HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S146/2025
File Title:	TCXM v. Minister for Immigration and Citizenship & Anor
Registry:	Sydney
Document filed:	Transcript -9-12-2025
Filing party:	HCA
Date filed:	10 Dec 2025

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[2025] HCATrans 083

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S146 of 2025

B e t w e e n -

TCXM

Appellant

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP

First Respondent

COMMONWEALTH OF AUSTRALIA

Second Respondent

GAGELER CJ
GORDON J
EDELMAN J
STEWARD J
GLEESON J
JAGOT J
BEECH-JONES J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON TUESDAY, 9 DECEMBER 2025, AT 10.00 AM

MR E.M. NEKVAPIL, SC: If the Court pleases, I appear with **MR J.D. DONNELLY**, **MR C.J. FITZGERALD** and **MR J.R.G. BLAKER** for the appellant. (instructed by Zarifi Lawyers)

MR S.P. DONAGHUE, KC, Solicitor-General of the Commonwealth of Australia**:** If it please your Honours, I appear with **MR P.M. KNOWLES, SC**, **MR B.D. KAPLAN, SC** and **MR M.P.A. MAYNARD** for the respondents. (instructed by Australian Government Solicitor)

MR N.M. WOOD, SC: May it please the Court, I appear with **MR J.E. HARTLEY**, **MS H.D. RYAN** and **MR R.A. NANTHAKUMAR** for the Human Rights Law Centre as amicus curiae. (instructed by Human Rights Law Centre)

GAGELER CJ: Thank you, Mr Wood. Before we begin, the parties have been notified that Justice Beech-Jones will be participating in the hearing by reading the transcript and have expressed no objection to that course. Mr Nekvapil.

MR NEKVAPIL: Thank you, your Honour. Your Honours, we propose to refer to the closed joint cause removed book. The only difference is that contains the unredacted judgment to which we propose to refer in the course of argument, but what I propose to do is to refer to it, I hope, only by directing your Honours' attention to it rather than reading from it.

GAGELER CJ: Is there anything in the closed material that you rely upon that is not in the open material?

MR NEKVAPIL: Yes, there is, your Honour, but I will make that clear within the first very initial part of my submissions, and then after that there will not be. It is just some facts about the interim arrangement.

GAGELER CJ: Yes, all right.

MR NEKVAPIL: And by consent, your Honours will know we filed a second further amended notice of appeal.

GAGELER CJ: Yes.

MR NEKVAPIL: So, your Honours, if I could ask your Honours to turn to the judgment – and I will be using the references to the redacted version of the judgment – at court book 89. Paragraph 36 sets out the text of section 198(2B):

> An officer must remove as soon as reasonably practicable an unlawful noncitizen if –

and it is the words before the "if" which are of great importance to this case. The respondents say that the duty is enlivened, and the primary judge made no error in holding to the contrary.

By ground 1, the appellant says firstly that the interim arrangement was entered in breach of a condition of procedural fairness; secondly, that this was therefore unlawful; thirdly, the primary judge could, and this Court on appeal would, on appeal grant an injunction to restrain the respondents from taking further action on the basis of that unlawful action; and fourthly, that it is not reasonably practicable to remove the appellant if a court has granted an injunction preventing that from occurring.

By ground 2, we say that on the proper construction of section 198(2B) and its application to the statutory and factual circumstances of this case, it is not reasonably practicable to remove the appellant to Nauru as there is a real risk that he would die there from a fatal asthma attack due to the lack of requisite specialist medical facilities to treat that condition.

Were the Court to uphold ground 2, we would submit that it would be appropriate to remit the matter to the Federal Court, in light of the passage of time, to determine whether the appellant would face a real risk of death in Nauru if removed there as at now. In oral submissions, we propose to commence with a very brief overview of the relevant facts and then to address ground 2 first and ground 1 second. If the Court pleases.

EDELMAN J: It is no part of either ground of yours that the appellant was selected as part of the small cohort or removal for reasons which included the fact that he had committed crimes?

MR NEKVAPIL: Not in terms of purpose. In terms of the statutory condition which led to him being removed, the character cancellation provisions turned on him having committed a crime, but we do not have purposive evidence or facts of that kind. The interim arrangement comprised the letters of 31 January, and 10 and 12 February between the President of Nauru and the Australian Minister for Home Affairs, and at the outset we want to just draw your Honours' attention to five facts about the arrangement.

If I could ask your Honours to turn to paragraph 42 of the judgment. This was the letter of 31 January, and the first point we would make is seen in the first indented paragraph there, that it was clear that the arrangement

was for the purpose of engaging sections 198AHB and 76AAA of the *Migration Act* – see three lines down:

> recent amendments . . . first such arrangement under these new provisions.

Second, that the terms of the arrangement expressly directed the arrangement to - - -

GORDON J: I am sorry to interrupt, did you say paragraph 42, on page 91?

MR NEKVAPIL: Yes, I did, your Honour.

GAGELER CJ: You are relying on the second sentence, is it?

MR NEKVAPIL: It is the second sentence in the first indented paragraph, and it says:

> As you are aware, recent amendments to our *Migration Act* –

GAGELER CJ: I see.

GORDON J: I see. Yes.

MR NEKVAPIL: And then the first such arrangement under those new provisions.

GORDON J: Do you rely on any other part of this letter?

MR NEKVAPIL: We do, your Honour. The second point is that – and your Honours see this bolded in the quotes from the three letters, that is bolded by his Honour the primary judge – it was directed to three individuals, one of whom was the appellant. The third thing we note is that, subject to the issues raised on this appeal, the terms of the arrangement itself would ensure that the conditions in section 76AAA were met in respect of the appellant, who consequently would have his visa cancelled, be detained and removed to Nauru.

GORDON J: Where does it say that?

MR NEKVAPIL: I just need to unpack that a bit for your Honour.

GORDON J: Thank you.

MR NEKVAPIL: And the point is that the only step additional and after the arrangement was a facultative step of a Commonwealth officer providing information by way of a visa application, but if your honours could turn to paragraph 43, this - - -

GORDON J: Sorry, are you going to come back to 42.

MR NEKVAPIL: I will, for my fourth and fifth points, your Honour.

GORDON J: Thank you.

MR NEKVAPIL: Paragraph 43 contains more detailed conditions, and your Honours see in clause 4, that:

> The GoN shall grant each person accepted for settlement while this arrangement is in force an indefinite stay visa to enter and remain –

In paragraph 47, which is the 10 February letter, which is part of the terms of the arrangement, the President of Nauru says that:

> each of the **initial 3 persons** . . . **will receive a long-term stay visa** –

That is bolded at the top of page 95 of the court book. In other words, not only would the arrangement coming into force satisfy section 76AAA(1)(c) of the *Migration Act*, but it was a term of the arrangement that the permission required by section 76AAA(1)(b) would be issued by Nauru.

Could I just note, on that, that at paragraph 52, your Honours see that the Nauruan Regulations which provided for the visa came into effect two days after the 10 February letter, on 12 February, the same day the arrangement itself came into force. Your Honours see that in clause 4(2) of the Nauru Regulations:

> The Director shall grant a long term stay visa to –

and then (a) refers to "an arrangement" so that, in effect, the regulations made it mandatory that there be a grant of a visa. On that topic – and this is a paragraph that I will not read out, but could I just ask your Honours on that same topic to read paragraph 45, at case book 94, and also paragraph 53 at court book 97.

Then, as to the administrative process for procuring the visas, described that as facultative, that is described at paragraphs 54 to 56 in full. We rely on the full findings there; part of it is redacted in the open judgment. So, that is the third point we wish to make.

The fourth point is that, coming back to paragraph 42 again – this is evident from paragraphs 42 and 43 – is that the term of the appellant's visa would be 30 years. The fifth point – and this is also to be seen from paragraph 42, and I draw your Honours' attention in particular to the first two dot points in the indented quote in paragraph 42 – is for that same 30-year period Australia would provide "financial support" to Nauru.

In that regard, can I also draw your Honours' attention please to paragraph 43, the attachment, and in particular to clause 7(f)(i), which is on page 93, and the same topic is also the subject of the first three lines in the chapeau in clause 9 and also clause 10. Then clause 8 notes other forms of ongoing involvement by Australia during the course of the arrangement.

Could we just then draw your Honours' attention – without reading it – to paragraph 40, at court book page 90, and in particular to the last two lines of paragraph 40, which are redacted. Then there are also ongoing discussions in the evidence on the same topic, which are summarised from paragraphs 69 to 73 of the judgment, but I do not need to take your Honours there now. So, that completes the redacted parts of the judgment that I wish to take the Court to. Could I then turn to the - - -

GORDON J: Do you propose to leave paragraph 42 now, Mr Nekvapil?

MR NEKVAPIL: I did, yes, your Honour.

GORDON J: In response to the questions raised – a question raised by Justice Edelman – I just want to understand that. In paragraph 42 in the last paragraph, it refers to some of those matters raised by his Honour, I thought, as well as on the following couple of pages. Is that the extent of it?

MR NEKVAPIL: Can I come back to that, because there was a great deal of evidence that was led, and we have made a decision to stick to the findings that are made in the judgment - - -

GORDON J: I see.

MR NEKVAPIL: - - - but I will just need to check whether there is any other matters referred to in the judgment about those matters relevant to your Honour Justice Edelman's question.

GORDON J: Thank you. I am grateful, thank you.

MR NEKVAPIL: Thank you, your Honour. As to the findings on the applicant's health, we have summarised them in paragraph 8 of our written submissions, but given the importance that they may take on for ground 2, I

just wish to take your Honours briefly to those. Could I ask your Honours to go to page 85 of the court book.

GAGELER CJ: From here on, we can refer to the open version of the judgment, can we?

MR NEKVAPIL: Yes, you can, your Honour. It is only that my page numbers are to the closed - - -

GAGELER CJ: If you just give us the paragraph numbers, it will be sufficient.

MR NEKVAPIL: Yes, thank you. Paragraph 21, your Honours see there was a trial over two days and that the applicant led affidavit evidence from the applicant. Subparagraph (b) is important but not (c):

> Professor Gregory King, a respiratory physician with specific sub-specialty training and expertise in asthma, who prepared two reports –

Paragraph 22, you see that the appellant and Professor King were cross-examined. At paragraph 23, his Honour made favourable comments about the appellant as a witness and accepted his lay evidence. At paragraph 24, his Honour made favourable comments about Professor King as a witness and accepted his expert evidence. The respondents led no expert evidence. The findings on the appellant's health commenced at paragraph77. At paragraph 77 his Honour accepted the:

> long history of severe and uncontrolled asthma –

At paragraph 81 the primary judge recorded the appellant's evidence that his conditions are worse in hot, humid climates and rejected the respondents' suggestion this was a recent invention. Your Honours will see that there was a suggestion it was a recent invention. Documents were then produced showing that that it had actually been raised by the appellant earlier, and his Honour accepted it was not a recent invention.

Paragraph 82, Professor King was cross-examined briefly but not challenged on the opinions. Then, from paragraph 83, his Honour recorded Professor King's opinions, which his Honour accepted and says that he accepted, that the appellant:

> has suffered severe asthma since at least 2017 –

and falls within the most severe category which is:

> characterised by recurrent hospital admission, past ICU admission . . . **likely to have ongoing asthma attacks, which may worsen with age**.

That his condition is further complicated by potential "Dysfunctional Breathing Syndrome":

> he requires regular specialist follow-up and management, ideally in a specialist –

severe:

> asthma service –

That absent those services:

> The possible and likely consequences . . . are **increasing frequency of asthma attacks and potentially of having a fatal asthma attack**.

And that is bolded in paragraph 87. Also see paragraph 84, which near the top includes – I am sorry, in the second paragraph is bolded:

> **including risk of death**.

Then at paragraph 86, not bolded, but your Honours see at the end of the paragraph:

> severe asthma attacks that are potentially life-threatening.

In paragraph 89, what his Honour recorded is that Professor King was then given some discovered documents about the medical facilities available in Nauru and asked to prepare a supplementary report, which was his second report. Then his Honour quotes and bolds:

> **The documentation of the medical services in the facility in the Republic of Nauru substantiate my opinion that the medical services available are insufficient to manage severe asthma on an ongoing basis, and to adequately manage severe or life-threatening attacks.**

And then at paragraph 90, his Honour found that:

> On the basis of this evidence . . . the medical services available in Nauru are inadequate to manage the applicant's condition of severe asthma on an ongoing basis.

STEWARD J: Do you accept the findings at paragraph 94?

MR NEKVAPIL: Yes, we do.

STEWARD J: I see.

MR NEKVAPIL: And that was for obvious reasons. Given the state of law on *M38* and *NATB*, that was a line of attack and, you can see, an effective line of attack in cross-examination. The findings were, in effect, he would be able to travel. There was also evidence about - - -

STEWARD J: He might be able to travel – he might. It depends.

MR NEKVAPIL: He might be able to travel, but there was evidence about the sorts of things that would be done before he travelled and so on. So, our case rests squarely on what happens after he arrives, or the risk of what happens after he arrives.

STEWARD J: I see. Thank you for that. Could I ask you a related question?

MR NEKVAPIL: Yes.

STEWARD J: Do you say that his medical condition would have been sufficient to justify the grant of a complementary protection visa?

MR NEKVAPIL: What we say about that, your Honour, is that there was no prospect under the specialist administrative regime in the Act of that occurring, for the reason that a complementary protection visa under section 36(2)(aa) was only available as against a "receiving country" – that is, a "country of nationality" or "former habitual residence" – and that the appellant and other persons to whom these provisions are directed, and this interim arrangement is directed, are not persons for whom Nauru is a receiving country.

STEWARD J: Thank you for that.

MR NEKVAPIL: So, the issue, in effect, does not arise in this statutory scheme. That is, as your Honours would appreciate, we say a very important point of distinction from *M38*, *NATB*, *SE* and all of those earlier cases where in effect what was happening was a person either had, in most of the cases, applied for a protection visa, lost, gone through the tribunal and the courts and then come to a court on an objective pleading to try and in effect rerun those allegations.

Could we move then, your Honours, to ground 2, and this is point 3 in our oral outline. Could I ask your Honours just to turn to paragraph 181 in the judgment. You can see here set out our ground 6, and we would just note this, that ground 5(e) and 6(f) expressly relied on non-refoulement, and section 197C(3), which is carved out of section 76AAA. Ground 6, paragraph (c) – it was no part of ground 6(c) to allege non-refoulement, rather – and your Honours can see this in paragraph (c)(ii):

> there is a real risk that the Applicant will suffer serious harm or death –

and it is really the serious risk of death that we rely on, on ground 2 in the appeal. So, the major premise in ground 6(c) was that section 198 did not require that he be removed to a real risk of death, and the minor premise was that the evidence established he faced such a risk.

Now, he failed on the m ajor premise, and that was because of his Honour's reasoning at paragraphs 183 to 186, where in effect his Honour concluded that he was bound by *NATB* to reject the appellant's construction on the major premise. Just to note, the effect of that was that his Honour – even though in paragraph 185 his Honour said:

> the fact that (as I have found) the medical services . . . are inadequate –

his Honour did not need to make findings in terms of a real risk of death, because having rejected the major premise it was unnecessary to do so, but we have taken your Honours to the evidence that his Honour did accept.

So *NATB*, as your Honours know, held that, by section 198, the Commonwealth Parliament has required the Executive to remove an unlawful noncitizen, even to virtually certain death in the removee country. To use the text, it means that Parliament intended that it is reasonably practicable to remove an unlawful noncitizen to a country, even if it is virtually certain that what awaits in that country is a premature death, and we submit that section 198 should not be so construed.

