unlawful detention will be the subject of court orders including that the unlawful non-citizen be released from detention. Sub-sections (4)-(5) of s 196 recognise that an unlawful non-citizen may be released from detention (see the discussion at [49] above). The conclusion that the Act does not contemplate a temporary disposition in which an unlawful non-citizen is not held in detention is not open unless it is the case that the Act intends that the unlawful detention of an unlawful non-citizen may continue and may not be alleviated by an order requiring the detainee's release. That is not the case. To hold that it is would offend the principle of legality and, in the absence of clear language, that approach to construction should not be adopted.

64 For all those reasons, I have respectfully come to the view, that the observations made by Kiefel and Keane JJ in *M76* should not govern my approach to construction or the approach I take to relief.

65 It remains to address some further authorities relied upon by the Commonwealth. Those authorities, it may be accepted, support the Commonwealth's contention that s 196(1) authorises the continued detention of a non-citizen detained under s 189(1) until one or other of the events listed in s 196(1) actually occurs and that the remedy for a failure to discharge the duty under s 198 is an order for mandamus.

66 In *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625 at [49] and [56], French J said:

> That the removal must take place "as soon as reasonably practicable" after a written request or final refusal of a visa (ss 198(1) and (6)) does not, on the face of it, import any express or implied limitation upon the obligation to detain the unlawful non-citizen under s 196.That obligation or liability is terminated by the event of removal. There are no words in the section which condition it upon the expiry of a time which is "reasonably practicable" to effect the removal after the satisfaction of one of the conditions in s 198.
>
> …
>
> The remedy for a failure in the discharge of [the s 198] duty may be mandamus, possibly directed to the Minister.

67 The reasoning of French J has been followed by single judges of this Court on a number of occasions: see *NAES v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 2 at [6]-[7] (Beaumont J); *SHFB v Minister for Immigration and Multicultural and*

Indigenous Affairs [2003] FCA 29 at [10], [12]-[13] (Selway J); *SHFB v Goodwin* [2003] FCA 294 at [8]-[12], [23]-[25], [30] (von Doussa J); *NAGA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 224 at [10]-[11], [64] (Emmett J); *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 52 at [15] and [36] (Whitlam J).

68 The Commonwealth also relied on a decision of the Full Court of this Court in *Minister for Immigration and Multicultural and Indigenous Affairs v* ***Al Masri*** (2003) 126 FCR 54. As its submission stated, at first instance, Merkel J had identified two "implied" limitations in s 196: *first*, that it was limited in its operation to such time as the Minister was taking all reasonable steps to remove a detained person from Australia as soon as reasonably practicable; and *second*, that it only operated where there was a real likelihood or prospect of removal of the person in the reasonably foreseeable future. Relevantly, the Full Court rejected the first limitation, saying at [134]:

> This limitation emerged from a reading of the power to detain in s 196(1) as subject to the duty imposed upon the Minister by s 198(1) to remove as soon as reasonably practicable. Although the two provisions are part of the same scheme, we would not read them together in this way. If the Minister were not fulfilling his duty under s 198(1) to remove as soon as reasonably practicable the detention would, in our view, still be lawful and the appropriate remedy would be an order in the nature of mandamus to compel the Minister to take the steps required for the performance of his duty.

69 The difficulty for the Commonwealth is that all of those authorities pre-date *Al-Kateb*, *M76*, *S4* and *M96A* and are inconsistent with the observations in those cases upon which the applicant relies. They are also inconsistent with the observations made by the Full Court in *ASP15* that where s 198 has been engaged it does have "effect on" the operation of s 196(1). Furthermore, for the reasons given by the applicant, the observations relied upon by the Commonwealth from *Al Masri* are *obiter* and, as is apparent from [135] of *Al Masri*, if the Full Court had come to the view that the detention in question was unlawful, the appropriate remedy would have been relief in the nature of habeas corpus.

70 It is for the proposition that mandamus is the appropriate remedy for a failure to comply with the duty in s 198 that the Commonwealth relied upon *ASP15* and the judgment of Murphy J in ***CMA19*** *v Minister for Home Affairs* [2020] FCA 736 which followed it. Reliance was placed on the following observation made at [42] of *ASP15*:

> In the case of detention pending a visa decision, failure to do so within the required time renders the Minister liable to the issue of a writ of mandamus to compel him or her to perform their statutory duty. However it does not render invalid the provision

> which authorises detention in the first place. So long as the *Migration Act* validly continues to authorise detention, there can be no claim for false imprisonment or habeas corpus.

71 As to the appropriate remedy, *ASP15* and *CMA19* are distinguishable for reasons largely discussed already. The observations made about the appropriateness of mandamus were made in the context of s 198 not having been engaged and, as a consequence, the detention in question being lawful. That mandamus and not habeas was regarded as the appropriate remedy turned, as the last sentence quoted above reveals, on whether or not the detention was lawful.

72 There can be little doubt, in my view, that if administrative detention under the Act is unauthorised and unlawful, habeas is the appropriate remedy.

73 The writ of habeas corpus remediates the unlawful detention of an individual: *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36 at 76 (Isaacs J). In *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [159], Gageler J referred to the availability, "long settled at the time of the establishment of the Commonwealth, of habeas corpus to compel release from any Executive detention not affirmatively authorised by statute". In *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, Gummow J said (at [108]) that "habeas corpus is available to every individual detained in this country without legal justification". Turning then to cases where the lawfulness of immigration detention was considered, in *Caldwell*, Latham CJ at 556 said that if it were shown the detention was not being used for a lawful purpose, "the detention would be unauthorised and a writ of habeas corpus would provide an immediate remedy". In that case, Dixon J at 581 adverted to an entitlement to "discharge on habeas" should detention not be lawful. The availability of a writ of habeas corpus to alleviate unlawful administrative detention is also confirmed in *Lim* at 19-20 (Brennan, Deane and Dawson JJ) and at 51 (Toohey J). In *Al-Kateb*, the availability of habeas corpus was confirmed in the judgment of Gleeson CJ at [24]-[28] and by Gummow J (at [88], [108] and [113]). In that case, Hayne J referred at [224] to the observations of Dixon J in *Caldwell* as to an entitlement to "discharge on habeas" and at [243] stated that "if the detention is not lawful, it must end" and that if the detention "is unlawful, the only order which a court may make is an order requiring the person to be discharged from detention".

74 The capacity of this Court to make an order in the nature of a writ of habeas corpus was not in contest and should not be doubted. A recent discussion of the authorities is found in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2020] FCA 394 (Wigney J). That case, as well as ***Chan*** *v Minister for Immigration and Multicultural and*

Indigenous Affairs (2003) 134 FCR 308 (Gray J), is an example of a proceeding in this Court in which an order requiring the release of a person from immigration detention was made.

75 Returning to the proper construction of the critical provisions of the Act, it follows from the foregoing discussion that I accept that the fourth principle contended for by the applicant and set out above at [34] is correct. Administrative detention under the Act is not necessarily authorised "until" one or other of the events specified in s 196(1) has occurred. For administrative detention under the Act to be lawful it must be detention for a purpose which the Act provides for, removal from Australia being one such permissible purpose. Where there is a departure from the permissible purpose for the detention, the detention will no longer be lawful irrespective of whether one or other of the events specified in s 196(1) has in fact occurred. That is so because it is a condition of the lawfulness of a detention that the detention be for a permissible purpose.

76 Where the permissible purpose is removal of the detainee from Australia, for the reasons already addressed and at least where s 198 is engaged by the detainee's circumstances, the detention which is authorised by s 196 of the Act is conditioned by the requirement in s 198 that the detainee be removed from Australia "as soon as reasonably practicable".