If we move then to point 4, we just want to start and touch briefly on the text and we will return to it in our principle of legality argument, but just what we would say by a starting point – your Honours have considered the text recently in *MZAPC* and I will not go over that, it is set out in all the parties' written submissions, but what we say is that there is nothing in the text of:

> an officer must remove as soon as "reasonably practicable" an unlawful non-citizen –

including "remove" being defined as removed from Australia – that requires a conclusion that what is reasonably practicable in connection with removal must pay no regard to a real risk that the person will dies once removed. We would submit that in ordinary use of the English language, it makes sense to say that it is not reasonably practicable to remove a person or thing from one place or state to another if they will then die or cease to exist.

Now, much turns on the meaning of "remove" because you could have for example workplace – reasonably practicable to remove a risk, or remove a cancer, something like that, where the meaning of "remove" in its context and purpose simply means to expel or reject, but - - -

GAGELER CJ: Can I just go back to the factual premise for this. As I understand it, you assert a real risk of death in Nauru. You do not assert, as I understand it, that the findings made by the primary judge rise to that level. Is that right, or are you saying that the findings you have taken us to give you real risk of death that you speak of?

MR NEKVAPIL: We need to say two things in answer. The first is we say that the findings do rise for a real risk of death, but the second is we say that, because the primary judge decided it on the major premise, he did not actually go on to draw that conclusion of fact. The reason that we would submit that this Court would remit if there was an error in rejecting the major premise is because the facts may now have changed.

The primary judge not having made a finding about real risk of death – one way or the other – for example, there may now be a change in the medical facilities available in Nauru, or anything of that kind. So that it would therefore be appropriate to remit if your Honours were to find an error in construing section 198 by reference to *NATB*.

GAGELER CJ: Now, just to be clear about the primary way you put the case, leave aside any change of circumstances.

MR NEKVAPIL: Yes.

GAGELER CJ: You say that the findings that you have taken us to on the basis of the medical evidence establish what you describe at high level as a real risk of death.

MR NEKVAPIL: Yes, we do say that.

GAGELER CJ: All right.

MR NEKVAPIL: We say that, on all the findings by the primary judge, which he accepted - - -

GAGELER CJ: I understand.

MR NEKVAPIL: - - - absent the medical facilities, there is a real risk of premature death from a fatal asthma attack if the appellant is removed to Nauru.

GORDON J: The principal one being that they are inadequate to deal with your client's medical condition - - -

MR NEKVAPIL: Yes, because the first set of findings - - -

GORDON J: - - - which is the finding the primary judge made.

MR NEKVAPIL: That is right. You need the facilities in order to ameliorate the risk and so, the facilities being inadequate, there just remains the risk and it will become worse with age and is worse in hot and humid climates and all of that.

GLEESON J: Because there already is a real risk of premature death from an asthma attack in this man's case.

MR NEKVAPIL: Well, that is true, your Honour, and it may be that one needs to introduce adjectives. I have tried to avoid doing that, I have just said "premature", but what we say is that one can imagine all sorts of hypothetical cases where those adjectives might become important. But in this case, what one is talking about is a, one could say, preventable, imminent, real risk of a death from an asthma attack that is not being treated.

GORDON J: Just so we – I am not harping on this, I promise, but if you go to paragraphs 89 and 90 of the judgment – they are the ones you took us to before – you have Professor King's evidence about the insufficiency of the medical services available both for ongoing management and then to deal with and manage a severe attack or life-threatening attack, and then the conclusion or finding made by the judge at paragraph 90.

MR NEKVAPIL: Yes, and that is – you will see in ground 6(c) it was pleaded in exactly that way.

GORDON J: Thank you.

MR NEKVAPIL: The primary cause of the risk – the positive cause of the risk – is the asthma condition. Therefore, there is the need for adequate

facilities, there is inadequate facilities and therefore the real risk of imminent premature death from a fatal asthma attack.

GAGELER CJ: A greater risk than if he were to stay in Australia.

MR NEKVAPIL: Thank you, your Honour, that is – at least that.

GAGELER CJ: You cannot say much more than that, can you?

MR NEKVAPIL: No, probably not. One can say why, but that is – comparatively put, that is our point, yes. But a substantial – I mean, the reason for taking your Honours to the facts is this is a substantial situation, it is not one of someone having a latent genetic disposition to something or – one can imagine other scenarios. This is an immediate, historically-proven condition.

EDELMAN J: That is the application to these facts. What, precisely, do you say is the legal constraint within 198(2)(b)?

MR NEKVAPIL: Yes. What we say is there is not the legal constraint which is being put there by *NATB*, which his Honour followed.

EDELMAN J: But you say the legal constraint is that it prevents removal in a circumstance where anyone faces a greater risk of premature death, for any reason.

MR NEKVAPIL: What we say in item 4 in the oral outline is that section 198(2)(b), the chapeau, the text can be construed so that it is not reasonably practicable to remove a person to a country where they face a real risk of death.

EDELMAN J: That just cannot be right, because everyone faces a real risk of death.

MR NEKVAPIL: Yes.

EDELMAN J: So, at the very least, it has to be a real risk of premature death that would not otherwise have existed.

MR NEKVAPIL: Yes.

EDELMAN J: And that could be even due to – either due to the medical resources of the country or due to the person's own lack of resources, could it?

MR NEKVAPIL: It could be, your Honour. There are all sorts of possibilities, but what we would say in this case is that it is a real risk of imminent death from a known medical condition, which if untreated - - -

EDELMAN J: Why would it have to be a medical condition?

MR NEKVAPIL: Well, it would not need to be, but it would need to be a real risk of premature death that is real and substantial, rather than potential.

GORDON J: Can I just ask about paragraph 4. In paragraph 3 we have:

> If there was a serious risk the Appellant would die –

And then we have, in 4:

> where they face a real risk of death –

MR NEKVAPIL: Yes.

GORDON J: They are different.

MR NEKVAPIL: Yes.

GORDON J: I just want to identify what it is that is the limit that you would seek to have us impose or have it subject to and construed as embracing. Is it a real risk of premature death from a known medical condition, if untreated? Or is it - - -

MR NEKVAPIL: I would not want to go so far as it having to be a known medical condition, because that is the application in this case, but it would be a real risk of premature death.

STEWARD J: Or increased risk.

MR NEKVAPIL: I am going to get stuck in word games, but a real or substantial risk of premature death. The substance of it is that it has to be something that, if you send this person there, it is really possible that their life will be a lot shorter than it otherwise would be.

GAGELER CJ: From any cause?

MR NEKVAPIL: From any cause that is not non-refoulement, because section 197C(1), Parliament has spoken with irresistible clearness, which we will come to in the principle of legality. So, in the Venn diagram of things, if it is a cause which could – falls within a non-refoulement-type

claim, then 197C(1) applies, irresistibly clearly, and the only remedy is 197C(3). That is the administrative regime Parliament has enacted.

EDELMAN J: So, we get to the situation where a person who faces a real and substantial increase in premature death, due perhaps to their own lack of resources, is not caught by 198(2B), but a person who faces a real and substantial increase in premature death, due to reasons of non-refoulement, is caught.

MR NEKVAPIL: Yes, we do, and I am not sure about your Honour's first part, which was slightly different to the example presented by the facts of this case, but you do have an argument against our construction, which is that if a person faces a real risk of being executed on return on repatriation, then 197C(1) would preclude it.

Although hopefully in that circumstance, 197C(3) would come in aid, but if a person faces a real risk of premature death for a reason that is not non-refoulement, we would say that it is not reasonably practicable to remove, and the reason we say one can arrive at that construction is for reasons we will now seek to develop.

We say that there is an assumption or underlying purpose in powers of removal, which is removal to a country where a person may live, and that then coheres with the right to life and the principle of legality so that Parliament would need to speak irresistibly clearly to make the text of 198, which does not of itself draw any bright line in this regard, apply in a way that would curtail the right to life.

JAGOT J: What about clearly documented, materially shorter life expectancies in any receiving country? There are many countries which have a substantially shorter life expectancy. Your formula: a real risk of premature death that would not exist but for the removal from Australia to a receiving country from any non-refoulement clause – would capture a country where there was a materially short life expectancy, probably from other things, due to lack of medical care that would otherwise be available in a country like Australia. So, it would capture that.

MR NEKVAPIL: Yes, and I would seek to put that on the same end of the spectrum as a latent genetic risk of a cancer that might be untreatable, or something of that kind, in the sense that there needs to be something immediate and substantial about it, something imminent about the risk, not something that - - -

JAGOT J: So that is not the test – so it is not any non-refoulement clause, it has to be – it is narrower. The Chief Justice said any non-refoulement

clause, you said yes to that, but now you are saying – I am not trying to trip you up, I am just saying it is not yes to that; it is something else.

MR NEKVAPIL: What we say about anything that is non-refoulement is covered by 197C. Anything that is not non-refoulement, it needs to be something imminent and real in terms of something that might kill a person in the imminent future.

JAGOT J: That is my – "imminent and real", I mean if you have documented – life expectancy in this country on average is 50, that is – I am trying to just get the criteria right – imminent and real, it is known, just as this man's asthma is known. I am just trying to work out where you are really drawing the line.

MR NEKVAPIL: I think the difference there, your Honour, is that it is a longer-term product of the, in effect, sort of life that a person will live in that country.

JAGOT J: So, is it a risk specific to the individual that is known, as opposed to a risk that would affect anyone living in that country? Is that what you are trying to say?

MR NEKVAPIL: It is a risk that is – I mean, examples in *M38* were massive anarchy, or something which might be a risk to anyone who goes there, but in this case what we are saying is there is a risk that is specific to the appellant which is because of this medical condition he has that upon and after arrival there is a real risk that within the short term, within the immediate future after his arrival, he may suffer from a fatal asthma attack.

JAGOT J: So, because it covers things like anarchy – so, it is not specific to the individual because that would affect everybody equally, the risk that you might get killed in a riot or something.

MR NEKVAPIL: Yes, and we would embrace that example from *M38* as one where it would be not reasonably practicable to send a person into that situation because there is a general imminent or immediate risk of losing your life in the first week you are there. I mean that sort of imminence. I do not want the first week to be the test, but - - -

JAGOT J: No, no, I understand.

MR NEKVAPIL: - - - I am trying to indicate that, despite the large error of twilight which is going to exist in the examples, we say that there is a day which our client falls within which is a risk of this degree and imminence and reality.

GORDON J: The cases of the authorities, and both sides set them out, deal with things that you – when they are looking at reasonable practicability, you cannot dump a person a sea, you have got to find them a place, it cannot be transitory, you have to give them a place to live.

MR NEKVAPIL: Yes.

GORDON J: *M38* talked about anarchy.

MR NEKVAPIL: Yes.

GORDON J: This is the first time when you are asking us, in effect, to identify a new meaning, interpretation of what is reasonably practicable.

MR NEKVAPIL: Yes.

GORDON J: As I understand it, drawing on what you have put as the right to life and liberty, but put that to one side at the moment, the way it is then put is to say, as I understand it, that there the person faces a real risk of imminent and premature death – that is, to the person – from a cause that is not non-refoulement.

MR NEKVAPIL: Yes.

GLEESON J: So, does that mean that anyone around the world with this man's condition, if they were able to come to Australia on, say, a holiday visa, would then be able to say you cannot remove me to my home country where medical facilities are inadequate and would expose me to that imminent risk?

MR NEKVAPIL: There are two responses to that question, your Honour. The first is that that might rise to the point of non-refoulement and, given that that is the receiving country, could also be the subject of a complementary protection application so that it falls within the specialised administrative regime. That is also the problem of our learned friends' example of a Nauruan citizen who comes here. The Act deals differently with what I will call repatriation.

But the second is that it is what is reasonably practicable. So, one does not have to say that a risk of this kind will always, in every circumstance, make it not reasonably practicable, we need to do something less ambitious than that, which is to say it is not precluded from consideration. So, for example, a person might say: even though I have a terminal illness which can be treated indefinitely in Australia, I want to go and die in my homeland, and therefore I am asking you to remove me. In

that situation, clearly it would be reasonably practicable because it is in accordance with reason for someone to have that autonomy.

STEWARD J: Can I ask you, take the example of a Nauruan citizen who has the same medical condition as your client, how do you say you meet the definition of "significant harm" in 36(2A)? Which subparagraph do we fit in if we were to seek a complementary protection visa?

MR NEKVAPIL: Just excuse me one moment, your Honour.

STEWARD J: Of course.

MR NEKVAPIL: Well, section 36(2)(aa):

> a non-citizen in Australia –

which they would be:

> has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country –

here, their country of nationality:

> there is a real risk that the non-citizen will suffer significant harm –

STEWARD J: Yes, but which subparagraph of the definition? Is it – are we "arbitrarily deprived"?

MR NEKVAPIL: Of significant harm?

STEWARD J: Yes, exactly.

MR NEKVAPIL: Yes.

STEWARD J: It is not the death penalty; it is not torture.

MR NEKVAPIL: No. Obviously, your Honour, it is going to depend on the circumstances.

STEWARD J: Of course it does, yes.

MR NEKVAPIL: But if it is purely a lack of medical facilities and a medical condition, let us say they have come here for treatment and then - - -

STEWARD J: Just assume that your client is a Nauruan citizen is probably the easiest way to put it.

MR NEKVAPIL: Yes.

STEWARD J: You can think about it and come back to it if you wish to.

MR NEKVAPIL: I would like to come back to it.

STEWARD J: All right. Very well. That is fine.

MR NEKVAPIL: But what I would – I think that part of the answer is the one I have just given, just to reiterate that, that what is reasonably practicable with respect to a consideration of a real risk may be different where we are talking about repatriation, and this is a novel circumstance where we are talking about deportation to a country with which a person has no connection.

Now, your Honours, what we wish to develop is what I have described as the right to live somewhere, and our proposition here is that, in context, section 198, like preceding deportation powers – this is part 5(1) of the oral outline – enacted by the Commonwealth Parliament is concerned with removal from Australia to another country where the person may continue their existence. That is, may live and not simply with expulsion from Australia.

If I could – just while I am taking your Honours to the next reference – ask for some folders to be handed up which are just three materials which are in paragraphs 15 to 18 of our reply which came in after the joint book of authorities, and our learned friends have them. Could I take your Honours, just while that is happening, please to volume 6 tab 24. This is the decision in *ASF17*. At paragraph [35], which is at 1466 of the joint book, your Honours refer to:

> there must first and foremost be identified a country to which that alien might be removed –

Just while we are here, I will just remind your Honours of paragraphs [39] and [40] where the real-world difficulties of removing to a non-receiving country were discussed.

Your Honours will see this point in paragraphs 15 to 18 of our reply, but the folder that we have handed up contains some sections from Vattel, the decision of the United States Supreme Court in *Fong Yue Ting*, the decision of the Privy Council and Attorney-General in *Cain*, and, as

your Honours know, *Robtelmes* was heavily influenced by those three sources.

GAGELER CJ: It may be that you handed up five sets of folders, not six. Do you have a spare set? I am sorry, I am just being told that there is another one that has been handed up.

MR NEKVAPIL: Okay, Mr Wood can have his back. The propositions we seek to make by reference to this material by way of historical context is that the purpose of section 198 is to remove to a country where a person can live. I just seek to make two points before I start which will seek to illustrate it.

The first is that, despite the constitutional right of a sovereign being to expel or deport, in practice, legislation enacted in exercise of that right has been enacted with the purpose of deporting the person to a country where they may thereafter live rather than merely pushing them over a land border or, in Australia's case, pushing them out to sea in a boat or dropping them on a rock.