77 What it is that constitutes the departure from the permissible purpose of detention where that purpose is removal, is the subject of the first and second principles for which the applicant contended. In my view the principles there contended for should also be accepted.

78 It is clear that detention has to have or has to be supported by a permissible purpose or, in other words, the detention must be *for* a permissible purpose. It is departure "from the purpose for [the] detention" (*S4* at [34]) which is the marker of unlawfulness.

79 What is also clear is that the purpose of or for the detention "is assessed objectively by reference to all of the circumstances": *M96A* at [22] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ. As Gleeson CJ observed in *Al-Kateb* at [17] "the motives or intentions of the Minister, or the officers referred to in s 198" are not relevant.

80 Next, it is necessary to identify what it is that marks a departure from the permissible purpose of removal of the detainee from Australia such that the detention of the detainee is no longer for that purpose in circumstances where a condition upon that purpose is that the detainee be removed from Australia as soon as reasonably practicable.

81 The applicant's answer to that question is found in its first and second principles and was given by reference to the observations made in *S4* at [34] that a departure from permissible purpose is marked by a "[d]eparture from the requirement" that the "purpose for [the] detention had to be carried into effect as soon as reasonably practicable", or, alternatively, that the permissible purpose of the detention "had to be undertaken and completed as soon as reasonably practicable". On that basis, the applicant contended that where, as here, the permissible purpose for the applicant's detention was his removal from Australia, the detention was rendered unlawful upon the purpose of removal having been departed from when it was not carried into effect as soon as reasonably practicable. Expressed by reference to the statement of Mason CJ in *Lim* at 11-12 quoted above at [35]), the applicant also contended that it was the failure to take steps (or sufficient steps) to pursue the removal of the applicant from Australia that marked the departure of the permissible purpose from the applicant's detention.

82 That test or formulation calls for an assessment of whether and to what extent the permissible purpose was, or is, being pursued and operates on the assumption that the pursuit of the applicant's removal from Australia as soon as reasonably practicable was a necessary condition of the existence of that permissible purpose.

83 Whilst the Commonwealth denied that the failure to take steps to pursue or effectuate the purpose of removal was a marker of unlawfulness, it did not contend for any particular test or criteria for assessing when detention would be rendered unlawful if a condition upon the lawfulness of the detention is the requirement that the detainee be removed from Australia as soon as reasonably practicable. Broadly stated, the Commonwealth contended that insofar as the detention under the Act needed to be supported by a permissible purpose, the applicant's detention has throughout the relevant period in contest been for the purpose of his removal from Australia. The Commonwealth argued that the relevant question turned on the existence of the purpose rather than the quality or vigour of the pursuit of it. Contrary to the view I have arrived at, that contention did not countenance that a condition upon the lawfulness of the detention or, to put it another way, that a necessary condition for the existence of the permissible purpose was the requirement that the purpose be effectuated as soon as reasonably practicable.

84 The Commonwealth did not contend for an alternative test of the kind that may be suggested in the reasoning of Hayne J in *Al-Kateb*. In *Al-Kateb,* Hayne J reasoned that it was the fact that the time for performance of the duty to remove as soon as reasonably practicable had arrived

which marked the point of departure of purpose from detention. As Hayne J said at [231], the legislature has authorised detention "until the first point at which removal is reasonably practicable" and at [251] "the purpose of detention for removal would not be spent until it had become reasonably practicable to remove the non-citizen concerned" (see also McHugh J at [34]).

85 The Full Court in *ASP15* acknowledged that reasoning at [31] (emphasis in original):

> The majority in *Al-Kateb* further held that detention for the purpose of removal would cease to be validly authorised by s 196(1) *if and only if* removal was required by s 198, but not effected. That is, detention for the purpose of removal would cease to be validly authorised by s 196(1) *if and only if* each of the criteria in s 198 was satisfied and removal was reasonably practicable. If a person continued to be detained after this, it would inevitably follow that the detention was for some purpose other than removal as authorised and required by s 198(2).

86 However to say that was the view of the majority overlooks the fact that although Callinan J formed part of the majority in *Al-Kateb*, at [295] his Honour said this:

> The words ''as soon as reasonably practicable'' in s 198 of the *Migration Act* are intended to ensure that all reasonable means are employed to remove an illegal entrant, and not to define a period or event beyond which his detention should be deemed to be unlawful.

87 Whether unlawfulness is to be marked by the failure to carry into effect or pursue the removal purpose or alternatively by the first point in time at which removal is reasonably practicable but not effectuated, was not the subject of submissions. There is a significant difference between those two approaches and it seems to me that only one of those approaches can be correct. I prefer the approach adopted by the unanimous High Court in *S4*. To my mind, it is more apt for an objective assessment of whether a detention is for a particular purpose. It is the existence or absence of a purpose which is the subject of the assessment and not whether or not the purpose has been achieved. The approach suggested by the reasoning of Hayne J is focused upon the achievement of the purpose and essentially deems the purpose not to have existed if it was not effectuated in the time available for its effectuation. A failure to achieve a purpose within a particular time may assist in demonstrating that the purpose does not exist after the time for its effectuation has passed, but such a failure should not be regarded as determinative of whether the requisite purpose had or had not existed either at all or during any particular period of the prior detention. Further, the approach calls for an assessment which would be very difficult to make.

88 If it is the case that the arrival of the time for the removal of the applicant as soon as reasonably practicable marks the point of departure of purpose from the detention, the result which I have arrived at would not have differed. For reasons that I will come to, the Commonwealth bears the onus of proof. It was therefore for the Commonwealth to establish that the earliest time for the removal of the applicant from Australia as soon as reasonably practicable had not been reached. The Commonwealth made no attempt to establish that proposition. No evidence was led even to establish the extent of the period necessary to effectuate or to have effectuated the applicant's removal from Australia as soon as reasonably practicable. The Commonwealth submitted that whether the applicant should have been removed by now or earlier was not a judgment for the Court to make in a case like this. However, the Commonwealth did say that the Court could not find that "the moment [to have removed the applicant] has arrived and that there has been a failure to do it". It also contended in relation to the second period that it could not be said "that it is yet practicable to remove the applicant to Lebanon". I did not, by those submissions, understand the Commonwealth to be asserting that the lawfulness of the applicant's detention was to be assessed by reference to whether the time for his removal as soon as reasonably practicable had been reached. If, contrary to my understanding, that was the intended submission, the submission would be based on a misunderstanding of who it is that bears the onus on the issue. If the proper question is whether the first point in time for removal from Australia as soon as reasonably practicable had arrived, it was for the Commonwealth to establish that that time had not yet arrived. It did not do so.

89 Consistently with the unanimous view of the Court in *S4*, the relevant inquiry for determining whether there has been a departure from the permissible purpose of the applicant's detention is whether the removal of the applicant from Australia has been "undertaken" or has been "carried into effect" as soon as reasonably practicable. An objective assessment is to be made of all relevant circumstances including the steps in pursuance of removal which have been taken as well as those steps which were reasonably practicable but were not taken. As Hayne J observed in *Al-Kateb* at [226], the phrase "as soon as reasonably practicable" is a "compound temporal expression" which "recognises that the time by which the event is to occur is affected by considerations of what is '[c]apable of being put into practice, carried out in action, effected, accomplished, or done'". The word "reasonably" in the phrase in question is important. I accept the Commonwealth's submission that the test is not whether everything that could have been done has been done. Perfection is not required, but whether reasonably practicable steps to pursue removal were or were not taken will be relevant.