GORDON J: Can I just say, I mean, deportation has historically been seen as deportation to a country to which you have a right to return, as distinct from removal. Deportation being a place to where you have a right to live is understandable in that context. Is it different for removal? Your answer is no.

MR NEKVAPIL: Our answer is no because the same – it is almost an unspoken assumption, but we wish to speak it, which is that the whole purpose of removing to a country, which is the problem which has given rise to a number of recent cases in this Court, is the inability to find a country to which a person can be removed and where they might reside, and is also in effect the mischief to which the present legislative scheme is directed.

GORDON J: Of course, the position would alter if they consented.

MR NEKVAPIL: Of course, yes, but Justice Hayne in *Al-Kateb* noted that in *Robtelmes* it was not deportation not to a country but – not to a particular country, but it is still to a country where they might live. So, we will see if we can develop this, and we do say that it still informs an underlying assumption in the removal powers despite them now being described as removal rather than deportation.

GLEESON J: Would there not be a lot of people who might be classified as economic refugees rather than political refugees who would have a case

of saying that, if they were returned to their country, they could not live there?

MR NEKVAPIL: We would submit that those concerns in respect to receiving countries are seen by Parliament predominantly to be dealt with by the provisions dealing with claims of return to the receiving country. Could I take your Honours to section 228 in Vattel?

GAGELER CJ: Sorry, what are we doing?

MR NEKVAPIL: I am sorry, your Honour, it is behind tab 4 in the folder I have just handed up, and it is just some extracts from Vattel. Could we just note in section 228 near the bottom the author explained that:

> exile and banishment –

are terms that have been applied:

> to the expulsion of a foreigner who is driven from a country where he had no settlement –

That is just important, definitionally, for the part that we wish to take your Honours to now. Could we go to section 229, and your Honours will see the sidenote:

> The exile and banished man have a right to live somewhere.

and:

> A man, by being exiled or banished, does not forfeit the human character, nor consequently his right to dwell somewhere on earth.

EDELMAN J: Where are you reading from?

MR NEKVAPIL: That is from section 229 on page 107, and I have just referred to the terms of the sidenote:

> have a right to live somewhere.

Then the next sentence:

> He derives this right from nature, or rather from its Author –

We just note the striking similarity in the explanation of the right to live somewhere as part of the *The Law of Nations* to the explanation by Blackstone, within about eight years, of the right to life, albeit in more

religious terms in those days. The right to live somewhere was repeated on the last page in the extract which is from book two in section 125:

> In speaking of exile and banishment, we have observed that every man has a right to dwell somewhere upon earth.

Then can we just point out in section 231, which is relied on heavily by the Supreme Court in *Fong Yue Ting*, by the Privy Council *Attorney-General v Cain* and by this Court in *Robtelmes,* the terms for expulsion, or the terms in which Vattel described expulsion is at page 108, about 9 lines down:

> Thus, also, it has a right to send them elsewhere –

So, although the authorities, which I will take your Honours to now, refer to "expel" or "deport", it is clear that Vattel's concept of it was to send elsewhere, where the person may have a right to live. Could I ask your Honours to turn then to - - -

EDELMAN J: One difficulty is that Vattel's discussion is in the context of the limits of punishment, but you have abandoned a case that this amounts to punishment.

MR NEKVAPIL: We have not abandoned that, your Honour.

EDELMAN J: I understood your answer to my question at the start, that you did not put any case based on the fact that a crime had anything to do with the reasons for selection of these three people.

MR NEKVAPIL: I am sorry, I meant that – I did say that there was no evidence of a subjective purpose, but we do wish to advance a case that this is punitive in respect of this precise combination and regime. But we say that there is a wider premise or assumption which then feeds into these cases. So, *Fong Yue Ting* concerned a provision which your Honours see, section 2, set out at page 699.

GORDON J: This is under tab 3?

MR NEKVAPIL: It is tab 3, thank you, your Honour. So, this was a deportation provision for repatriation of the kind your Honour asked me about. At page 707, Justice Gray, writing for the majority, refers to:

> The right of a nation to expel or deport foreigners . . . as the right to prohibit and prevent their entrance into the country.

That is the passage relied on by Chief Justice Griffith in *Robtelmes*. Then there is the reference to Vattel:

a right to send them elsewhere –

There is a discussion of some authorities from the time about taking to the frontier, and then one comes to, at page 709, a definition of deportation, which is also picked up in *Robtelmes*:

> "Deportation" is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken.

We just note there the notion of "the country to which he is taken" and being governed by those laws. Then can I contrast that, your Honours, with the example given by Justice Field in dissent at page 756. At about four lines down:

> According to this theory, congress might have ordered executive officers to take the Chinese laborers to the ocean, and put them into a boat, and set them adrift, or to take them to the borders of Mexico, and turn them loose there, and in both cases without any means of support. Indeed, it might have sanctioned towards these laborers the most shocking brutality conceivable.

Now, if that sort of law was constitutionally permissible, it is not what Congress in fact had done. Rather, it exercised the very muscular constitutional power of expulsion by a humane law for deportation which recognise the foundational principle that the people, when removed, would have a right to live somewhere, in this case by way of repatriation. Could I take your Honours then - - -

GAGELER CJ: So, what do we take from this case?

MR NEKVAPIL: When your Honours look at *NATB*, there is a discussion of whether removal is removal from or removal from and to. What we say is that it is a fundamental premise of the deportation powers in these cases, as well as all of the powers that this Court has considered, historically, of this kind, that a person is being deported to a place where they may continue to live.

GORDON J: So, I put to you before, I did not understand there to be any dispute between either yourself or the Commonwealth picking up the proposition here that they could not be taken and just put out to sea, they had to be taken to a place where they had a right to live. I do not know that those things are in issue – and it cannot be transitory is another way of what

some of the authorities have looked at it. The question is whether it goes further. I might be wrong, Mr Nekvapil, but - - -

MR NEKVAPIL: Well, what we say though, your Honour, is once one appreciates that the purpose of the power of the duty in section 198 is not simply to expel or remove out of Australia but remove to a country, for the purpose of a person living in that country, then the expression "reasonably practicable to remove" takes on a complexion which is capable of recognising a person's right to life.

So, if I can, noting the time, just come forward for a moment to – we make points which your Honours just in effect said to me about needing a right to reside somewhere where a person can actually enter and have a long-term residence, and we would say that a right to residence, which is also the object of the statutory provisions here – section 198AHB and 76AAA(1)(b), which produce a:

permission to enter and remain –

the purpose is to provide a right to reside, but that a right to reside is not an end in itself but the condition necessary for a person to in effect live out their natural life in the country to which they are removed. We say there is a resonance between that notion and the express terms of the power in section 198AHB(1), which refers to the "ongoing presence" of a person.

That can be found in paragraph 37 of the judgment below, and we say that the whole purpose of the scheme, which your Honours can see in the extrinsic materials that the primary judge referred to, is to solve the problem – or the mischief, I will call it – discussed in *YBFZ* of finding a place where people will have a right to reside and an ongoing presence.

STEWARD J: Is it your case that the nub of what you are trying to put to us, or putting to us, is really not so much in (2)(b), but in 76AAA(1)(b), that it is a condition that the noncitizen has permission to enter and remain in that country? Is that where we should be looking in this area?

MR NEKVAPIL: Yes. That is how this scheme, coherent with what we would say is the purpose of section – the underlying premise of 198, is to produce a right to enter and remain. That is what 76AAA(1)(b) does.

STEWARD J: And is it your case that – I know you have not put it so far, but is it a logical aspect of your case that you would say that 76AAA(1)(b) is not satisfied here?

MR NEKVAPIL: No, we say 76AAA(1)(b) is about producing a legal right, that is, a right to reside in a place.

STEWARD J: But it is only triggered where you can say there is permission to enter and remain in that country.

MR NEKVAPIL: Yes.

STEWARD J: You say that is satisfied here?

MR NEKVAPIL: We say that the effect of the interim arrangement itself was to give a right to enter and remain - - -

STEWARD J: All right. Thank you.

MR NEKVAPIL: - - - but we also, from Australia's side of the equation, point to 76AAA(1)(c), which takes you to 198AHB(1), which describes an arrangement, including for the "ongoing presence", and we have shown your Honours the interim arrangement.

But can I come forward to point 6 in our outline, which is that with the principle of legality, section 198's text would be construed so that it is not reasonably practicable to remove a person to a country if they face a risk of death of the kind I have described. Could I take your Honours to volume 7 of the joint bundle of authorities.

STEWARD J: Are we going to be using this folder that you have handed up again?

MR NEKVAPIL: I do not think so.

STEWARD J: All right. Thank you.

MR NEKVAPIL: I had more, but I think I am moving on now.

GAGELER CJ: I am a little confused about this argument. We are not really concerned with 76AAA or 198AHB, are we? I mean, they set the context for its application in these circumstances, but as I understand it, you are presenting an argument that is based on the ubiquitous language of the requirement to remove from Australia "as soon as reasonably practicable".

MR NEKVAPIL: Yes.

GAGELER CJ: So, your argument applies to that language as used throughout section 198, as I understand it.

MR NEKVAPIL: Yes, and I have probably raced through that a bit too quickly. The only point at this point in the argument for referring

to 76AAA and 198AHB is to say that they cohere with the notion that 198 is about removal to a place where a person may live, because the very purpose of enacting those provisions was to open an opportunity for section 198 to be able to operate in that way by producing a country where the people may live. At this point of the argument it is just to say that is coherent with the assumption, we say, underpinning 198, which is it is about removal to a place where a person may live.

GAGELER CJ: But this language has been in the Act since – when? Since 1992?

MR NEKVAPIL: Section 198? It basically finds its genesis in the *Lim* provisions, but I think 1992 is the commencement of 198 – yes.

GAGELER CJ: All right. And so, you are presenting an in-principle argument by reference to what you are calling the principle of legality as to why the language should be given a different meaning from what it has been understood to mean since 2003, is that right?

MR NEKVAPIL: It has been understood by the Full Court of the Federal Court to mean that. It is since section 197C has since been enacted to give effect to, really, the dispositive reason for the decision in *NATB*, which is that case was about a non-refoulement claim. We would say that section 197C has given effect to *NATB* in light of some later cases which might have cast doubt on whether non-refoulement was excluded, but in no way does a statutory enactment of that principle reenact an understanding in *NATB* about the right to life outside of non-refoulement. That is what we say.

So, we say that this argument, on a case of this kind – it was argued in front of Justice French in *WAJZ*, but his Honour said he was bound by *NATB*, and so an argument in a case of this kind, which is not a non-refoulement case, has not come to this Court previously. The principle of legality was considered in *NATB* – and I will come to it in just a moment – but we say that it was not considered, with respect, correctly, and we would seek to invoke it, what we say is on the correct approach.

Could I ask your Honours to turn to volume 7, tab 44. I know your Honour Justice Edelman has already asked me about the different contexts of punishment. I recognise this case is in a different context, but it does discuss fundamental rights which also, in this case, include life, for the purpose of the principle of legality. Could I take your Honours to paragraph [9], which is at 2091. About 5 lines down, your Honours quoted from *Lim*:

> "an alien who is actually within this country enjoys the protection of our law".

Your Honours immediately then referring to the right to life, and again at paragraphs [12] and [14], and in paragraph [12], for the "irreducible status" of human beings, your Honours cited the passage in Blackstone, which includes page 128, which I have said aligns with the explanation in Vattel of the basis for the right to live somewhere.

Now, we say the right to life is thus engaged by a construction of the text of section 198 whereby it is reasonably practicable to remove a person from Australia, where they are owed protection of law, to a country where they will not be able to live. That is, where that purpose, premise or assumption behind the power of removal is not borne out in substance because the person would not live, but instead will or may die. We would say "will die" to reflect *NATB*'s virtual certainty or, on our facts, a real risk.

Your Honours have our submissions. We have given your Honours the reference to *Hurt v The King*. We would say that, this being a most fundamental right, it would require irresistible clarity, but we say that there is nothing in the text of:

> An officer –

who:

> must remove as soon as reasonably practicable an unlawful non-citizen –

which requires a conclusion that what is reasonably practicable in connection with removal must pay no regard to a real risk of the person dying after being removed.

GORDON J: It is a real risk of imminent or premature death, is it not?

MR NEKVAPIL: Yes, of imminent or premature death.

GORDON J: Because unfortunately, we all die.

MR NEKVAPIL: Of course, everyone is going to die sometime after they are removed - - -

GORDON J: So, I think we need to make sure that we understand what it is you are asking.

MR NEKVAPIL: Thank you, your Honour – of imminent and premature death. Upon arrival in the country, in effect, they will have that risk of imminent and premature death. We say that that construction is just as a matter of ordinary text, but especially in the context I have just tried to describe, being of a country where they may live, so we say that in the use of ordinary English words, if a person will die if removed from one place to another, it could be said not to be reasonably practicable to remove them there, and therefore the principle of legality requires plain speaking to change the meaning of those words in a way that curtails the right to life.

Now, by section 197C(1), Parliament has spoken irresistibly clearly in terms of one set of obligations at international law, and that clear speaking also overlaps with the right to life in that, if a real risk to life gives rise to non-refoulement, then by section 197C, Parliament has said that is "irrelevant" to section 198.

The reason – not that the reason necessarily matters, but the reason they have done that is because of the existence of the special administrative regime, and we would submit that it is open to Parliament to speak clearly also to the right to life in the way it has done for international obligations by section 197C, but not having done so, the principle of legality favours the construction we advance. If I can turn, then, to – did your Honours propose a morning break?

GAGELER CJ: Yes. Where are you up to in your outline?

MR NEKVAPIL: I am at point 6(3).

GAGELER CJ: Yes. We will take the morning adjournment.

AT 11.14 AM SHORT ADJOURNMENT

UPON RESUMING AT 11.29 AM:

MR NEKVAPIL: Could I take your Honours to volume 6, tab 37. This is the final decision of the Full Court in *NATB*. I just seek to briefly make our points, which I have been building up to with the previous argument. At paragraph 43, their Honours noted the possibility of the word "remove" being "from", or the word "remove" being "from" and "to" and, at paragraph 44:

> it cannot have been Parliament's intention to oblige or permit an officer to remove an unlawful non-citizen from Australia's territorial boundaries by dumping that person in the sea –

That, we say, is the correct expression of the meaning of "remove" here, that is, it is a removal to a country where the person may live and not one which would fall within that characterisation of the statutory law or the one given as an example of Justice Field in dissent in *Fong Yue Ting*. At paragraph 46, however, their Honours said that they:

> do not think the distinction referred to –

was important. We submit it is very important, because it gives the right purposive or contextual notion of "remove", which is controlling of the meaning of "reasonably practicable".

Then, in paragraph 53, which is the critical paragraph that the learned primary judge relied upon, we would say that their Honours adopted a kind of mixture of "removal from" and "removal from" and "to", because it was removal as far as the reception country admitting the person, but that was the completion.

We would say that if the contextual purpose does not extend to removal to the sea, then there is no purposive reason why it would extend to removing to a country where, a day later, for example, that country then removed the person to the sea or did something equally inimicable to their right to live somewhere or to the purpose of the power being to remove them there to live.

So, what we would say – and just the final point to make on this, which we have made in writing and I will just seek to make it briefly, is that their Honours relied on the availability of non-compellable ministerial powers. We would submit that insofar as the text and the argument we have from purpose or context and the principle of legality is concerned, the availability, the theoretical availability or the statutory availability of non-compellable ministerial powers necessarily, at the point where the duty in 198 bites, those powers have not been exercised because the duty bites at the point, on the Full Court's analysis, that the person has been off-loaded from the plane and admitted into the other country.