90 Furthermore, in making that assessment it will be necessary to bear in mind that removal from Australia is not country-specific. As Hayne J observed in *Al-Kateb* at [227] by reference to ss 196 and 198, "*[r]emoval* is the purpose of the provisions, not repatriation or removal *to* a place" (emphasis in original) and that it followed that "the duty imposed by s 198 requires an officer to seek to remove the non-citizen to any place that will receive the non-citizen". I reject the Commonwealth's contention that, if the active pursuit of removal is a condition of the lawfulness of a detention, the scope of that pursuit is confined to the country of destination that the officer effectuating the removal may have chosen.

91 Before making the assessment just mentioned, I should record that, consistently with authority, the Commonwealth accepted that it bears the onus of proof as to whether the applicant's detention is lawful. There are only two authorities that need to be mentioned.

92 ***McHugh*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 concerned an application for a writ of habeas corpus. In that case, Anderson J helpfully set out a detailed analysis of the operation of the onus of proof at [101]-[105]. At [103] his Honour described a series of shifting onuses, whereby:

- the applicant must first demonstrate his or her restraint by the respondent;
- the respondent must provide a prima facie justification for that restraint;
- the applicant then has an initial evidentiary onus to raise a prima facie question as to that justification; whereupon
- the respondent bears the final legal onus of proving the legality of the restraint.

93 The position in respect of false imprisonment is addressed in *Burgess*. In that case, Besanko J stated at [17] that "[t]he onus is on the respondent to establish on the balance of probabilities that the applicant's detention was lawful". In each of *McHugh* and *Burgess*, their Honours identified the justification for the onus being so placed as the paramount importance placed by the common law on the right to personal liberty: see *McHugh* at [101] and *Burgess* at [68].

94 In this case it is uncontroversial that the applicant is restrained by the Commonwealth and that, if it be necessary for the applicant to have discharged his initial evidentiary onus to raise a prima facie question, that has been done.

WAS THE APPLICANT'S DETENTION IN THE FIRST PERIOD LAWFUL?

95 The Commonwealth conceded that in the first period (26 July 2019 to 27 November 2019) active steps to progress the removal of the applicant were not taken by the Commonwealth. The Commonwealth submitted that what occurred during that time were regular reviews of the applicant's situation, but conceded that there is no evidence of any attempts to resolve the perceived impediments to the applicant's removal. The perceived impediment, as expressed by the Commonwealth in its submission, was that "it was thought that the applicant could not be removed under s 198 of the Act because he was owed protection obligations". The Commonwealth conceded that that reasoning was "plainly incorrect having regard to s 197C of the Act".

96 To put the factual propositions relied upon by the Commonwealth in relation to the first period into their proper context, I will refer to the evidence. *First,* I should set out the terms of s 197C:

> **Australia's non-refoulement obligations irrelevant to removal of unlawful non-citizens under section 198**
>
> (1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.
>
> (2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

97 Section 197C gained some prominence in the case law as a result of an early consideration of its effect by North ACJ in ***DMH16*** *v Minister for Immigration and Border Protection* (2017) 253 FCR 576. It is of some significance that the applicant here was the applicant in *DMH16*. That is, the applicant is DMH16.

98 In *DMH16,* the applicant contested the Minister's rejection of his application for a protection visa which was refused on or about 17 October 2016. That refusal occurred in circumstances where the Minister had received advice from the Department that the applicant was a person in respect of whom Australia had protection obligations under the *Convention Relating to the Status of Refugees* done at Geneva on 28 July 1951. In his refusal decision, the Minister accepted that the Department had found that Australia has non-refoulement obligations towards the applicant and contemplated that indefinite detention of the applicant was a possibility, because "Australia will not remove a non-citizen, as a consequence of the refusal of their visa application, to the country in respect of which the non-refoulement obligation exists".

99 North ACJ held that that reasoning was tainted by jurisdictional error. At [26] his Honour described the effect of s 197C in the following terms:

> [I]f the protection visa was refused the applicant would either be removed to Syria immediately, or, if the Minister decided to consider alternative management options, be detained for a definite period, namely, until the Minster considered whether to exercise the power under s 195A. Then if the Minister refused to exercise the power, the applicant would be removed to Syria.

100 *DMH16* was decided on 3 May 2017, with North ACJ ordering that the Minister's decision be quashed and the Applicant's application for a protection visa be remitted for determination according to law. In July or August 2017, the Minister referred the applicant's matter to the Visa Applicant Character Consideration Unit section of the Department where it was concluded that the Applicant "is a person in respect of whom Australia has protection obligations, with the country of reference being Syria."

101 In January 2018, an officer of the Department provided a submission to a delegate of the Minister for consideration under s 501(1) of the Act. At [74] of that submission, it was stated:

> You should also be aware that if you decide to refuse [the applicant]'s application for a Protection visa, he will, as an unlawful non-citizen, be subject to continued immigration detention under s189 of the Act and removal from Australia under s198 of the Act "as soon as reasonably practicable." In this respect, you should note that s197C of the Act provides that for the purposes of s198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

102 In December 2018, a delegate of the Minister refused the applicant's application for a protection visa under s 501(1) of the Act. The delegate's reasons expressly acknowledged [74] of the aforementioned submission.

103 Later that month, the applicant's solicitors inquired as to how the Department now planned to deal with the applicant's matter. The Department indicated that a submission would be made to the Minister for consideration of the applicant's case and in April 2019 made its submission to the Minister inquiring whether he wished to consider exercising his discretion under s 195A or s 197AB of the Act in respect of the applicant. Under s 195A the Minister may, if the Minister thinks it is in the public interest to do so, grant a visa to a person in detention. Under s 197AB, and again if the Minister thinks that it is in the public interest to do so, the Minister may make a residence determination allowing a person held in detention to reside at a specific place instead of being detained in a detention centre.

104 On 25 July 2019, the Department notified the applicant's solicitor that the Minister had declined to consider exercising his discretion under either of those provisions.

105 In assessing the first period, it is relevant to note that the evidence shows that, well prior to the Minister declining to consider his discretion under s 195A or s 197AB of the Act, officers of the Department began some consideration of the applicant's removal. That consideration appears to have commenced on 29 January 2019 when, as I will shortly explain, the applicant's case was referred to the "removal space" within Departmental systems. On that day internal communications occurred between Departmental officers concerning how a Syrian travel document may be obtained for the applicant. That appears to be all that occurred before the applicant's referral for involuntary removal was questioned on 28 February 2019 by an Assistant Director in the Complex and Controversial Cases section of the Department. The Assistant Director queried why the applicant had been referred for involuntary removal noting that "he engages Australia's protection obligations". That inquiry was responded to by an Inspector Baxter, Removal Operations Victoria. Inspector Baxter sought clarification as to whether the applicant engaged Australia's protection obligations but indicated that, if that was the case, "Removals will immediately stop the removal as per standard process". He further stated that "as per current Removals process, we will cease trying to obtain a travel document from the Syrian authorities" until outstanding issues relating to Australia's protection obligations are resolved. On 1 March 2019, after receiving confirmation from the Assistant Director that the applicant had been indicatively found to engage Australia's protection obligations, Inspector Baxter directed that that the applicant's "Status Resolution barrier" should be changed to "8.7 (non-refoulement obligations)" and informed various officers within the Department that "we will not be [pursuing] any removal arrangements" for the applicant.

106 Evidence of any dealing with the applicant's situation from July 2019 through to the end of the first period was given by two officers of the Department stationed at Yongah Hill Immigration Detention Centre in Western Australia ("**Yongah Hill**") where the applicant is detained.

107 In giving evidence which was uncontested and which I accept, Derek D'Cruz deposed that he held the position of Acting Director of Status Resolution, Western Australia within the Department, a position he has held since July 2019. In that role, Mr D'Cruz was required to participate in a monthly "Detention Review Committee" ("**DRC**") meeting for Yongah Hill. Mr D'Cruz explained the usual practice for such meetings including that if the chair of the meeting considered that there are issues with an individual's case, the chair would raise the case for discussion at the meeting. Mr D'Cruz deposed that, to his knowledge, the applicant's case had not generated an action item for discussion at a DRC meeting since he commenced as Acting Director in July 2019, meaning that no specific action had been recommended by the

DRC in relation to the applicant in the first period. He also deposed that he could not recall the applicant's case being discussed at a DRC meeting.

108 Mr D'Cruz's evidence was that DRC reports are generated monthly by the administration team at Yongah Hill for the purpose of DRC meetings. He produced to the Court the reports for each of August, September, October and November 2019 relating to the applicant. I will return to those shortly.

109 Mr D'Cruz gave his understanding of "the way the system operates in practice" and stated that once visa pathways are concluded and no visa has been granted, a person is transferred to "the removal space" in Departmental systems "by Status Resolution", which I understand to be a section within the Department. He deposed that a Status Resolution Officer would continue to have oversight and stay involved to manage the person's case while that person is in detention but that the "Removals section" takes the lead in these cases. He deposed by reference to a notation in the August DRC report that the applicant had, on 29 January 2019, been referred to "the removal space" by the Status Resolution team within the Department. His understanding was that once visa pathways are concluded and no visa has been granted, a person is transferred to the "removal space" in Departmental systems by the Status Resolution team, so removal arrangements can be progressed. He stated that the DRC reports showed the applicant's case "continuing to sit in the removal space".

110 Each of the monthly reports exhibited by Mr D'Cruz is in similar form. Each report includes a heading "Status Resolution Barrier" under which it is stated that the applicant's Status Resolution Barrier is "8.7 – Removal Not Currently Practicable – Non-Refoulement Obligations". Each report has a section "CM Case Review Barriers" under which a reference is made to the applicant not having a valid travel document and being unwilling to apply for a travel document or depart from Australia. The absence of a valid travel document is either expressly or impliedly identified as an obstacle. Additionally, by reference to the applicant's Status Resolution Barrier, the reports variously state that the applicant "cannot be removed" or is "Not removable". Each report also lists removal or involuntary removal as a "Case Objective".

111 Chez Mitchell is a Detention Status Resolution Officer within the Western Australian Status Resolution team at Yongah Hill. Her evidence was also uncontroversial and I accept it. She was the applicant's Status Resolution Officer from 31 July 2019 until 24 November 2019. In that role she completed a monthly 'case review' of the applicant's file. Five such reviews were

completed and exhibited to her affidavit. She deposed that the cases of all detainees at Yongah Hill are reviewed by the DRC each month and that that review is based on the information contained in the 'case reviews' such as those prepared by her in relation to the applicant. She attended the DRC meetings held whilst she had responsibility for the applicant. At those meetings, she was not asked any questions, asked to contribute nor allocated any action items in respect of the applicant's case.

112 Each of the 'case reviews' for the applicant prepared by Ms Mitchell deals with what are referred to as "barriers to case resolution" and indicate non-refoulement obligations and a lack of a valid travel document as barriers or obstacles. Each also includes a notation that the applicant is "Not removable – 501 with non-refoulement issues", or alternatively "cannot be removed – Status Resolution Barrier 8.7 (non-refoulement obligations)". Referring to such comments in relation to one of the reports, Ms Mitchell deposed that she understood those notations to mean that the applicant was in the returns and removals space as an involuntary removal, that he was someone to be removed against his wishes but that he was non-removable because he could not be returned to his country of origin because he was owed protection.

113 Each of the last four 'case reviews' also contained the following notation in a section headed "Approach and Acuity" in which Ms Mitchell was requested to justify whether the case management approach for the applicant was still appropriate. The answer given was in the following terms:

> Service Level: Monitored - SRO will review case on a monthly basis and remain alert to any changes in circumstances that affect case progression. At this stage of [the applicant's] immigration pathway, minimal intervention is required. SRO to ensure barriers to status resolution are identified/escalated appropriately to effectively achieve case objective: Removal (or in the September and October 'case reviews' – "Revocation Outcome"

114 Ms Mitchell was not examined in relation to these remarks. There was however no evidence of any action taken by her or anyone else to "ensure barriers to status resolution are identified/escalated appropriately to effectively achieve case objective".

115 The evidence confirms the concession made by the Commonwealth that active steps to progress the removal of the applicant from Australia were not taken between 26 July 2019 and 27 November 2019. The evidence does not establish that, in the first period, the applicant's removal from Australia was undertaken or carried into effect as soon as reasonably practicable.

116 The absence of any or sufficient steps being taken to progress removal over a period of detention will not necessarily demonstrate that removal of the detainee from Australia was not undertaken or carried into effect as soon as reasonably practicable. As Hayne J noted in *Al-Kateb* at [226]-[228] the removal of a non-citizen from Australia will ordinarily require the cooperation of other countries to effectuate that removal. There may be delays or obstacles to the timely removal of a detainee caused by circumstances beyond the control of Australia which bring about inaction or cause the absence of active steps to progress removal. There may be other justifications for inaction or delayed action which will serve to deny the conclusion that the removal of the non-citizen was not undertaken or carried into effect as soon as reasonably practicable.

117 The Commonwealth did not seek to justify its inaction in the first period by reference to obstacles beyond its control. The only justification the Commonwealth asserted for its inaction was that having regard to s 197C of the Act "it was [incorrectly] thought that the applicant could not be removed under s 198 of the Act because he was owed protection obligations".

118 There are a number of difficulties with that asserted justification despite my preparedness to accept that the reason or reasons for the lack of action in relation to the applicant's removal may be relevant. It may be accepted that in the pursuance of the removal of a non-citizen from Australia, an error or errors may be made which may cause delay or inaction. It may also be accepted that the requirement to undertake or carry into effect a removal as soon as reasonably practicable includes some allowance for error to be made in the pursuance of the removal. I do not consider, however, that such an allowance would extend to unreasonable error and that an error about the operation of the law made by officers within the government department responsible for that law would likely constitute reasonable error, particularly where the law in question is clear and its effect was spelt out in litigation (*DMH16*) involving the very person who is the subject of the law's requirement that he be removed from Australia as soon as reasonably practicable and without regard to any non-refoulement obligations that may exist in respect of that person.

119 In any event, the Commonwealth has not demonstrated that the reason for the inactivity in relation to the applicant's removal was an erroneous view, held by those responsible for the inactivity, that the applicant could not be removed under s 198 of the Act because of the effect of s 197C. No person who might be said was responsible for that inactivity gave evidence that

the Act, or that person's understanding of the Act, was the reason for the inactivity. Nor is such an inference available.

120 The evidence demonstrates that inactivity in relation to the applicant's removal commenced on or about 1 March 2019 when Inspector Baxter directed that the applicant's "Status Resolution barrier" should be changed to "8.7 (non-refoulement obligations)" and informed various officers that "we will not be [pursuing] any removal arrangements". Thereafter, the records from the applicant's file to which I have earlier referred demonstrate that throughout the first period the applicant's Status Resolution barrier "8.7 (non-refoulement)" was maintained. I would infer that that status was the reason for the inactivity and for the view expressed in those reports that the applicant could not be removed. Whilst it is clear from that material that the applicant's engagement with Australia's non-refoulement obligations was the source of the view that the applicant cannot be removed and thus the reason for the consequent inactivity, there is nothing in that material to support the conclusion that the Act or some perception of how the Act operated was the source of the erroneous view that the applicant could not be removed from Australia. To the contrary, on the basis that the applicant engaged Australia's protection obligations, the reason that Removals would not be "[pursuing] any removal arrangements" for the applicant was given in Inspector Baxter's communication referred at [105] above to be "as per standard process".