That is, once it has been reasonably practicable, because any time before then, something might change, they might have a medical condition that means they need to be taken back to Australia. So, necessarily, at the point where it engages with the right to life – sorry, where the duty bites, at that point, those powers ex hypothesi have not been exercised.

GORDON J: So, your argument is that because here we are dealing with a different cohort and a different set of facts, one has to have a different approach to the way in which "reasonably practicable" works, because we do not have the benefit of these other provisions. Is that the way it is put? That is, we do not have - - -

MR NEKVAPIL: Yes, that is certainly part of it, and also for this cohort, the availability of ministerial powers has a different complexion because, in effect, these people are ones who are BVR holders who have been selected to be sent to Nauru, and so the likelihood is, at that point - - -

STEWARD J: That is not quite right in practice, though, is it? I mean, the duty may bite, but there is a process that has to be followed, which takes time – for example, here, a medical examination and so forth – which would give someone an opportunity to seek out a section 195A visa. Whether they get there in time, I do not know, but - - -

MR NEKVAPIL: I accept it is in the mix of the construction of the statute, and that is how it was deployed here, but our point is that by the time that the duty finally arises - - -

STEWARD J: Yes, I understand what you are saying, yes, okay.

MR NEKVAPIL: Yes, thank you, your Honour.

GAGELER CJ: I am confused again.

MR NEKVAPIL: Sorry, your Honour.

GAGELER CJ: Are you making some specific argument? I understand once you get to paragraph 7 of your outline, you are making a specific argument about this particular cohort.

MR NEKVAPIL: Yes.

GAGELER CJ: But as I understood all of your argument so far, it is a general argument about the meaning of these general words that appear throughout section 198.

MR NEKVAPIL: It is, apart from the answer I gave your Honour before, which is that those provisions cohere with the notion we are putting forward.

GAGELER CJ: I understand that, yes.

MR NEKVAPIL: Thank you, your Honour, that is correct. Can I move now to point 7. I will just go through this point-by-point. We say that if – on text, context and purpose and the principal of legality – section 198 would be construed as Parliament requiring removal to a country where there is a real risk of imminent and premature death, then section 198 would be invalid but for section 3A, and therefore would be read down by section 3A of the *Migration Act* but only to the extent of requiring removal to that kind of risk of death, and then only in its operation with sections 76AAA, 198AHB and the interim arrangement in their operation or application to the interim arrangement to require that a person be removed to Nauru, notwithstanding a real risk of that kind. We contend that the combined circumstances of the statutory regime make the regime prima facie punitive.

Your Honours have *Fong Yue Ting*, and that held that deportation of the kind defined by Justice Gray is not punitive, but we do note the expressions in some of the dissenting judgments, such as Justice Brewer at page 740, about the painful aspects of deportation as a starting point for our building blocks, and we then identify nine salient features of the statutory scheme in its application with the interim arrangement.

First, none of the deportation powers considered in the historical cases in this country – *Robtelmes*, *Yates*, *O'Keefe*, *Koon Wing Lau* and *Lim* – mandated removal by the Executive to a country where the person faced a real risk of death, that is, as a mandatory point of construction. In Australia, the special administrative regime for protection claims may, for present purposes, be assumed to have ensured those facing a real risk of death in a receiving country were not required by section 198 to be removed there.

That is, in effect, the working assumption of *M38*, *NATB* and the other cases that were an attempt to rerun a protection claim that failed with the Executive in the courts. We have noted in our submissions that sending a person to death has historically been a punitive act ordered by courts and not allowed to parliaments.

The second point is that unlike the residents from *Fong Yue Ting* and *Yates*, and one can also include the wartime refugees in *Koon Wing Lau*, BVR-holders are persons who, as a class characteristic, cannot be repatriated, very often, as in the case of the appellant, because Australia has been found to owe them protection obligations.

That gives deportation of such persons to a third country with which they have no connection a different quality from the deportation of the classes of people to whom the historical deportation provisions were directed. The primary purpose of that legislation was to ensure deportation

to a country which also owed these people some obligation of protection or in which they had a status by reason of prior connection, or some other connection.

Third, although deportation to a third country with which a person has no connection has remained possible on the broad deportation powers enacted since Justice O'Connor's judgment in *Robtelmes*, it has not been the primary purpose of the deportation power and, for practical and diplomatic reasons has, at least in modern times, been a highly unusual implementation of the power to deport.

We are not aware of a scheme in modern times like that in section 198 coupled with sections 198AHB and 76AAA which imposes a duty to deport to a specific third country with which a group of people has no connection. Your Honours might have noticed in section 228, Vattel mentioned that sometimes an exile was required to remain in an appointed place.

GAGELER CJ: Can I just ask a question about your salient features in paragraph 7(1).

MR NEKVAPIL: Yes.

GAGELER CJ: If you delete paragraph (a), are you still making the argument?

MR NEKVAPIL: No. We say it is these features with (a). Once (a) goes, we do not make the argument.

GAGELER CJ: All right, thank you.

EDELMAN J: What are these people being punished for?

MR NEKVAPIL: Well, my sixth point is that the deportation is the direct consequence of visa cancellation on character grounds. Now, I know that that of itself has been held by this Court to not be punitive, but it is an integer or a triggering event that these people are persons who have, for the most part, committed offences, become of bad character and then been persons who have been detained indefinitely, released, and now there is a desire to send this particular class of BVR-holders somewhere.

Fourth, unlike repatriation or removal to a safe third country, here, the removal will not end Australia's involvement. Rather, Australia will remain involved, exercising the powers in section 198AHB(2) as contemplated under the interim arrangement, which includes but is not limited to the power to "make payments" in respect of the person's ongoing

presence, as well as ongoing involvement contemplated by clause 8 in the annexure.

This is a very unusual feature of the present scheme, and we have struggled to come up with historical analogies. We do not take this analogy too far, but it shares some features with transportation, where persons convicted of crimes were sent to island places in which Britain had sufficient ongoing involvement to require that they be accepted at least for a period of time.

Now, obviously, one problem with that analogy is that convicts had to do hard labour until given a ticket of leave, but recall that here, our complaint, as have just said to your honour the Chief Justice, only relates to section 198's operation to require removal to Nauru of a person who faces a real risk of imminent and premature death, and in that operation, the removal of the appellant to Nauru entails a degree of suffering and jeopardy akin to the lot of a person transported by way of punishment.

The fifth is territorial confinement on an island. There are many such examples historically of islands being used as, in effect, a form of imprisonment. I want to be very clear in saying that that I mean the analogy only from the perspective of Australia and the persons being removed of its – there is nothing disrespectful in that concerning Nauru. It is said that they will be allowed to leave, but one wonders how realistic it is that a member of the *NZYQ*-affected cohort will be able to find anywhere to go. It is also said that they have freedom of movement, but that is also true of certain prison islands where people have freedom to move within an island.

Sixth, the deportation is the direct consequence of visa cancellation on character grounds. I have said that to your Honour Justice Edelman already. Seventh, removal to Nauru with others who are being sent there, having had their visas cancelled on character grounds and cannot be sent anywhere else, may be likened to a mark of infamy. That is referred to, as well, in Vattel, at section 228. Being a member of the cohort sent to Nauru will in some ways be a more visible stigma than an ankle bracelet.

Eighth, once the interim arrangement was agreed, the whole scheme entailed almost no discretion; I showed your Honours at the start, and I will not repeat that point. Ninth, unless we were successful on ground 1, there was no procedural fairness entailed in the making of the interim arrangement directed in effect to these three individuals. That is, in an ad hominem way, an interim arrangement targeting three individuals, or the application for the visa, which was a conclusion below that we do not appeal from. Even if we were to succeed on ground 1, procedural fairness did not condition validity.

So, we would say that, so construed, section 198 in that operation, in that combination with those provisions and the interim arrangement, is prima facie punitive. We would say that a law involving removal of an alien is not necessarily non-punitive, and we address that in our reply at paragraph 24. Recent examples involve detention, but there is nothing necessary about the fact that it is a law for deportation with respect to aliens which means that it could not be punitive.

Finally, construed in that way, section 198 is not reasonably capable of being seen as necessary, and we have identified potentially a less drastic means would be to have a scheme where procedural fairness is afforded at some stage before removal, or another possibility would be to extend the special administrative scheme for protection claims so that these claims can have some ability to be processed in the statutory scheme in the kind of way that non-refoulement claims could be.

Less drastic means could also include ensuring that – including a term in an arrangement or the statute requiring that a term be included in an arrangement that preventative measures will be implemented to avoid a real risk of imminent and premature death or, as we have said in our written submissions, a person on that very particular application of section 198 could be left to remain, subject to the valid existing BVR regime.

I now move to ground 1 and, coming to point 9 in our oral outline, we say that the decision to enter the interim arrangement was an exercise of statutory power. Your Honours can find the provisions usefully set out together in the primary judgment at paragraphs 32 and following, and there is some extrinsic material there as well.

What we say is that the entire purpose and function of section 76AAA and section 198AHB is to enable the Commonwealth to trigger certain statutory effects, including those provided in section 76AAA, by doing a particular thing. If that thing done by the Commonwealth matches the description in section 198AHB, then the statutory effects are triggered.

GAGELER CJ: That does not make the doing of the thing an exercise of statutory power.

MR NEKVAPIL: Not necessarily of itself, but it is – we would say – in purpose and function indistinguishable from a form of conferral of statutory power where it is said, in effect, if a Minister or the Commonwealth does a thing, then these will be the statutory effects. So, grammatically, the form is different – it uses "if" – but in function and purpose it is, we would submit, almost indistinguishable from what would be called the exercise of a statutory power.

That is, as a starting point, we would say, indicative of a conferral of a statutory power. It is different from, for example, in *NEAT Domestic*, where the factum was the doing of a thing by a corporation. Here, the doing of a thing is by the Executive Government, and - - -

GAGELER CJ: Which does not need statutory power to do the thing.

MR NEKVAPIL: No, quite so. Of course, it could do the thing in exercise of executive power, but what we say is that the thing is actually, on analysis, quite prescriptively regulated in what Justice McHugh in *De Keyser's*, which is quoted in *Jarratt*, described as:

> the statutory regime laid down –

and we would say that section 198AHB(1) on its face would appear to describe – if you just look at it as a textual meaning, it would appear to describe a whole range of international arrangements, including extradition, repatriation or international arrangements for removal and receipt of noncitizens, whether or not they hold BVRs.

As a textual descriptor, it is very broad, but what is evident from the associated provisions is that the actual focus of section 198AHB is much more specific, because when we come to section 198AHB(5), if I could just take your Honours to that, you see in the definition of "third country reception functions" a range of features that are contemplated, including, as I have said, "ongoing presence", which is also in subsection (1), but also that it will be the:

> presence of persons who are not citizens of that country –

so that it is – there is some specificity in what is contemplated by section 198AHB which shows it is a far more prescriptive and specific type of exercise of power which is contemplated in order to trigger these provisions.

Section 198AHB(2) contemplates that there will be third-country reception functions of the arrangement, and then the arrangement needs to be one which satisfies section 76AAA(1)(c), and it therefore will need to cohere with the other conditions described in subsection (1), one of which is that it has to be for the purpose of removal of BVR holders upon being given a permission to enter and remain.

That is also clear from the extrinsic materials. So, it becomes clear, looking at the surrounding provisions, that in fact this is a very specific and targeted sort of exercise which the statute is proposing. Further, we have

noted that section 76AAA(1)(c) refers to the arrangement must be in force, notwithstanding that section 198AHB(5) defines an arrangement to include one that is not legally binding.

Of course, the Commonwealth has non-statutory executive power to enter into treaties and other international arrangements and it then has legislative power to enact domestic legislation to give effect to those arrangements, but we would submit that is not this statutory scheme. This domestic legislation was enacted to empower the Commonwealth to do a thing to produce domestic legislative effects. That the thing is entering into an arrangement with another nation does not mean the power cannot be statutory, because Parliament also has power to confer statutory power to enter international arrangements.

I have already given your Honours the reference in 9(1), I will not take you there – the reference to *Jarratt*. We say that *Plaintiff M68,* first of all, does not decide in respect of 198AHA, but also is different. We accept, of course, that 198AHA was given a retrospective effect, but in substance the enactment of that provision was Parliament exercising legislative power to give effect to and operate upon the Commonwealth having already entered in the MOU.

For section 198AHB, in substance, Parliament has conferred a power for the sole purpose of enabling the Executive to do a thing in order to produce substantial statutory effect for BVR-holders, those effects being profound effects on their fundamental rights and future existence. Coming then to point 10, which is that the statutory power was conditioned by procedural fairness and its exercise was directed to and affected the interests of three individuals which, we would say, required something.

We have already shown your Honours how this exercise of power in the terms of the interim arrangement itself was targeted to directly affecting the rights of three individuals, including the appellant. One can therefore put aside the possibility of an exercise of power under these provisions which had a fluctuating pool of people on whom it operated and which, we would submit, might be a situation where procedural fairness would be reduced to nothingness.

Could we just note that in your Honours' very recent decision in *Badari* – which I will not take your Honours to, because most of your Honours have just finished publishing it – at paragraph 17, the Court stated the presumption about procedural fairness in terms of:

> a statutory power which is capable of having an adverse effect on . . . rights or interests . . . is impliedly conditioned on the observance of procedural fairness.

We would embrace that formulation, which addresses the question of what the conditions on the power are – that is, the first *Project Blue Sky* question, and not the second – what the consequence of breach is. In other words, the presumption implies a condition on the exercise of power but says nothing as to the consequence of breach, although very often where the implication exists, the second question may be answered that breach also has a consequence of invalidity.

But that fact does not mean that the reverse is true; if Parliament says the consequence of breach is not invalidity, as it has done here, that does not remove the procedural fairness condition on the exercise of power as an implication. If, on the other hand, it is an exercise of non-statutory executive power, then either the statute required the interim arrangement be entered with procedural fairness or the executive source of power was conditioned on the interim arrangement being attended by procedural fairness.

GAGELER CJ: So, do we apply the law as it existed at the time of entering into the arrangement or the law as it is now declared to be by Parliament, in addressing that submission?

MR NEKVAPIL: Does your Honour refer to the Amending Act?

GAGELER CJ: Yes.

MR NEKVAPIL: Yes. Perhaps – I probably should just go directly to the Amending Act, because obviously that is a - - -

GAGELER CJ: This is a removed appeal from a primary judge of the Federal Australia the Full Court of the Federal Court. So, it is an appeal by way of rehearing, is that right?

MR NEKVAPIL: Yes, it is.

GAGELER CJ: So, we apply the law as it now exists?

MR NEKVAPIL: Yes, your Honour.

GAGELER CJ: Right.

MR NEKVAPIL: I will take your Honours to point 15, if I could, which is that the Amending Act does not make lawful the exercise of power to enter into the interim arrangement on the assumption, which we have made by now, that there was an implication of procedural fairness, and your Honours know nothing was done in that direction.

So, the first point which, I have just already developed somewhat to your Honours, is that *Project Blue Sky* presents two questions. The first is the exercise of the power condition, and second: what are the consequences of breach? We would submit that if a power is subject to a condition, then an exercise of that power in breach of that condition is unlawful and that that is so whether or not the consequence of the breach is invalidity.

We would submit that this shows two things. First, that invalidity is a consequence of unlawfulness, and unlawfulness is not a consequence of invalidity, and second, that unlawfulness is different from invalidity and can exist without it.

GAGELER CJ: Does the Amending Act not remove the source of the unlawfulness?

MR NEKVAPIL: I will address it in turn, your Honour. Can I start with item 10. I think your Honour is referring to item 9(2), which retrospectively applies section 198AHAA.