121 That communication reveals, as other evidence and common sense make apparent, that there was a Departmental process or policy in place which deals with non-citizens who engage Australia's non-refoulement obligations and provides directions to officers of the Department in relation to the circumstances in which such persons may be removed from Australia. It was adherence by Departmental officers to that policy which is likely to be the basis for Inspector Baxter's direction that the applicant's "status resolution barrier" be designated as "8.7", for that status to have been maintained and for the consequent notation, in the various reports on the applicant's file, that he could not be removed. The Departmental policy is reflected in the reasons for the applicant's visa refusal in October 2016 where the Minister said "Australia will not remove a non-citizen, as a consequence of the refusal of their visa application, to the country in respect of which the non-refoulement obligation exists". Those observations reflect what the Explanatory Memorandum for the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) which introduced s 197C into the Act explained in the following statement (at [1142] and [1146]):

> Australia will continue to meet its *non-refoulement* obligations through other mechanisms … For example, Australia's *non-refoulement* obligations will be met through the protection visa application process or the use of the Minister's personal powers in the Migration Act, including those under sections 46A, 195A or 417 of the Migration Act.

122 There is no basis for concluding that that Departmental policy was founded upon a misunderstanding of s 197C or s 198 of the Act. Any suggestion that the Commonwealth is itself ignorant of the power given and the obligation imposed by the Act on its officers to remove an unlawful non-citizen despite the fact that Australia has non-refoulement obligations in respect of that person is untenable.

123 There is therefore no error established by the Commonwealth which could serve to justify the inaction in question. That inaction was likely based on Commonwealth officers following Commonwealth policy. A policy of non-refoulement is morally justifiable. However, in relation to removal required by s 198 of the Act and in the light of s 197C, the pursuance of such a policy is not legally justifiable. As the applicant contended, by a submission to which the Commonwealth did not respond, the Commonwealth cannot act as though s 197C does not exist. If the policy was an obstacle to the applicant's removal from Australia as soon as reasonably practicable, that obstacle was self-imposed by the Commonwealth, is contrary to the Act's requirements, and cannot justify the inactivity in question.

124 The Commonwealth made no attempt to demonstrate that no reasonably practicable steps in pursuance of the applicant's removal to Syria were available to be taken in the first period. It may be inferred that reasonably practicable steps, such as procuring a Syrian travel document for the applicant and engaging with the Syrian government to facilitate any other requirement for the applicant's transfer, could have been commenced if not completed. The prospect of the applicant being physically transferred to Syria within the first period is not excluded by the evidence, but I do not regard a finding to that effect to be necessary for the conclusion I have reached.

125 The applicant also relied upon the Commonwealth's failure in the first period to pursue his removal to Lebanon. The activities engaged in by the Commonwealth in the second period to pursue the applicant's removal to Lebanon (to which I will shortly refer) demonstrate that there were steps available for the Commonwealth to pursue the applicant's removal from Australia which do not impinge upon any non-refoulement obligations that may be owed by Australia in respect of the applicant. There is no evidence to deny the conclusion that those steps in relation

to the applicant's removal to Lebanon could have been taken by the Commonwealth in the first period.

126 I would therefore conclude that, in the first period and in the context of the Act's requirement that the applicant be removed from Australia as soon as reasonably practicable under s 198 irrespective of whether Australia has non-refoulement obligations in respect of him under s 197C, despite the availability of reasonably practicable step, no steps were taken to pursue the applicants removal to Syria, his country of nationality, and that, despite reasonably practicable steps being available to be taken in pursuit of the applicant's removal to Lebanon, no such steps were taken.

127 Bearing in mind that a broad view of reasonableness may be taken, the failure to take any steps when reasonable and practicable steps for effectuating a detainee's removal from Australia were available, serves to demonstrate that removal from Australia was not undertaken or carried into effect as soon as reasonably practicable.

128 It follows that, in the first period, the removal of the applicant from Australia was not undertaken or carried into effect as soon as reasonably practicable, that there was therefore a departure from the requisite removal purpose for the applicant's detention throughout the course of that period and that, as a consequence, the applicant's detention by the Commonwealth was unlawful during that period.

WAS THE APPLICANT'S DETENTION IN THE SECOND PERIOD LAWFUL?

129 The second period commenced on 28 November 2019 and extends to the date of judgment. The evidence about the second period was current as at the last date of the hearing on 17 July 2020. However, the parties indicated that they would seek to update the Court should relevant circumstances change. No such updating has occurred. I will proceed on the basis that, other than for the expiry of further time, those circumstances that are relevant and prevailed at the time of the hearing continue to be the prevailing circumstances as at the date of judgment.

130 The Commonwealth contended that in the second period, it has been taking steps to have the applicant removed to Lebanon. It also contended that it has not been reasonably practicable to remove the applicant to Syria.

131 In relation to steps the Commonwealth contends it has taken to pursue the applicant's removal to Lebanon, the Commonwealth relied on the evidence of two deponents. Nicholas Yates holds a position within the Department as the First Secretary of Immigration and Border Protection

at the Australian Embassy in Beirut. The other deponent, Sally Davis, is the Acting Superintendent of Removals Operations HQ, Field Operations Branch, Enforcement Command in the Australian Border Force, which is also a position within the Department.

132 Mr Yates first became aware of the applicant's case on 28 November 2019. On that day he was contacted by another officer of the Department who requested that he reach out to his Lebanese counterparts to gauge whether they would be willing to accept the return of the applicant to Lebanon. He deposed that, on receiving that request, he reviewed Departmental records from which he understood that the applicant was born in Lebanon and that both his mother and father were Lebanese citizens and that the Department had previously concluded that the applicant was, at the very least, eligible to claim Lebanese citizenship. He also understood that the Department had made similar enquiries about the applicant with the Lebanese government in 2015.

133 That evidence was evidence of Mr Yates' understanding and of understandings previously held by Departmental officers. It was not contended by the Commonwealth that the applicant is a citizen of Lebanon. Nor did the Commonwealth seek to substantiate the view recounted by Mr Yates that the applicant was "eligible to claim Lebanese citizenship" – whatever that may mean. Other evidence before me demonstrates that the enquiries made in 2015 to which the evidence of Mr Yates referred, were made with the applicant's consent and were responded to by the Lebanese General Directorate of General Security ("**Lebanese General Security**") with the advice that "no records were found" for the applicant. Having said that, I did not understand that the applicant contested that the applicant's parents had each acquired Lebanese citizenship.

134 On the same day, Mr Yates reached out to his contact, a Major in the Director-General's Office, at Lebanese General Security. To Mr Yates' understanding the functions of the Lebanese General Security include responsibility for issuing Lebanese passports and issuing entry visas. Mr Yates' contact at Lebanese General Security told him that he could give no formal indication about the applicant's case until a "deportation file" created by the Lebanese Embassy in Australia was received. Mr Yates was told that the applicant's case was ultimately up to the Director General, the head of Lebanese General Security, to decide. Mr Yates passed that information to other officials of the Department.

135 Ms Davis also first became aware of the applicant's case on 28 November 2019 when she received an email from another officer of the Department seeking her urgent assistance with

"this high profile case". On the following day she was provided with a copy of Mr Yates' communication which set out the activities of Mr Yates to which I have just referred.

136 On 4 December 2019, Ms Davis met with the Lebanese Ambassador to Australia. She provided him with correspondence which indicated that, whilst the applicant had claimed that he was born in Lebanon, identity documents place his birth in Syria. The letter stated that Lebanon's "Tripoli Registry" had confirmed by telephone in April 2015 that the applicant's father and mother became Lebanese citizens by Presidential Decree in 1994. The letter asserted that the applicant's father was currently residing in Tripoli. Ms Davis requested that the Lebanese Ambassador engage with "the relevant areas in Beirut" to confirm that the applicant has a right to enter and reside in Lebanon. Ms Davis asked whether, if the applicant was not registered as a Lebanese national, he could apply for a Lebanese travel document on the basis that his father is Lebanese and because the applicant should be eligible for Lebanese citizenship.

137 Ms Davis deposed that the Lebanese Ambassador told her that he would try to provide her with further information in the following two weeks.

138 Mr Yates was advised on 4 December 2019 of the meeting between Ms Davis and the Lebanese Ambassador. He then informed his contact at Lebanese General Security that the Department had submitted a formal request to the Lebanese Embassy in Australia regarding the applicant. That contact appears to have occurred on 5 December 2019. Mr Yates stated that he had additionally reached out to his Lebanese counterpart on 10 December 2019, 10 February 2020 and 12 February 2020, requesting an update on the status of the Department's request. He deposed that the response received was that Lebanese General Security was yet to receive the "deportation file". Ms Davis deposed that the Lebanese Ambassador with whom she met on a few occasions through to February 2020, had informed her that he had sent the deportation request to Lebanese General Security and was awaiting their response. The inconsistency between the information given by Mr Yates' contact and the Ambassador was not reconciled. On 20 February 2020, the Lebanese Ambassador told Ms Davis that he had followed up the applicant's case with Lebanese General Security and that they advised him that they are still looking into the case.

139 On 27 February 2020 and 12 March 2020, Ms Davis directed another officer of the Department to contact the Lebanese Embassy to follow up on the applicant's case. That was done by email. The Embassy had not responded to those emails at the time that Ms Davis made her first

affidavit on or about 1 May 2020 and there is no evidence that any response has ever been received.

140 Ms Davis stated that her team had been advised on 11 March 2020 by the Lebanese Consulate in Sydney that they are presently not issuing travel documents to anyone due to a shortage of '*laissez-passers'*, a form of travel document used by Lebanon. She deposed that in her experience it normally takes about twelve months for a Lebanese citizen to receive a travel document from the Lebanese government and longer for Syrian and Palestinian citizens. She considered that due to the COVID-19 outbreak and its consequent disruptions, obtaining a travel document from Lebanon in relation to the applicant may take longer than usual. Ms Davis was nevertheless of the opinion that, given that her team had successfully obtained travel documents from Lebanon for Syrian nationals in the past, it remains possible that a travel document will be obtained from Lebanon in relation to the applicant.

141 A second affidavit of Ms Davis was filed on 26 June 2020. Ms Davis deposed that, as at that time, the Lebanese Embassy in Australia was not fully operational due to COVID-19 and that the Lebanese Ambassador was away. She deposed that she had emailed the Ambassador on 24 June 2020 asking for an update regarding the applicant but that the Ambassador had not responded. As at that time, Ms Davis opined that it was still feasible that the Department would obtain a travel document from Lebanon in relation to the applicant although the process may take longer than usual given the current economic and health crisis.

142 Mr Yates stated that in his experience with others who have been removed from Australia to Lebanon, it normally takes a number of months to receive a formal response from Lebanese General Security in relation to a removal case. In his view, Lebanon had been in the midst of a severe economic crisis before the COVID-19 outbreak and that, since that outbreak, various states of lockdown have occurred in Lebanon from October 2019. Consequently, he considered that Lebanese agencies have been focused on a wide range of mostly domestic matters. He was therefore mindful not to seek frequent updates from his Lebanese contact on the applicant's case. He expected that, given the events just outlined, the delivery of the deportation file and the formal response from Lebanese General Security may take longer than usual. As he considers that the Lebanese authorities are focused on internal issues, Mr Yates has had very little contact with the Lebanese General Security contact with whom he last raised the applicant's case on 12 February 2020. Mr Yates was nevertheless of the belief that Lebanon remains a viable option for the applicant's removal.

143 At the time of making his first affidavit on or around 1 May 2020, Mr Yates stated that he would follow up the applicant's case as appropriate. If he formed the view that he was not going to be able to progress the applicant's case further through his contact at Lebanese General Security, the next step would be to escalate the case to the Australian Ambassador in Lebanon in order to raise it directly with the Director General at Lebanese General Security. He was of the view, at the time of his first affidavit, that the time for that had not yet arrived.

144 In his second affidavit made on or around 26 June 2020, Mr Yates deposed that he had still not considered it appropriate to follow up the applicant's case with his contact at Lebanese General Security. He opined that, by reason of the state of lockdown as a result of the COVID-19 outbreak and the economic crisis in Lebanon as well as the closure of the airport in Beirut together with limitations on entry into Lebanon, the removal of the applicant to Lebanon was not at that time practicable. Due to his view that the removal of the applicant to Lebanon was not practicable, Mr Yates considered that to follow up the applicant's case when there was no practical prospect of removing the applicant, would not be productive and could attract a negative reaction from Lebanese officials.

145 The applicant's Status Resolution Officer at Yongah Hill since 19 November 2019, Michele Fryer-Hornsby affirmed an affidavit on or around 26 June 2020. Ms Fryer-Hornsby has completed a 'case review' for the applicant every 30 days since she assumed responsibility for him. Each of the seven 'case reviews' completed by her was exhibited to her affidavit.

146 Each of those 'case reviews' (except the fifth) continues to identify the applicant's "barrier indicator" to be "[8.7] Non-Refoulement". In a section dealing with "barriers to case resolution" each report identifies as an "obstacle" – "No valid [Travel Document]" and "Non-refoulement obligations exist". Each of the 'case reviews' (again, except the fifth) identifies removal as the "Case Objective".

147 Ms Davis also made a third affidavit filed on 8 July 2020. That affidavit included evidence which the Commonwealth seeks to rely upon for the proposition that since the start of the second period it has not been reasonably practicable to remove the applicant to Syria. Ms Davis was cross-examined in relation to this evidence and in respect of some of it she either clarified or expanded upon her evidence.

148 Ms Davis deposed that at all relevant times Syria has been classified by the Department of Foreign Affairs and Trade as a 'Do Not Travel' zone given the extremely dangerous security

situation arising out of the prolonged armed conflict in that country. She deposed, and it is not in contest, that the *Aviation Transport Security Regulations 2005* (Cth) ("**Aviation Regulations**") require that if the applicant were returned on a flight to Syria he be accompanied by two security escorts. The Commonwealth does not generally send its officials to 'Do Not Travel' zones for reasons including their safety. Ms Davis stated that in exceptional circumstances the Department has removed unlawful non-citizens to a 'Do Not Travel' zone. She said, however, that such operations required detailed risk assessments and approval by a Deputy Commissioner of the Australian Border Force. No such approval has been sought in relation to the applicant. Ms Davis asserted that Australia has no diplomatic outpost or relations with Syria. However, in cross-examination she clarified that she only meant to say that Australia has no diplomatic post located in Syria. She confirmed that there are ways in which the Australian government can communicate with the Syrian government including by contacting the Syrian Consulate in Sydney.

149 Ms Davis deposed that Australia does not have security assets available on the ground in Syria to provide security for its escorts should a return flight be delayed or if there was some incident at the airport during a removal exercise. She deposed that because of a lack of Australian presence in Syria, the Department could not provide protection for security escorts should such protection be required. In cross-examination, Ms Davis clarified that so far as she was expressing a concern for the risks for security escorts travelling to Syria she was only dealing with circumstances in which the escorts would need to fly into Syria. She accepted that Syria is a country with multiple land borders including with Turkey and Lebanon.

150 Lastly, Ms Davis deposed that since 17 March 2020 and given the COVID-19 outbreak, the Department had ceased all escorted removals of unlawful non-citizens from Australia including because of the infection risk to security escorts. However in cross-examination, Ms Davis clarified that, although that statement was true at the time she made her affidavit on 8 July 2019, since that time escorted removals to New Zealand have occurred involving the escort of individuals by at least two escorts in accordance with the requirements of the Aviation Regulations.