GAGELER CJ: Yes.

MR NEKVAPIL: But can I just start with item 10, and your Honours can find this under tab 1, volume 1 of the joint book of authorities, it is at page 24. So, what we say is item 10 was clearly directed to a mischief identified by the original ground 1 in our appeal to the Full Court of the Federal Court. Namely, that entry into the interim arrangement might have been invalid, and, more directly, might lack legal effect for the purpose of section 76AAA(1). That, really, was the gist of our argument and the mischief to which it was directed.

We accept that Parliament hit that target. Ground 1 in this Court accepts that the interim arrangement is taken to be valid for that purpose, that is, it has legal effect as a third country reception arrangement under section 76AAA(1)(c). However, item 10's provision that an entry will have been valid, that is, effective for section 76AAA(1)(c), is not a provision that the entry will have been lawful.

The Commonwealth contends that the unlawfulness in its entry of the interim arrangement was a consequence of the entry's invalidity, and I have dealt with that submission. So, can I come then to item 9(2) - - -

GAGELER CJ: Sorry, I just do not get the item 10 argument. Can you say it again?

MR NEKVAPIL: Yes. The item 10 argument is item 10's target was validating, that is, removing any ineffectiveness, for the interim arrangement for the purpose of section 76AAA(1) so that from then on it will be taken to always have been effective for the purpose of 76AAA(1).

GAGELER CJ: You say it is – you accept that it is effective to do that?

MR NEKVAPIL: We accept it is effective to do that, yes. So, section 76AAA(1)(c) has been triggered, we accept that. But we say is that it does not remove the condition, the procedural fairness condition, implied into the exercise of power under 198AHB(1). That, the Commonwealth says, is done by section 198AHAA(1), for which I need to take your Honours now to items 3 and 9. Item 3 inserts section 198AHAA(1):

> The rules of natural justice do not apply to an exercise of the executive power of the Commonwealth to:
>
> (a) enter into a third country reception arrangement with a foreign country –

The first point we make about section 198AHAA(1) is that it is expressed by reference to an exercise of executive power, and in subsection (3) there is a clear distinction drawn in (a) and (b) between the expression "executive power" and "statutory power" such that executive power must be taken for the purpose of the Amending Act to mean non-statutory executive power.

That makes sense, that it would be directed specifically to non-statutory executive power, because the Commonwealth's position is that the learned primary judge was correct to say that the interim arrangement is in exercise of non-statutory power, but because we say it is an exercise of statutory power, we say it is ineffective to that extent.

Here, we deploy the principle in *Bhardwaj* at paragraph 48, which is described in paragraph 39 of our written submissions, which requires clearness to enlarge the effect of administrative decision removed from judicial review. So, we say it should be construed only as directed to exercise of non-statutory executive power.

The second point we make is that section 198AHAA should be understood as being directed to removing the common law presumption in respect of exercises of power yet to be undertaken. So, if we start with section 198AHAA(1)(a) read together with item 9(2)(a), that works perfectly, where a future arrangement is to be entered into. Your Honours will see subsection (2)(a) says that 198AHAA applies to:

> a third country reception arrangement entered into –

including:

after commencement –

So, where the past participle "entered into" is something that is to be done in the future – to be entered into – then there is no difficulty in section 198AHAA(1) being read as directing that the future exercise of the power to enter into that arrangement is not attended by the presumption as to procedural fairness.

The use of the past participle "entered into" has a different grammatical operation when describing something that has already occurred before commencement. Then we say it refers to a concluded arrangement, and this reference to an arrangement where the entry has been completed and is passed is not apt to refer to section 198AHAA(1)(a) because section 198AHAA(1)(a) contemplates the exercise of power to enter into an arrangement, which is necessarily anterior to the arrangement having concluded.

That is, to use the language in 9(2)(a), an arrangement that has already been "entered into"; that is, it is concluded at a point in the past before commencement, but item 9(2)(a), in its backwards-looking operation, still has work to do for such concluded arrangements in its application to section 198AHAA(2), and we would submit that it should be construed in that way, notwithstanding some duplication with item 9(2)(c).

Our third point, which is the final point for item 9, is that for which we must lean most heavily on that *Bhardwaj* principle, which is that the word "exercise" in section 198AHAA(1) should be understood only to refer to a valid exercise. If our second point is rejected, that may, we accept, give limited efficacy to item 9(2)(a) in its retrospective operation, but that also has the benefit of avoiding duplication with item 10.

The Commonwealth says, in effect, that item 10 has the effect of ensuring that a past purported exercise of power to enter into an arrangement is validated for the purpose of section 198AHAA(1) and item 9(2)(a) itself, such as to make the purported exercise of the power to enter into an interim arrangement a valid exercise for section 198AHAA(1) itself.

But if item 10 had that effect – that is, it validates what would otherwise be an invalid exercise of power for the purpose of an exercise of power within 198AHAA(1) – that would mean item 10 was entirely unnecessary other than in that operation, because section 198AHAA(1) itself would then have not only a validating effect but a lawful-making

effect for section 76AAA, 198AHB and all the things that item 10 appears to have targeted, so that in effect item 10's only operation would be to validate for the purpose of section 198AHAA.

GAGELER CJ: What was the point of item 9(2)(a)?

MR NEKVAPIL: We say, on our second argument, that its point was as to future, that is, arrangements to be entered into after commencement – was to remove the implication of procedural fairness applicable to the exercise of power, that is, applying it to section 198AHAA(1)(a), into a third country reception arrangement with a foreign country in the future.

GAGELER CJ: You would not need to say that, it would just follow as a matter of course, would it not? It is the word "before" that adds something.

MR NEKVAPIL: Well, it is certainly the word "before" that is relied on, but - - -

GAGELER CJ: So, what is the point of that word?

MR NEKVAPIL: That is what I have just sought to explain. The point of that is that it can have work to do where there has been a concluded arrangement for the purpose of the application of section 198AHAA(2). So, the arrangement has been entered into, section 198AHAA(2) would then be denuded – I have accepted that that would involve a degree of overlap with 9(2)(c). So, I accept it is not the most – that there is a natural construction which has (a), (b) and (c) lining up with the provisions in 198AHAA, but because item 9(2) refers to 198AHAA as a whole and not subsection (1), it can still have an operation in that way.

I might keep moving from where I am, which is to come to point 16, which is that an injunction may restrain a body from taking further action based on an act that is valid but unlawful. That is, of course, exactly what this Court contemplated in *Project Blue Sky* in paragraph 100, where the making of the content standard had contravened the condition that meant it was unlawful and the Court said at paragraph 100 that, even though valid, an injunction could go to restrain further action after – that is, consequent upon – the unlawful act, even though it is valid.

Here, we say that it is the entry into the interim arrangement in breach of an implied condition of procedural fairness that makes it unlawful. That supplies the basis for an injunction under *Project Blue Sky*, paragraph 100, which – just noting – your Honour Justice Gageler footnoted in footnote (180) of paragraph 112 of *Smethurst* as a possible additional operation of a section 75(v) injunction.

We say that such an injunction is available within federal jurisdiction as defined by the terms in section 75(v), reflects that the section 75(v) jurisdiction is to grant an injunction – and this is cited in our reply at paragraph 5 from *Plaintiff S157* at paragraph 104 – that section 75(v) jurisdiction is to grant an injunction to assure both:

> that officers of the Commonwealth obey the law –

and that they do not exceed their jurisdiction. We have also given your Honours – and I just raise this because I have noticed *Plaintiff S157* in our learned friends' oral outline – in paragraph 42, footnote 55 of our primary written submissions, we footnote *Plaintiff S157* – which unfortunately is not in the bundle – at paragraph 5, where Chief Justice Gleeson described the prerogative writs in terms descriptive of jurisdictional error and then said:

> An injunction may issue to restrain unlawful behaviour.

And then quoted Barton in the convention debates, using language consistent, we would say, with the broader scope for an injunction. We have also given your Honours reference to a paper by Justice Gummow writing extra-curially and there are further references in our submissions, including to some observations by Justice Gaudron which were picked up in references in *Smethurst*.

GAGELER CJ: So, the injunction is the injunction you refer to in your second further amended notice of appeal, is it?

MR NEKVAPIL: Yes.

GAGELER CJ: It is an injunction against an exercise of power in the section 198 - - -

MR NEKVAPIL: I am sorry, your Honour – if your Honour could just give me a moment to bring that up. Yes, it is at paragraph (b):

> *Preventative relief against removal to Nauru*
>
> (b) An injunction restraining the Respondents . . . from removing the Appellant from Australia to Nauru –

GAGELER CJ: But you accept, I understand, that the effect of item 10 of the Amendment Act is to get you to get you to section 76AAA, which provides for the giving of the notice, which means a visa ceases - - -

MR NEKVAPIL: Yes.

GAGELER CJ: - - - which means that section 198 kicks in of its own force.

MR NEKVAPIL: No.

GAGELER CJ: No?

MR NEKVAPIL: That is the point where – in *MZAPC*, this Court said that 198 conforms to an injunction in the sense that it is not reasonably practicable to remove if there is in force an injunction, and so the injunction would be granted to restrain action consequent upon unlawful conduct, to enforce obedience to the law, and the effect of that injunction would be that section 198 would not arise, because it would be – so there is no inconsistency between a command of Parliament in 198 and your Honours granting an injunction.

GAGELER CJ: The unlawful conduct here is the entering into the agreement.

MR NEKVAPIL: Yes, in breach of the implied condition of procedural fairness, which gives rise to unlawfulness but not invalidity.

GAGELER CJ: I think I understand the argument now.

MR NEKVAPIL: If your Honours please, that is my time.

GAGELER CJ: Thank you. Mr Wood.

MR WOOD: Please the Court. We intend to focus on what has been described by the Commonwealth as the settled construction of the expression "as soon as reasonably practicable". Our proposition is that our Human Rights Law Centre's construction of that phrase is entirely consistent with and conforms with *M38*, that *NATB* may be read as consistent with *M38*, and insofar as it took a step beyond the *M38* construction, it was unprincipled and incorrect. That is the burden of the oral submission that I wish to make.

Can I start, then, with *M38*, which is at volume 6, tab 33 of the bundle of authorities. Now, very briefly, what is uncontroversial: the appellant had applied for a protection visa; failed before the delegate; failed before the tribunal; twice sought judicial review of the tribunal's decision; twice failed. What the appellant then did was to seek an injunction restraining removal to Iran, which was dealt with in the separate proceeding which was the subject of the judgment in the book. That is all dealt with at paragraphs 9 to 11 of the judgment.

Now, incidentally – although I do not say this is terribly important for this Court – the basis for the injunction application that was sought in *M38* was not predicated on the meaning of the expression "as soon as reasonably practicable". Your Honours will find the pleaded grounds in support of the injunction application at paragraph 11 of the judgment; paragraph 12 is a response by the appellant to the summary judgment application brought by the Commonwealth.

Then your Honours will see in due course that at paragraphs 14 to 16 and 20 to 21 the Full Court summarised the argument that the appellant advanced. The essential proposition is reflected at paragraph 16, and the proposition was that it was "beyond power" for the Commonwealth to remove him to a place where he had established:

> in court the facts that demonstrate –

he is a refugee. In other words, the idea was that you could come to court, prove to a court that you are a refugee, irrespective of what happened in the administrative process that culminated in the tribunal decision, and that would preclude removal. So, your Honours will see at paragraph 70 that the Full Court expressly state the proposition that the appellant:

> did not rely on any conception of reasonable practicability.

In support of his case. So, everything that came from *M38* was obiter, but it was obiter that ended up being highly influential in the development of jurisprudence in the Federal Court. Again, briefly, the Federal Court had summarised its rejection of the appellant's argument as advanced at paragraph 71, the proposition being that it was "misconceived". Essentially, it was misconceived because:

> by the time an officer is called upon to discharge the duty imposed by s 198(6) of the Act, any claim by a detainee for refugee status has been refused, or is taken to have been refused, in accordance with the processes established under the Act.

And at 73 we find the reference by the Full Court to what they called the:

> specialised administrative regime for the determination of claims for refugee status.

One finds similar approval at paragraph 78 of what Justice Hayne had said as a single Justice of this Court in *Re Minister, Ex parte SE*, which was to similar effect. All of that analysis is sound; it is not contradicted in any way by our argument. Now, despite that no argument was made about "as soon

as reasonably practicable", it was addressed in some detail by the court at paragraphs 64 to 69. I want to take the Court with some care through what was said in those relevant paragraphs. Can I start at paragraph 65. So, at paragraph 65, I think in the second-last sentence, the court say that:

> The word "reasonably" in the expression "reasonably practicable" limits or qualifies what would otherwise be an almost absolute obligation –

and state in the discussion there that the very concept of practicability involves some element of reasonableness. Again, that is all correct, we say. Now, I will not take your Honours to *NATB* now – I will do that in a moment – but your Honours will note that in *NATB*, which is volume 6, tab 37, at paragraphs 47 to 50, the Full Court in *NATB* only take issue with *M38*'s analysis of the phrase in one nuanced respect, and that is that the Full Court in *NATB*:

> do not think the word "reasonably" operates in an "opposing sense" to –

practicability, simply because their Honours conclude that the very word "practicable" itself inherently involves a notion of reasonableness. So, in *NATB*, the only divergence from the observations made by the Full Court in *M38* was that the express inclusion of the word "reasonably" operates:

> to extend the reasonableness notion, already inherent in the word "practicable", further along what may be described as "the continuum of reasonableness".

So, we endorse, again, this aspect of the reasoning in *M38*. We note that your Honour Justice Edelman in *MZAPC*, which is volume 6, tab 35, at paragraph [65] to [66], observed that:

> there is considerable flexibility in the elastic notions of reason or prudence, as well as feasibility.

We agree in substance with what the appellant has put that arises on the facts of this particular case, which concerns life and death, that at the least, the values of the Act which inform the concept of reasonableness in 198 at least admit of the possibility that where a person faces an imminent risk of premature death in the place to which they will be removed, that that bears on the prudence, the reasonableness, and this Court does not need to sketch the outer limits of what reasonableness, in other words, in the sense of prudence, might admit as being relevant to.

We say that practical considerations from the officer's viewpoint are plainly potentially relevant to the reasonable practicability of removal, but they do not exhaust the concept. We say that that is supported by what the Full Court in *M38* said at paragraph 69. Can I take your Honours' attention there.

GAGELER CJ: Mr Wood, is it the officer's perspective or is it an objective question?

MR WOOD: It is an objective question, your Honour. I will not come to that. We say that is, effectively, the – that is the ratio that emerges from *AJL20*; I will come to that in a moment. That does not preclude, of course, the Commonwealth coming to Court, advancing evidence and submissions to seek to persuade the Court that from the officer's perspective, removal is or is not reasonably practicable as the case may be, but it is an objective jurisdictional fact, albeit an evaluative one. So, can I take the Court to 69 of *M38*, where the court says:

> Doubtless, there will be other factors that, from time to time, will lead an officer to conclude that, at the time removal is contemplated, removal would not be reasonably practicable –

And then, in the second sentence, gives examples which we say the Commonwealth cannot satisfactorily explain away. The examples that are given are:

> If, for example, the only country willing to receive an unlawful non-citizen were suffering from some severe natural disaster . . . a state of utter civil anarchy –

and the like – and, later, the *NATB* Court speaks of a plague as an example, then:

> the officer may well be entitled to conclude that his or her removal would not be reasonably practicable –

The Commonwealth's answer to this is to say – because, of course, the line erected by the Commonwealth is that anything that happens after removal is irrelevant; that whilst the journey may be relevant – will they survive the trip is, on the Commonwealth's view, relevant – upon admittance by the receiving country, consequences following that are strictly irrelevant to the Commonwealth.

GORDON J: Is that quite right? I understood that they accepted it had to be a place, and it had to be – it could not be transitory, so there had to be some ability for them to remain for a period.

MR WOOD: That may be so, that may be so. Nevertheless, what the Commonwealth seeks to do, at least addressing the notion of consequences in the sense of harm, potentially death, to the removee is to say, at paragraph 50 of their written submissions, that these observations of the Full Court – I quote the Commonwealth:

> must be understood to refer to circumstances affecting the willingness of the country to receive a person, or the practical ability of the officer to effect removal –

We say that is not correct. The very premise of the example given in the second sentence of *M38* is that the example is the country is willing to receive the person and, by ready implication, could do so.

STEWARD J: The problem is, you can probably read it either way. You can read it the way the Commonwealth does – that delivery would be practically impossible because there is a natural disaster, you cannot land a plane, cannot dock a ship, or what have you – or it might be read the way you are reading it, which is that the circumstances after delivery are relevant.

MR WOOD: We say that is the better reading. At the end of the day, this Court will rule on the point – I am seeking to address the proposition that this is all established law. As I understand it, the Commonwealth may submit that when 197C was enacted, it was a reenactment presumption applied so as to, if you like, confirm the correctness of the previous understanding of the scope of the removal duty, and again, I am saying that it is not, properly understood, an existing correct understanding to say that the consequences post-removal do not matter.

STEWARD J: I understand.

MR WOOD: The point that your Honour the Chief Justice asked me a moment ago is about objective jurisdictional facts. So, the one quibble that we have with *M38* is paragraph 67, the final sentence, where it is – as we read it – suggested that the officer's evaluative assessment of reasonable practicability is determinative, perhaps subject to judicial review.

We say it follows from *AJL*20 – which is volume 3, tab 9 – that whether and when it is reasonably practicable to remove a person is a question of objective jurisdictional fact ultimately determined by the court. In the interests of time and given the limited time I have, can I give your Honours some paragraph references.

Paragraph 8 of *AJL20* refers to findings of fact made by the primary judge in that case. Those findings were made on contested evidence. That contested evidence included debate about whether or not the Commonwealth was doing enough by making overtures to Lebanon rather than Syria. The case was not run on the basis that the officer had a view that it was not yet reasonably practicable and the question being was that officer's view reasonably open to the officer. Rather, the question was being determined by the Court on evidence advanced by the parties to the Court.

The Commonwealth conceded on the removed appeal the findings of fact made in that respect by the primary judge, and your Honours in the majority, particularly paragraphs 30 to 32, set out some passages that reinforce on a principled way why, ultimately, the question of whether and when it has become reasonably practicable to remove has to be:

> capable of objective determination by court at any time and from time to time.

the majority ultimately concluding that the remedy was mandamus, not habeas. So, that proposition partly explains why the Commonwealth's suggestion at paragraph 54 of their written submissions that my client's construction is unworkable and should be rejected, the suggestion is, well, it cannot be right that the officer has a complex evaluative judgement to be performed, that they are ill-suited, in effect, to make.

We say it is readily to be expected that the Commonwealth, on whose behalf both the detention and the removal is being conducted, has the resources to establish processes to conscientiously assess claims that might be made from time to time as to why it is not reasonably practicable to remove. In cases of genuine doubt, either the proposed to removee or the Commonwealth could come to a court and seek a ruling on the question.

So, that is what I wanted to say about *M38*, beyond what we have said in writing. The issue then becomes what happened on the next step in *NATB*. Can I take the Court to volume 6, tab 37. Now, what happened in *NATB* was essentially this. There were three appeals with similar facts. Two of the three appellants – that is, NATB and SDAE – sought an injunction expressly based on non-refoulement obligations not only under the Refugees Convention, but also the Convention Against Torture – I will call that the CAT.

Now, while the appellant in *M38* had, strictly speaking on the pleaded case in *M38*, also advanced a CAT claim, it was suggested at least by the leave court in *NATB* that the Full Court in *M38* had not given considered attention to the significance of the CAT claim. One finds the

reference to that of paragraph 25 of *NATB*. The significance of that was, well, it might be argued that the CAT claim, at a time in the Act's history where complementary protection provisions had not yet been enacted, might bear on the reasonable practicability of removal.

Can I take the Court to paragraph 25 of *NATB*. In the second sentence, dealing with the leave court that had granted NATB and the others leave to appeal, this is said:

> The Full Court noted (at [22]) that, in *M38*, it had been made clear that what is reasonably practicable is not confined literally to –

putting the person on a ship:

> and that what is likely to happen at the destination point may be relevant.

That might provide an additional answer to your Honour Justice Steward's question. So, we say – and the court goes on to say:

> The Full Court asked rhetorically (at [22]):
>
> > Therefore, it might be said, if misfortune such as earthquakes –

and so on:

> > are relevant, why not torture?

So, we say it is perfectly clear that both *M38*, the leave court, and by ready implication the appeal court in *NATB*, were accepting that what is being called here misfortunes – in other words, misfortunes that may happen on arrival at the destination point – may be relevant. The question is: what about torture, at a point in time when complimentary protection had not yet been enacted.

Of course, we accept that on the current legislative framework, it is perfectly clear that torture would not bear on reasonable practicability. That is the function of both the specialised administrative regime that has a complementary protection aspect whereby Australia has domestically implemented certain other treaties beyond the Refugees Convention; it is also clear from the very terms of 197C. But at this point in time, that was not the case, so, how was it resolved by the court?

We say that the point in issue was resolved on the basis of what we would call an inferred legislative choice. Can I take your Honours to

paragraph 63 of *NATB*. At 63, in the second sentence in *NATB*, the Full Court say:

> But the Full Court –

in *M38*:

> held it would be contrary to the scheme of the Act to construe s 198(6) as enabling an officer to consider:
>
> > . . . claims for refugee status or whether his or her return to a country . . . would constitute a breach of an obligation against refoulement, arising under Art 33(1) of the Refugees Convention or elsewhere under international law.

We say there are observations to a similar effect at 68 to 69, where what you draw from what the Full Court was saying was, at this point in time, the wisdom of Parliament had been to enact a specialised administrative regime that, at that point in time, only implemented Refugees Convention non-refoulement duties and not the others, but that was Parliament's choice.

One would not allow 198 sensibly to work in that context by allowing a claim to feared torture that might be advanced under both the Refugees Convention and under the CAT to be advanced, if you like, as a jurisdictional fact through the courts at the back end of the removal stage. That was the inferred legislative choice, that Parliament had dealt with non-refoulement in the way that it had.

Of course, all of these claims were protection claims. This was not a misfortune case, nor was *M38*. All of the appellants in *NATB* were contending that they were owed non-refoulement obligations under the CAT or the Refugees Convention. So, where does the confusion kick in? It kicks in, your Honours, at paragraph 53 of the judgment. At 53 in the second sentence their Honours says that:

> the reference to reasonable practicability –

in 198:

> does not require an officer to take into account what is likely, or even virtually certain, to befall the unlawful non-citizen after removal is complete –

at least:

> once the person has been admitted –

Read in isolation, that is the proposition that has been held by the primary judge and in a number of other single judge decisions in the Federal Court to be fatal to any argument that what might happen at the other end might be relevant. But that, for the reasons I have explained, is very difficult to cohere with the *NATB* court's, we say, acceptance of *M38*, and I took your Honours to paragraph 25 of *NATB* which makes it reasonably clear that both courts were accepting that consequences at the end on destination may matter.

We say that you cannot read that second sentence in isolation. You need to read it in context. What the Full Court is addressing is a particular claim which is a protection claim, not a misfortune case. So, if one looks at the very next sentence, the Full Court says:

> Even if it is virtually certain that he or she will be killed, tortured or persecuted . . . whether on a Refugees Convention ground or not –

In other words, perhaps on a CAT ground that does not require a Refugees Convention nexus to be made good:

> that is not a practical consideration –

bearing on removal, but that is just simply the nature of the case that was before their Honours. It was a claim for protection. We say that that contextual reading, where you can cohere *NATB* with *M38*, is supported by paragraphs 55 to 59, which I will not read out, but again speak to the specialised administrative regime, and by paragraph 13 of the Full Court's judgment in *NATB* which speak of the claim at issue in that case being:

> death, torture, persecution or other mistreatment –

the claim was to fear harm from a human being, it was not to fear harm from an earthquake, a plague or to be concerned about living in an environment where medical facilities were not available to treat your particular needs.

So, we say that the settled understanding is entirely consistent with the propositions advanced by the Human Rights Law Centre in its written submissions. I have a couple of very brief points to make which I can make quite rapidly. First of all, to the extent that the Commonwealth argues that there is High Court authority that accedes to their interpretation of *M38* and *NATB* and makes it, in effect, decided, that is wrong.

The Commonwealth refers to *ASF17*. I will not read passages from it, but I will give your Honours relevant paragraphs. That is volume 6,

tab 24 of the bundle. The underlying claim made by the individual in that case was aptly characterised as a protection claim, it was a claim to fear harm from human beings in Iran on the basis of ASF17's sexuality. One can see paragraphs 11 and 38 where your Honours with that underlying claim.

Similarly, the Commonwealth relies on a passage in the judgment in *MZAPC*. That is at volume 6, tab 35. Paragraph [35] of your Honour's judgment in that case, there is a citation of a passage from *M38* that is relied on heavily by our friends, which speaks about practical considerations. We say that the High Court was not purporting to give a comprehensive account of all matters that might bear on the reasonable practicability of removal.

That the misfortunate issue did not arise in that case, it was not the issue, the issue was whether or not an injunction might bear on reasonable practicability and the Court decided that question. In any event, the very passage on which our friends rely in that respect that is cited in *MZAPC* is a passage from *M38* which, for the reasons I have explained, we say is entirely consistent with the construction that we are advancing.

Can I make one more point, if time permits; that concerns the Commonwealth's argument that the construction for which we contend would give the *NZYQ* constitutional limit an unstable operation. We say that is wrong as a matter of principle. This debate is about the proper construction of a statutory provision, at least that is our argument: how do you give meaning to the words "as soon as reasonably practicable"?

Parliament could – we accept – in principle, enact another law that made it expressly clear that post-removal consequences are irrelevant to the duty to remove a person. That could be done. The statutory construction question has no direct nexus with the constitutional limit. Parliament can write the rules for the circumstances in which removal must be effected. Our constructional proposition is not embedded as a constitutional limit is the main point.

In any event, the nature of the constitutional limit identified by this Court in *NZYQ* for when detention might become punitive, is inherently such that powers to detain may be enlivened or cease to be enlivened as various circumstances may change, including circumstances in potential countries of removal.

In that respect, our argument, whilst at the statutory level, may again affect the ability of the Commonwealth under the current framework to detain a person, these are not circumstances that are terribly surprising or that diverge from what the Court has already recognised in *NZYQ*. Unless the Court has any questions, those are our submissions.

GAGELER CJ: Thank you, Mr Wood. Can you use three minutes, Mr Solicitor?

MR DONAGHUE: I can actually, your Honour. Just to explain where we are going. Can I ask your Honours to take up our oral outline. So, what you will see there is that we had structured that outline by reference to ground 1 and then ground 2; paragraphs 1 to 7 addressing ground 1, and paragraphs 8 to 13 addressing ground 2.

The oral argument your Honours have heard this morning has seen what I think can fairly be characterised as a downgrading of the significance of ground 1 in the overall scheme of the case. Much more attention has been focused on ground 2, and in those circumstances, we have decided to flip our oral presentation. So, we will start with the ground 2 paragraphs which Mr Knowles is going to address specifically; paragraphs 9 through to 13.

So, that leads out of ground 2 the constitutional point, which I am going to deal with, but Mr Knowles will deal with the constructional point about *NATB* straight after lunch and spend as long on that as he needs to. Then I will use the balance of our time to return to the issue set out in relation to ground 1.

You may or may not have noted that there is nothing in our oral outline that corresponds to the non-justiciability argument, which is the subject of our notice of contention. We do not abandon that argument, but we rely only on our written submissions in relation to it. So, my focus when we get to ground 1 will principally be on the Amending Act, which we submit is a complete answer to ground 1. So, my main focus there will be on that Act and on the validity challenge. If that course is convenient to your Honours, that is how we propose to - - -

GAGELER CJ: Thank you, yes. We will take the luncheon adjournment now.

AT 12.42 PM LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.15 PM:

GAGELER CJ: Mr Knowles.

MR KNOWLES: May it please the Court. As the Solicitor-General indicated, I will address the Court on that aspect of ground 2, dealing with the statutory construction of section 198. The Solicitor-General will address the Court on the constitutional challenge to that provision.

In respect of the statutory construction argument, it is uncontroversial that section 198 imposes a duty to remove an unlawful noncitizen as soon as reasonably practicable. What is in contest is the submission that we make that reasonable practicability in this context is concerned with the process of removal itself and not the prevailing circumstances in the country of removal once removal is complete.

It is that controversial proposition that I will seek to address and advance by reference to first the text, and that is reflected in our oral outline at paragraphs 9 and 10, and secondly the context, including the role played by section 197C, the nature of Australia's international obligations and the principle of legality, which is reflected in paragraphs 11 to 13 of our oral outline.

Turning to the text, there are essentially two points that we seek to draw from the text, and for this purpose it is sufficient to consider the chapeau of section 198. The first is that, as this Court held, or as the plurality of this Court held in *MZAPC* at paragraph 35 – I do not need to take your Honours to it – the compound phrase "as soon as reasonably practicable" incorporates two elements: a substantive element and a temporal element. That is: what is it possible to do and when can that thing be done?

Secondly, in considering both the temporal and substantive elements, it must be kept in mind that the relevant duty to be performed is a limited one. That is, the duty to remove a noncitizen from Australia. In *MZAPC*, the plurality at paragraph [35] endorsed what Justice Gummow had said in *Al-Kateb*, that the substantive element conveyed by the term "practicable" has regard to that which is able to be put in practice and that which can be effected or accomplished.

Now, we take from this – that is, the words "that which is able to be put into practice" or "that which can be effected or accomplished" – that the officer on whom the duty is imposed is not required to make a normative assessment. That is, the officer is not required to ask what should be done but, rather, what can be done in practice.

The question, as I have indicated, is "reasonable practicability" refers to the process of removal itself. Can I – just in order to address that – take

your Honours first to *NATB* itself, not so much to repeat what has already been said about the context of the judgment but to address the matter said by the counsel for the intervener to the effect that the judgment could be read as allowing for considerations of events which occur after removal has taken place.

The decision in *NATB*, your Honours, can be found at tab 37 of the bundle, and I will take your Honours only to paragraphs 52 and 53. Mr Wood for the intervener took your Honours to paragraph 53 but not 52 and, in my submission, 52 has some important role to play. Starting at paragraph 52 on page 516 of the report, their Honours state that:

> it is possible to say that determination about reasonable practicability is not necessarily limited to physical considerations, such as the health of the person to be removed, or the availability of an operating airport in the country of destination.

Pausing there, both of those matters are matters which are directly relevant to the process of removal itself, rather than the circumstances which might pertain after removal. Then their Honours continue over the page:

> The willingness of another country to allow the person to enter its territorial boundaries is at least one non-physical factor relevant to reasonable practicability.

And then I will allow your Honours to read the rest of the paragraph, but I do rely in particular on the final sentence of that paragraph, where the Court says:

> Moreover, the context for determining reasonable practicability is the proposed physical removal of the person from Australia.