151 One further matter relied upon by the Commonwealth for its assertion that, since the start of the second period, it has not been reasonably practicable to remove the applicant to Syria, is that the applicant does not have a travel document that would facilitate his entry to Syria. Whether or not the applicant has a valid travel document was not directly addressed by the

evidence. The 'case reviews' for the applicant refer to a Syrian travel document and material exhibited to Ms Davis' first affidavit contains a copy of a Syrian passport which appears to have been issued to the applicant but which expired in 2008. The 'case reviews' also refer to a lack of a travel document and the internal communications referred to at [105] above are also premised on the applicant not having a Syrian travel document. I accept that it is likely that at all times relevant the applicant has not had a valid Syrian travel document.

152 The applicant noted that efforts made to pursue his removal to Lebanon were first made within days of his Federal Court proceeding being filed. Whilst the applicant does suggest that those efforts were motivated by the filing of that proceeding, the applicant does not seek to suggest that those efforts are a sham. The applicant does contend that those efforts should be regarded as fruitless. He contended that the evidence does not establish that he is a citizen of Lebanon and that certainly the government of Lebanon has not accepted that he is a citizen of that country. Further, the applicant contended that on the evidence, Lebanon has indicated no willingness to receive the applicant and has recently ceased to engage with the Commonwealth. The applicant also contested that the evidence relied upon by the Commonwealth demonstrated that it has not been practicable to physically transfer the applicant to Syria. I will return to those matters.

153 The applicant's primary contention as to why, in relation to the second period, the Commonwealth has failed to demonstrate that his removal from Australia has been undertaken or has been carried into effect as soon as reasonably practicable, is that the Commonwealth has not demonstrated that it has been or is pursuing the applicant's removal to Syria or taken any steps in furtherance thereof. I accept this contention.

154 Unlike its pleading in relation to Lebanon, the Commonwealth did not plead that it had commenced engaging with Syria to determine whether Syria would receive the applicant. Nor does the pleading assert any steps taken by the Commonwealth to pursue the applicant's removal to Syria. The Commonwealth's Defence initially made no reference at all to Syria. Leave for the Commonwealth to amend its Defence was sought and provided very shortly before trial in circumstances where the Commonwealth contended that it was taken by surprise when the applicant's written submissions filed and served shortly before the trial commenced, asserted an absence of any steps taken by the Commonwealth to pursue removal of the applicant to Syria. In that submission, the applicant contended that the Commonwealth had

taken no steps to seek to remove him to Syria "because [it] does not want to breach its non-refoulement obligations by removing the applicant there under [s 198]".

155 Despite those assertions and the opportunity offered to the Commonwealth to respond to them, including by the filing of Ms Davis' third affidavit, neither the Amended Defence filed, nor the submissions made by the Commonwealth, nor any evidence given by the Commonwealth including by Ms Davis, a senior officer in the Department, stated in part or in whole that, despite the position taken during the first period, the Commonwealth had decided that it would pursue the applicant's removal to Syria or that it was intending to or had taken steps to effectuate that course.

156 Ms Davis' third affidavit deposed as to why in her view and since at least July 2019 it has not been reasonably practicable to remove the applicant to Syria and why it is not presently reasonably practicable to do so. I will address the cogency of that view shortly, but what is significant, particularly in the context just explained, is that Ms Davis did not say that the Commonwealth is or has been pursuing the applicant's removal to Syria. Her evidence merely set out the perceived obstacles to the applicant's physical removal to Syria. Ms Davis did not say that any steps had been taken in furtherance of any decision to pursue the applicant's removal to Syria or that the obstacles to his physical transfer to Syria to which she referred had prevented any of the necessary preliminary steps, such as obtaining a travel document for the applicant, from being pursued.

157 Further, the evidence revealed that the Commonwealth has maintained the position taken in the first period, that Australia's non-refoulement obligations should be treated as precluding it from removing the applicant to Syria. Each of the applicant's seven 'case reviews' made in the second period show that the applicant's "barrier indicator" continues to be "[8.7] Non-Refoulement" and those documents continued to assert non-refoulement obligations as an obstacle to the applicant's removal. The applicant's Status Resolution Officer during the second period, Ms Fryer-Hornsby, deposed by reference to the 'case reviews' that "the applicant was non-removable because he could not be returned to his country of origin because he was owed protection".

158 If the Commonwealth had determined to change course, to correct what it contended was the mistake in its thinking during the first period that the applicant could not be removed to Syria, and to pursue the applicant's removal to Syria as soon as reasonably practicable, I would have expected to see some steps taken to effectuate that objective over the seven months between

the commencement of the second period and the hearing or indeed in the nine months to the present time. However, as I have said, there is no evidence – neither of a decision to pursue removal of the applicant to Syria nor of any steps taken in pursuance thereof. And, if such a decision had been made, and assuming it to have been impracticable to physically transfer the applicant to Syria, it is likely that there were steps available to be taken to facilitate the applicant's removal to Syria as soon as reasonably practicable after the last step, of physically taking him to Syria, became practicable. For instance, there is no evidence of any attempt to contact the Syrian government, to ascertain its attitude to receiving the applicant, to understand what the Syrian government required of the Australian government or of the applicant before being prepared to accept the applicant, or, to arrange for a travel document for the applicant in order to enable him to travel to Syria.

159 All of that goes to demonstrate that the only change of course effectuated by the Commonwealth in relation to its attitude or its efforts to remove the applicant from Australia, as between the first and second periods, is that the Commonwealth moved from pursuing no country as a destination country for the applicant's removal to pursuing Lebanon alone.

160 In arriving at that conclusion I have made the positive findings referred to above. However, it must be firmly kept in mind that the Commonwealth bears the onus of proof. If the Commonwealth's failure to pursue the applicant's removal to Syria is probative of whether or not the Commonwealth had undertaken or sought to give effect to the applicant's removal as soon as reasonably practicable, it was for the Commonwealth to demonstrate that there was no such failure. The Commonwealth has not done so.

161 There is one matter I need to return to for completeness. It is not clear but it may have been suggested by the Commonwealth's oral reply submissions that a comment in one of the applicant's case reviews prepared by Ms Fryer-Hornsby indicates that efforts were made in recent times to pursue a travel document for Syria for the applicant. The comment to which my attention was drawn is made in a 'case review' made on 26 May 2020. The comment is as follows:

> Outcome of TD Discussion: Removals unable to acquire TD for involuntary to Syria. 3rd country option being explored (Lebanon).

162 That comment or a similar comment appears in each of the 'case reviews' prepared by Ms Fryer-Hornsby and in my view is historic. Each such report contains a section setting out the "Activities this period". None of the activities listed in any of the 'case reviews' suggest

any step was taken during the period covered by the report in relation to obtaining a travel document for the applicant. There is nothing elsewhere in the evidence given by Ms Fryer-Hornsby directly which suggests any such activities were undertaken whilst she had responsibility for the applicant. In my view, the comment is likely to be a reference to the internal communications about obtaining a Syrian travel document for the applicant which occurred in late January of 2019 to which I have referred at [105] above. It remains the case that the Commonwealth has not established that any step was taken by it to progress or pursue the applicant's removal to Syria.

163 I need next to consider the significance of the Commonwealth's failure to demonstrate that it has or is pursuing the applicant's removal to Syria. That matter cannot be examined without taking into account the first period as well. Taking both periods into account, there is no evidence of the Commonwealth pursuing the applicant's removal to Syria for over thirteen months despite Syria being the applicant's country of nationality and therefore, at least prima facie, the most likely country willing to receive the applicant and consequently the most likely country which the applicant could be removed to as soon as reasonably practicable.