I rely on that to make clear that it is not possible to read what follows in paragraph 53 as contemplating the possibility of reasonable practicability involving consideration of post-removal circumstances because it follows immediately on from a statement that reasonable practicability is the proposed physical removal itself.

Then their Honours go on to state the passage which I think Mr Wood for the intervener conceded is perhaps more directly unfavourable to the appellant's case as to the irrelevance of subsequent events, even where those subsequent events may be very likely to occur.

GORDON J: Are we right to read the reference to the second limitation to be the second matter that is identified in the paragraph preceding it?

MR KNOWLES: Yes, and I think – well, the second limitation is in contradistinction to paragraph 52 because the second sentence of paragraph 52 commences "First", and so I understand paragraph 52 to be the first limitation.

GORDON J: I do not know, "Second" appears on the third line of paragraph 52 on page 517, that is why I am asking.

MR KNOWLES: I see. Yes, your Honour.

GLEESON J: It is the context, is it not?

MR KNOWLES: It must be that it is the same. I withdraw that and I respectfully endorse your Honour's more careful reading than mine.

GORDON J: Thank you.

GLEESON J: Can I make sure that I understand. The second part of paragraph 52 says "Second". Without attempting an exhaustive statement, it is impossible to identify some limitations, and they are the ones that arise out of the words, and ones that arise out of the context. Is the second limitation the context?

MR KNOWLES: I think the second limitation is that the limitations must arise from reasonable practicability arising from words or context, but the relevant context is the proposed physical removal of the person from Australia. The relevant context is not, for the purpose of my submission, events that might happen after removal.

GLEESON J: I see. Thank you.

MR KNOWLES: The difficulty with – or the textual difficulty with the appellant's submission is that it introduces into the concept of reasonable practicability a disconnect in that that qualification is no longer connected to the removal itself, it is connected to other outside circumstances. Just to establish that *NATB* is not at all an outlier, can I take your Honours to what has become a relatively well-known decision, albeit of a first instance judge: the judgment of Justice French in *WAIS*, which is in volume 7, tab 42.

His Honour said at – and, unfortunately, the paragraph numbers seem to have dropped off the version that I have, but at paragraph 58, which can be found at – if your Honours give me a moment – yes, page 2056 of the bundle, paragraph 59 is the second paragraph – well, I will take your Honours to the first paragraph on that page, which is in other versions

of this document numbered paragraph 58, but the first paragraph on page 2056 refers to:

> What is reasonable –

This is the second sentence of that paragraph:

> What is reasonable is to be determined, inter alia, by reference to the practical difficulties that may lie in the way of making arrangements for removal which involve the cooperation of other countries –

So, his Honour there clearly linking reasonable practicability to the process, or the arrangements, for removal. Then, returning to a similar theme, at paragraph 59, his Honour, in the penultimate sentence of that paragraph, states:

> It is appropriate to have regard to the practical difficulties in the way of making removal arrangements –

and then there is a reference to the test of the reasonably foreseeable future, but his Honour then refers to – in the final sentence – the phrase:

> the real world –

practical:

> difficulties that attach to such removal.

That phrase "real world difficulties" is exactly the phrase that was endorsed by this Court in *NZYQ* at paragraph [61], when stating the constitutional limit on detention under section 189, and the relevance for the current context is plainly that the practical difficulties, or the real world difficulties, are those difficulties which attach to removal.

So, what was put by my learned friend for the appellant, principally by reference to the 19th century text of Monsieur Vattel, was that removal incorporated a right to live in the place removed. Now, we do not challenge the idea that removal from Australia means removal to another country. That is the holding in *M70*, and that does not depend on any meaning being given to the words "reasonable practicability"; it depends only upon what the word "removal" means.

GORDON J: Just so I am clear, we know that from *NATB*, at 44, that you cannot just be taken to – they talk about dumping in the sea.

MR KNOWLES: Yes.

GORDON J: You accept that it has to be removal to a place, which was the phrase in *M76*, or removal to a country, which is *M70*.

MR KNOWLES: Yes.

GORDON J: You accept, as I understand it, the *ASF17* analysis – tell me if I am wrong, Mr Knowles – that you have to have a country identified, and it cannot be transitory.

MR KNOWLES: I accept all of those propositions, but I accept them for slightly different reasons, and I can explain that, your Honour.

GORDON J: If you are coming to this, then that is fine, Mr Knowles. I may have interrupted too early.

MR KNOWLES: No, no, I think it is possibly best to deal with it now, if the Court please, but removal to the high seas, the ocean, the figurative rock, is not – for the reasons given in *Plaintiff M70* – removal for the purpose of the Act, because as this Court held in *ASF17*, removal requires the identification of a country willing to receive. Why the second example of natural disaster, plague, no working airport - - -

GORDON J: So, this is in *M38* anarchy-type of ideas, which is the last category.

MR KNOWLES: That is the last category. That is slightly different, because that technically would be removal, if there is a country willing to receive them despite anarchy and no working airport but removal is not reasonably practicable there, not because the person might be exposed to whatever risk that anarchy or plague might bring after removal is complete but because the process of removal itself cannot reasonably and practicably be done in those circumstances.

So, if there is no working airport, there is no one to receive them. If there is a plague or anarchy, the risk associated with, for example, accompanying a removed person, would be sufficiently high that it would not be reasonable – at least, not reasonably practicable – to remove them. So, that example is where reasonable practicability of removal has some work to do.

GORDON J: What about natural disaster?

MR KNOWLES: Well, natural disaster is essentially, in my submission, the same. It would have to be a natural disaster, and this is returning to the question that your Honour Justice Steward asked my friend about how *M38*

should be read. Natural disaster would have to be a natural disaster which makes the process of removal not reasonably practicable.

STEWARD J: Like an earthquake.

MR KNOWLES: Like an earthquake, but for instance in a large country an earthquake in one part of the country may not make removal to another part of the country not reasonably practicable. It will depend upon the facts.

STEWARD J: Can I ask you, Mr Knowles, do you put your case as far as this that, in weighing the probability of the constructional choices here, one thing that might arguably weigh in your favour is that, if the appellant is right, you are really setting up, in a de facto sense, another class of visa with its own criteria – which I think on one view is imminent and premature death – and how that would fit in with the complementary protection regime.

MR KNOWLES: That is a very large question which I do wish to address, and that one I will come back to because it requires some understanding of the complementary protection regime and what it does and does not cover. So, if your Honour will allow me to return to that - - -

STEWARD J: And as part of that as well, will you also address the non-compellable powers?

MR KNOWLES: Yes, of course, and I will do so by reference to what was said in *ASF17*.

STEWARD J: Thank you.

GAGELER CJ: Mr Knowles, you are dealing here, I think, with the text of section 198.

MR KNOWLES: Yes.

GAGELER CJ: Can I perhaps translate your argument this way, and you tell me if this is correct - - -

MR KNOWLES: I am sorry it requires translation, your Honour, but - - -

GAGELER CJ: No, no. You look at the text and it says: "an officer must remove", and you say "remove" means: physically take from Australia to another country – that is it, that is the duty.

MR KNOWLES: Yes.

GAGELER CJ: And then you say "as soon as reasonably practicable" speaks to the performance of that duty and nothing more. So, it is - - -

MR KNOWLES: With one qualification, it speaks to – yes is the answer, but that has both a temporal and substantive aspects that were considered in *MZAPC*. So - - -

GAGELER CJ: That is right, that is not a qualification, that is an explanation, I think, yes.

MR KNOWLES: Yes, your Honour, that is the short point, and it is in fact the whole point.

GAGELER CJ: Yes.

MR KNOWLES: Everything that follows could be accused to be unnecessary.

EDELMAN J: It must be a bit more than that, at least. You need a receiving country, and you need the consent of the receiving country.

MR KNOWLES: Yes.

EDELMAN J: Which means that the reasonable practicability and feasibility must be more than just what is physical.

MR KNOWLES: Quite.

EDELMAN J: It must involve notions of consent and, presumably, a sufficiently authoritative working government of the country that is able to provide that consent in an authoritative way.

MR KNOWLES: Yes, I accept all of what your Honour said, especially that part, which is not limited – and *NATB* made this clear – it is not limited to what is physically practicable. Can I just tie that into the last example in the schema that I was giving in response to Justice Gordon's question, which I had not yet got to, which is what has been described during this hearing as transitory permission.

That is not at all inconsistent with the argument that I am putting that it is not reasonably practicable to return someone where the consent of the receiving country is so limited that it is not properly consent to receive at all and for all purposes, because if your Honours go to a matter which was touched on in *ASF17* but was not required to be determined – *ASF17* is at tab 24 of the joint bundle – and I will return to this later, to deal with the Minister's non-compellable powers, but I wanted to just point out to

your Honours, in the "Factual background of procedural history" section of the judgment at paragraph [9] there is reference to a departmental policy in which removal will not be undertaken:

> to a country in respect of which they have no right of residency or long-term stay –

The plurality go on to state – and I accept that this was not a legal finding; it is a description of the factual basis – but the plurality go on to say:

> Considerations underpinning the third country removal policy include the potential for diplomatic controversy were someone to be removed to a country which had not agreed to accept them and the lack of any basis for generally considering that a country would agree to accept anyone who has no right of residency or long-term stay in that country.

So I accept your Honour Justice Edelman's proposition that removal does require the consent of the receiving country, and the reason why purely transitory locations would be not sufficient to satisfy the statutory definition of removal is that one could not be reasonably satisfied, or that it would not be reasonably practicable, to remove if there was a real risk that that process of removal itself would cause damage to diplomatic relationships or - - -

GLEESON J: But is that not more of a question about the scope of the duty, being the duty to remove to another country, which has to be identified, than, perhaps, the separate question of how the duty is to be exercised as soon as reasonably practicable?

MR KNOWLES: I accept that, your Honour. It could be said that that is a little bit more like the rock in the ocean scenario, that there simply is no country willing to receive the person and therefore it is not "removal", rather than being determined under whether it is "reasonably practicable to remove". But even if I am wrong in that, it would not be reasonably practicable to remove somebody who, for example, had an entitlement to a seven-day tourist visa without the permission of that country for the person to stay.

The reason why that would not be reasonably practicable does not depend on events which postdate removal. It would not be reasonably practicable because the process of the removal itself would give rise to the very risk that is referred to there in paragraph [9] and, indeed, the process of removal itself would be liable to challenge because the person, in this example, would not be a tourist at all.

So, whilst I accept all of the examples that your Honour Justice Gordon has referred to as being, if I can put it this way, barriers to removal, whether because the outcome would not amount to removal or whether because it would not be reasonably practicable to remove in those circumstances, the common feature of all of those cases is that removal and the barrier to removal relates to the removal process itself, not the circumstances which might pertain after removal is completed. That is why, in our submission, section 198 just cannot do the work which the appellants need it to do.

Just to finally circle back to my friends' reliance on Monsieur Vattel and, in particular, the reference in the text to removal to a place where somebody can live, what my friend seeks to do is expand upon a requirement that it is a place where someone can live, because the circumstances of this case is that upon removal, the appellant will be able to live in Nauru.

My learned friend seeks to read words into Vattel and all that follows, that there is a right to be removed to a country not only where someone can live but where someone can live enjoying a particular standard of living, including a particular aspect to health care. There is simply no such right. There is no right recognised at international law; there is no right recognised in domestic law.

For reasons I will come when I come to the legislative history, it cannot be suggested, as both the appellant and the intervener do, that upon the introduction of section 197C there was some disconnect available that claims which would engage non-refoulement obligations had to be ignored, yet claims and potentially less serious claims which did not engage those non-refoulement obligations had to be considered. That is simply – the perversity of that outcome is reason itself why it ought not be preferred, but what I will come to directly is that the legislative history does not support that.

To make that proposition good, can I take your Honours first, now, back to *ASF17*, which is at tab 24, volume 6 of the authorities. I had previously taken your Honours to paragraph [9], but moving forward to the substantive part of the judgment, I first refer to paragraph [35] to make the point that I have already made, that:

> For removal . . . to be practicable, there must . . . be identified a country to where that alien might be removed –

But then, more relevantly for the argument that I am presently seeking to make, can I refer your Honours to paragraph [38]. Rather than read the

whole of the paragraph, I might just allow your Honours to read it. What I draw from this paragraph are two propositions.

The first is, albeit said in the context of a refugee claim, the plurality stated that even in the case of a genuine and well-founded fear, that is not a sufficient basis to avoid the operation of section 198. I will come back to why that statement in the paragraph regarding removal to a fear of harm should not be understood as limited to either refugee claims or non-refoulement claims more generally.

But then the second prospect – or the second proposition, I should say – that I take from this paragraph is from the final sentence, that Parliament has enacted a scheme that exclusively provides for the risk of harm upon return to a country to be addressed through the Minister's non-compellable powers, and in this particular case, I would refer or rely upon, particularly, the availability of section 195A.

That, to answer your Honour Justice Steward's question, is particularly important in this case because what my friends seek to invite your Honours to find is that the construction of section 198 that the Commonwealth propound has the perverse and, indeed, inhuman consequence that a person facing certain death has to be removed regardless, and that is simply not a correct understanding of the statutory scheme.

The statutory scheme allows for consideration of those types of claims whether or not they are non-refoulement claims. They can be protected through the grant of a visa under section 195A and, importantly, the Minister can be held accountable and responsible to Parliament.

STEWARD J: You would say they are important pressure valve provisions, typically to deal with significant changes, say, in country information, from when the decision-maker makes the decision and when the time for removal arises, which may be some years later on.

MR KNOWLES: May be some years later and may be particularly poorly suited to be made in the context of a court inquiry years prior or months prior to removal itself.

EDELMAN J: I cannot remember – were sections 48B and 195A present at the time that 198B was, itself, introduced?

MR KNOWLES: I think, your Honour, the only honest answer I could give to that is I would have to take it on notice. I do not know from the top of my head what the legislative history is, but I will ask for that to be - - -

EDELMAN J: But you do not say that the meaning of section 198B has changed at any time since its introduction, do you?

MR KNOWLES: No, and what I am about to turn to presently is the introduction of section 197C did not change its meaning except in one limited aspect, and it certainly did not change the meaning of what "reasonably practicable" attaches to. That is what I will turn to immediately, if I might, because I want to take your Honours to what the pre-197C position was, which is best reflected, I think, in *Plaintiff M70*.

Although, I accept, as my learned friends say in writing, there was a series of cases – *M61* first, in this Court, then *Plaintiff M70*, and then *SZQRB* in the Full Federal Court – which all had the consequence, in my submission, that there was an implied limit on section 198, and that implied limit was that it was not engaged where non-refoulement claims had not been considered.

To make that good, can I ask your Honours to turn to *Plaintiff M70*, which is at tab 19, volume 6. And I might start – although there are a number of paragraphs, I might start with paragraph 92, which is in the decision of Justices Gummow, Hayne, Crennan and Bell.

JAGOT J: Paragraph 92?

MR KNOWLES: Paragraph 92, which is found at page 190 of the report. First, their Honours referred to the proposition, uncontroversial in this case, that the power to remove is confined by the necessity to find a receiving State or a State to which the person can be removed. Then it is understood by references to paragraphs 93 and 94 that there are some other qualifications on the power to remove.

Particularly, at paragraph 94, their Honours refer to the Refugees Convention and the possibility that removal would be a breach of international obligations. Then, although there is reference to both section 198 and section 198A, if your Honours move forward in the judgment, the conclusion is effectively expressed at paragraphs 97 and 98, where their Honours say that:

> Section 198(2) should not be read as supplying a power to remove the present plaintiffs from Australia.