164 The Commonwealth has not demonstrated that its failure to pursue the applicant's removal to Syria has been inconsequential to its obligation to remove him from Australia as soon as reasonably practicable. Syria may well be a 'Do Not Travel' zone as Ms Davis attested, but she also attested to the Commonwealth removing unlawful non-citizens to a 'Do Not Travel' zone where a detailed risk assessment is done and approval from a Deputy Commissioner of the Australian Border Force is obtained. Ms Davis did not say that those requirements were unavailable to be taken in relation to the applicant's removal to Syria. Nor in relation to what appeared to be the primary basis for concern expressed in relation to entry into a 'Do Not Travel' zone – the safety of security escorts – did Ms Davis take into account in giving her view about practicability, the possibility of a land-based transfer in which security escorts would not need to enter Syria. Further still, the evidence of a Departmental policy ceasing escorted removals due to the COVID-19 outbreak was undermined by the concession made that escorted removals had recently occurred. The Commonwealth did not demonstrate that exceptions to the policy were available for some countries but not for Syria.

165 In any event, an inability to execute the physical transfer of a non-citizen to Syria for a period does not demonstrate that the person's removal from Australia as soon as reasonably

practicable was not nevertheless compromised by a failure to take all of the necessary pre-requisite steps to facilitate that physical transfer as and when it becomes practicable.

166 The Commonwealth contended that to demonstrate that removal from Australia had been carried into effect as soon as reasonably practicable, it was not necessary for it to demonstrate that all available steps to pursue or progress removal had been taken. In relation to the second period, the Commonwealth relied upon the steps taken in relation to Lebanon as being sufficient to demonstrate that the applicant's removal was being pursued by it as soon as reasonably practicable.

167 I have already accepted that perfection in the pursuit of the removal of a detainee as soon as reasonably practicable is not necessary. I do not however accept that, taking into account all of the circumstances, the steps taken by the Commonwealth in relation to the prospect of Lebanon accepting the applicant are sufficient to demonstrate that during the second period the applicant's removal from Australia has been undertaken or carried into effect as soon as reasonably practicable.

168 It may be accepted that pursuing the applicant's removal to Lebanon was a sufficiently viable possibility to justify its pursuance for a period. But that period could have commenced at the start of the first period. Over thirteen months have now passed since that time without any suggestion from the Lebanese authorities that there is any prospect of Lebanon accepting the applicant. I accept that the economic crisis and the COVID-19 outbreak in Lebanon will likely have caused delays, but Mr Yates deposed that it normally takes a number of months to receive a formal response from Lebanese General Security. Over ten months have now passed since Mr Yates reached out to his contact at Lebanese General Security and Mr Yates has yet to receive any substantive response to his numerous requests (the last of which was made in early February 2020), for an update on the status of the request made by the Commonwealth for Lebanon to accept the applicant. Ms Davis deposed that the Lebanese Ambassador had indicated to her that he would try to provide her with further information within two weeks of when they first met in relation to the applicant on 4 December 2019. Despite Ms Davis and the Department following up on many occasions, the Lebanese Ambassador has been unresponsive. All of that suggests to me that Lebanon has not been a viable possibility for pursuing the applicant's removal for many months at least.

169 However, even if removal to Lebanon was and remains a viable possibility, there is nothing put forward by the Commonwealth to justify why the applicant's removal to Syria has not been

pursued at the same time. The efforts made in relation to Lebanon were hardly resource intensive. As earlier indicated, even if it is the case that there are and have been for some time obstacles to the applicant's physical transfer to Syria, the necessary pre-requisite steps of obtaining Syrian approval including obtaining a travel document for the applicant, could but have not been pursued.

170 There may well be room for debate as to what steps should be reasonably pursued in an endeavour to remove a detainee from Australia as soon as reasonably practicable. Accepting that a broad view should be taken about the reasonableness of a course of action adopted to pursue such a removal, I am nevertheless unable to conclude that, in the circumstances relevant to the applicant's prospective removal from Australia since 26 July 2019 as demonstrated by the evidence, it may be said that the pursuance of a course for the applicant's removal from Australia which excluded Syria as a prospective receiving country was a reasonable course for undertaking or carrying into effect the applicant's removal from Australia as soon as reasonably practicable. Of course, in arriving at that conclusion, I have put aside, as the Commonwealth was required by the Act to do, the question of whether Australia has non-refoulement obligations in respect of the applicant.

171 That conclusion, in my view, compels my ultimate conclusion that, in the second period and on an objective assessment of the relevant circumstances, the removal of the applicant from Australia has not been shown to have been undertaken or carried into effect as soon as reasonably practicable, that there was therefore a departure from the requisite removal purpose for the applicant's detention over the course of that period and that, as a consequence, the applicant's detention by the Commonwealth was unlawful throughout that period.

CONCLUSION

172 I have concluded that, since 26 July 2019, the applicant's detention by the Commonwealth has been unlawful.

173 For the applicant's claim of false imprisonment made in the proceeding that commenced in this Court, my holding requires that that proceeding be listed for further hearing as to damages. I will make an order to that effect in that proceeding.

174 For the applicant's claim in the proceeding commenced in the Federal Circuit Court, my holding requires me to determine whether an order in the nature of a writ of habeas corpus directed to the Commonwealth commanding it to release the applicant should be made. The

Court's jurisdiction to make that order is not in contest. The availability and appropriateness of that remedy is supported by the discussion at [72]-[74] above. No discretionary considerations that would serve to deny the appropriateness of an order requiring the applicant's release from detention have been raised or are apparent to me. As Gray J said in *Chan* at [55] if habeas corpus is a discretionary remedy "the area in which discretion can be exercised must be very small. It is almost unthinkable that a court would sanction the continued unlawful detention of a person".

175 The Commonwealth did contend that an order releasing the applicant should not be made because s 189 of the Act would require an officer of the Commonwealth to immediately re-detain the applicant. Although not put in these terms, that submission may be taken to suggest that an order releasing the applicant would be inutile and for that reason ought not be made. However, for the reasons given at [60]-[64], I do not accept that in the prevailing circumstances which have led me to hold that s 196 does not operate to render lawful the applicant's continued detention, it would be lawful for an officer of the Commonwealth to re-detain the applicant exercising the power conferred by s 189 of the Act. As Black CJ, Sundberg and Weinberg JJ said in *Al Masri* at [30], an intention ought not be imputed to Parliament "such that if s 196 did not operate to render lawful the continued detention of an unlawful non-citizen, that consequence could be avoided by a succession of repeated actions to detain under s 189". Accordingly, the order I propose to make will have utility.

176 Lastly, there are conflicting views and therefore some doubt (see *Al-Kateb* at [28] (Gleeson CJ) and at [142] (Gummow J) as against [243] (Hayne J)) as to whether I have the capacity to make a supplementary order imposing conditions upon the applicant, such as a condition requiring the applicant to inform the Commonwealth of where he resides. However, no application has been made for any such conditions to be imposed upon the applicant and, in that circumstance, I need not give that matter further consideration.

177 In the proceeding which commenced in the Federal Circuit Court, I will make an order directed to the Commonwealth commanding it to release the applicant from detention forthwith.

178 In that proceeding the applicant seeks his costs. As an order for costs usually follows the event, and as no exceptional circumstances are apparent as to why that should not be so in this case, I will make an order to the effect that if no application opposing an order for costs is made by the Commonwealth within 7 days of the publication of these reasons, the Commonwealth pay the applicant's costs of the proceeding.

I certify that the preceding one hundred and seventy-eight (178) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromberg.

Associate:

Dated: 11 September 2020