The present plaintiffs being people who had not had refugee claims considered. Then their Honours continue:

> Reading s 198(2) as supplying that power would allow the Minister to remove a person who claims to be a person to whom Australia

> owes protection obligations, but whose claims have not been assessed, to *any* country willing to receive that person.

And then their Honours say that that:

> would give s 198A(1) no separate work to do.

This was addressing an argument that there was an alternative power of removal, which is not relevant in this case. But at paragraph 98, their Honours go on to say as an additional point that section 198(2) cannot be read:

> as providing a power to remove from Australia to *any* country that is willing to receive the person concerned any offshore entry person who claims to be a person to whom Australia owes protection obligations, but whose claims have not been assessed –

And the reason for that is that that would destroy:

> the legislative intention evident from the Act as a whole –

and the Act as a whole is understood to be a statutory scheme intended to facilitate Australia's compliance with international obligations and, particularly, compliance with the Refugees Convention and the Refugees Protocol.

So, their Honours there expressly are not talking about it not being reasonably practicable to remove a person whose claims have not been assessed. Rather, they are simply saying that there is an implied limit by reason of the structure of the Act whereby section 198 is not engaged at all where, broadly speaking, non-refoulement obligations have not been considered.

It is that particular implied limitation which section 197C was introduced to reverse. Nothing in the introduction to section 197C was, in my submission, intended to alter the meaning of when it will be reasonably practicable to remove a person. Rather, all it did was remove the implied limitation recognised in *Plaintiff M70* in relation to the Refugees Convention and in *SZQRB* in relation to complementary protection.

That purpose is evident if I take your Honours briefly to the explanatory memorandum, which is at tab 45, volume 8 of the joint bundle of authorities. I do apologise, it is a relatively long document. The part of the document that I wish to take your Honours to is at page 2330, using the numbering of the joint bundle.

Without seeking to linger on this unnecessarily, starting at paragraph 1133, the drafters of the explanatory memorandum refer to judicial review of protection visas in recent years. At the next paragraph, 1134 and 1135, there is particular reference to *Plaintiff M61*, *Plaintiff M70* and *SZQRB*. Importantly, at 1136, the drafters of the explanatory memorandum refer to the State:

> Prior to this . . . jurisprudence –

as being:

> section 198 of the Migration Act created an obligation to remove unlawful non-citizens in the circumstances prescribed in section 198 and this duty was not constrained by reference to Australia's international obligations –

And their Honours cite for that proposition *M38*, which, as your Honours have been taken to by Mr Wood, formed part of the reasoning in *NATB* itself. I rely particularly on paragraph 1137, where the drafters say that:

> In general terms, the amendments in this item are intended to restore the situation to that arising prior to the jurisprudence –

And 1140, that:

> The amendment are intended to put it beyond doubt that the purpose of section 198 is not to respond to international protection obligations, but to provide officers with the duty to remove unlawful non-citizens from Australia in the circumstances as set out –

So, what I take from that is that, contrary to what I understand the intervener and indeed, the appellant's submission, section 197C does not alter at all the approach to be taken to the reasonable practicability of removal. What it does do, in clear and uncertain terms, is remove the implication recognised in *Plaintiff M70* and other cases that the duty would not be engaged at all where claims that potentially engaged Australia's non-refoulement obligations remain to be considered.

So, one does not, with respect, achieve the situation that my friends seek to urge upon your Honours that the introduction of section 197C somehow means that claims engaging non-refoulement obligations would be irrelevant to assessing reasonable practicability of removal, but claims which do not engage those obligations somehow remain relevant. Apart from that being a somewhat perverse outcome, it simply misunderstands what section 197C was seeking to do, which was not address reasonable

practicability at all, but instead the implied limit recognised in *M70* and those subsequent cases.

Can I then perhaps turn to why, indeed, it would be an absurd outcome. The first reason is really obvious, in the sense that one might expect harm that was sufficient to constitute persecution or serious harm for the purposes of either refugee obligations or protection obligations in some cases will be more serious or as serious than harms or potential harms which do not engage those obligations.

Secondly – and my friend sought to avoid this outcome, but we say, for reasons I will come to, it cannot be avoided – secondly, the outcome is absurd because applying the same logic in this case, it would follow, in my submission, that a Nauruan citizen with the same medical conditions could not return or be returned to Nauru because they would face the very same risk.

Now, my friends sought to avoid that outcome by saying that is not correct because in the case of a Nauruan citizen, he could make a claim for complementary protection – I choose the gender "he" for no particular purpose – he could make a claim for complementary protection, whereas the appellant cannot because Nauru is not the appellant's receiving country for the purposes of section 36(2)(aa). Now that is correct, insofar as it goes: Nauru is not a receiving country for someone who is not either a national of Nauru or Nauru being their place of former habitual residence.

But it does not follow that a Nauruan citizen in the same circumstances could bring a claim for complementary protection. This goes to the issue raised, perhaps I think, by your Honour Justice Steward's question to me earlier. If one has regard to section 36(2A)(a) and what serious harm amounts to for the purposes of that section, it is very difficult, if not impossible, to see what a person who is a Nauruan citizen but otherwise in identical circumstances to the appellant would say that would bring him within the statutory definition of serious harm.

For example, what is said here is that he faced a risk to life, but consistently with Australia's international obligations, "serious harm" refers to, relevantly, the arbitrary deprivation of life. It cannot, in my respectful submission, be an arbitrary depravation of life that somebody faces a risk faced by other members of the Nauruan community by reason of healthcare generally available in Nauru, or for that matter in any other country.

It is not on the list of authorities because it only became apparent in the approach taken by my learned friend – that is, my learned friend for the appellant – in relation to a complementary protection claim, but your Honour Justice Gleeson did deal with the meaning of arbitrary

deprivation of life in a decision *SZDCD* [2019] FCA 326, between paragraphs 43 and 48.

I will not do justice to the nuance of the reasoning, but it is in essence that an arbitrary deprivation of life cannot be a risk faced by all people in a particular country, nor can it be a risk which is not intentional, in the sense that the risk of arbitrary deprivation of life is a risk which follows from intentional acts of the person performing acts of harm.

So, this is a very long-winded explanation as to why the Nauruan citizen otherwise in the same position as my learned friend also is likely not to be within the scope of either Australia's refugee or complimentary protection obligations, and you get, on the hard logic of my friends' position, Australia would be unable to return a person who has no permission to remain in Australia, who is a citizen of Nauru, to Nauru.

That absurd outcome simply reflects the reason why section 198, and in particular the words "reasonably practicable", must be attached to performance of the removal duty itself, rather than consideration of the circumstances which may prevail at a later point in time. In answer to your Honour Justice Edelman's question, the Solicitor-General has done some devilling.

Section 198 was introduced in 1992; section 48A and 48B were introduced in 1995; section 195A was introduced in 2005; and although not relevant to this case, section 351 and section 417, which deal with a discretionary power to substitute decisions of merits review bodies, were introduced in 1992. So, the short answer to your Honour's question is that the provisions were not introduced simultaneously.

The final matter which I did wish to address really goes to another difficulty which is not only practical, it is both legal and conceptual, in my submission, which is the uncertainty created by the position advanced by my learned friends. Without disrespect to the appellants, the statutory test which they have urged has morphed somewhat. In writing, it was variously described as a "real risk", a "serious risk" or a "substantial risk". In oral submissions, it was refined to a risk of imminent or premature death, or perhaps a risk of both imminent and premature death.

In truth, it must be something even more than that because it must be not just a risk of imminent and premature death, but it must be such a risk which is magnified or made greater by the process of removal itself. So, there may be cases where a person suffering a life-threatening illness is no worse off from being removed from Australia, or indeed better off, depending upon the circumstances.

Even if one accepts that there must be some comparison undertaken on my learned friends' position between the magnitude of the risk in Australia and the magnitude of the risk in the country of removal, my friend has given, with respect, no concrete detail as to how a test phrased as "imminent and premature death" being the relevant risk might properly be applied.

An officer, or indeed a court, might be called upon to assess complex factual questions evaluating whether or not, first, what medical conditions a person subject to removal might have, what health care services are available in the country of removal, whether those health care services are generally available – either on a geographical basis within the country, or on an accessibility basis in terms of general access to health care – the health of a noncitizen may change from time to time, the health care available in a receiving country may change from time to time.

As I think my learned friend accepted in argument, although the current facts are – the current facts arise by reason of access to health care, they are not limited to that, and one would have to consider other generalised risks, perhaps including crime rates, the risk of poverty, the risk that your Honour Justice Jagot referred to in terms of a comparative risk of living a shorter life by reference to life expectancy.

It cannot be assumed, or at least contemplated, in my submission, that Parliament intended an officer and every officer who is subject to the duty to have to make an assessment of those matters, or indeed that the court could be called upon to determine all of those matters. Rather, if reasonable practicability is limited in the way we say to the practicability of the process of removal, that is consistent not only with the statutory text but it is an approach which has an overwhelming advantage; that it is consistent with both the historical material and the introduction of section 197C, but also the general purposes of removal.

If your Honours please, the Solicitor-General will address the constitutional aspects of ground 2 and ground 1.

GAGELER CJ: Thank you, Mr Knowles. Mr Solicitor.

MR DONAGHUE: Your Honours, I will start with ground 1 and can I ask you to take up the *Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025*, which is in volume 1, tab 1, if you are using the book. That Amending Act operates in two almost entirely independent ways to provide a complete answer to the procedural fairness challenge raised by ground 1.

The first pathway is item 10, and the second pathway is items 3 and 9, item 3 inserting section 198AHAA, and item 9(2) making that provision operate retrospectively. So, can I take those two paths in turn. As I say, either path is sufficient for success.

GORDON J: You do not need both.

MR DONAGHUE: Sorry, your Honour?

GORDON J: You do not need both.

MR DONAGHUE: I do not need both. There is only one very narrow respect in which item 10 might buttress the second pathway, but I will identify that when I get there but I do not need both. If your Honours could turn to item 10:

> **Validation of things done** –

you see a familiar form of Commonwealth validating legislation. Subitem (1) identifies that the item is applying to things:

> done, or purportedly done, before commencement –

So, it is backward looking to things that have happened before the commencement date, which was 6 September 2025. The things that were done before that date need to meet the criteria in (a) and (b) and is to be:

> covered by subitem (2); and

and it needs to be:

> apart from this item, be wholly or partly invalid –

for a specific reason:

> because the rules of natural justice were not observed –

What are the things covered in subitem (2)? Well, relevantly for our purposes, in (2)(a) they include:

> entering into or purportedly entering into a third country reception arrangement –

So, one of the evident targets of item 10 was a third country reception arrangement or purported third country arrangement entered into in the past which would have been invalid for breach of the rules of procedural

fairness. The very thing that is alleged in ground 1. So, the whole case seeking to avoid item 10 is that argument that invited your Honours to find that the provision completely missed its evident target.

Subitem (3) makes it plain that it does not matter for the purpose of this part of the argument, item 10, whether or not the exercise of power purportedly in question was an exercise of what the Act calls executive power in (a), or (b), statutory power under the *Migration Act*. So, for the other pathway, that distinction is relevant, but for this pathway, it is not. Whether or not entry into the agreement was statutory power or non-statutory executive power makes no difference, and the operative provision is then (4), the provision is:

> taken for all purposes to be valid and to have always been valid –

The remaining provisions are avoidance of doubt provisions that your Honours do not need to concern yourselves with. In this case, unlike most of the cases where your Honours look at provisions of this kind, there is no challenge to the validity of item 10.

So, it is unlike *Duncan* or *AEU* or the more recent AN0M case, *CD v Commonwealth*. No issue as to validity and, indeed, the appellant expressly accepted both in writing and orally this morning that item 10 is effective to validate the arrangements to which it applies. So, your Honour the Chief Justice asked about 76AAA and the answer was: we accept that item 10 has validated the interim arrangement for the purpose of that provision.

The argument then is that the admitted validation of the interim arrangement did not remedy what is said to be its unlawfulness, and that is a submission that your Honours are invited to accept as a matter of the construction of item 10. So, it attributes to Parliament an intention that when Parliament said the interim arrangement is to be taken for all purposes to be valid and always to have been valid, its intention was to leave it open to a court to grant an injunction to prevent any further action being taken to implement that validated agreement.

Our short point is that that would be an astonishing intention to attribute to the Parliament. It is difficult to see any reason why Parliament would have validated this provision with retrospective effect while nevertheless intending that a court may prevent anything from being done on the basis of the validated provision.

The argument depends entirely on the distinction which we, of course, accept exists between unlawfulness and invalidity. It is the *Project Blue Sky* distinction. It is a distinction that exists because there are some

kinds particularly of statutory conditions that may, if breached, not result in the invalidity of a decision but which are nevertheless unlawful. It is, in the old parlance, directory statutory requirements, and it may be that requirements of that kind can be enforced by injunction, but procedural fairness, in our submission, is never characterised in that way.

There are countless cases in which a denial of procedural fairness has been recognised as a jurisdictional error; that results in a material denial of procedural fairness as a jurisdictional error that results in the invalidity of the decision. Our submission is that, in a provision that is designed to cure – to validate things that would be invalid because of a denial of procedural fairness – your Honours would not interpret the validating provision as rectifying the consistent effect of a denial of procedural fairness while nevertheless leaving behind an unlawfulness that could result in injunctive relief.

In support of that submission, without taking your Honours to it, we have cited a couple of cases in outline paragraph 3, *Duncan* and the recent *CD* decision. But in those cases, particularly in *Duncan* and then picked up in *CD*, the Court describes the effect of a provision like 10(4) taken to be valid language as attributing:

> the consequence of legal validity –

and attaching:

> new legal consequences and a new legal status to the things done –

We submit that is what section 10(4) does. The new legal status that has been attached by section 10 is a status that permits action to be taken on the basis of the validated decision.

GORDON J: Including in the future.

MR DONAGHUE: Including in the future. That is the whole point, it is to take the thing that happened in the past and to allow in the future action to be taken on the basis that the thing was properly done. So, by that path by itself we submit item 10 answers ground 1, but if for some reason we are wrong about that, there is the second path.

Now, the second path, as I foreshadowed, does vary depending on whether the power to enter the arrangement was statutory or non-statutory. So can I take those two alternatives in sequence. On the premise that the power to enter into the agreement was non-statutory, which is a premise I am going to make good in just a few minutes, the pathway is, as I said, item 3 and then item 9.

So, if your Honours go to item 3, or in the *Migration Act* either way, you can see the terms of 198AHAA dealing specifically with whether or not the rules of natural justice do apply to entry into a third country reception arrangement and stating in terms in subsection (1) that they:

> do not apply to an exercise of –

what is again called:

> the executive power of the Commonwealth to –

enter into an arrangement. Now, we accept that this provision is properly construed as using the words "executive power" in that context in a way that draws a distinction between statutory executive power and non-statutory executive power.

The reason we accept that is because when your Honours look at subsection (3) you will see – and subsection (3) is not relevant to subsection (1), but nevertheless it is in the same section and so it gives context to what Parliament thought, and subsection (3) draws a distinction between paragraphs (a) and (b) executive power, and (b) statutory power.

So, we think you would probably properly read this provision – even though that definition, or that provision, only applies back to subsection (2), reading the provision as a whole, we accept that you properly read it as requiring the entry into the third country reception arrangement to be occurring in the exercise of non-statutory power, which we submit is a correct understanding of how this works. If I can make good the premise that that is the kind of power that was exercised, then 198AHAA says:

> The rules of natural justice do not apply –

and that effect is then made retrospective by item 9(2)(a), which your Honours have seen earlier this morning, which expressly provides that that section that you have just seen applies to:

> a third country reception arrangement entered into with a foreign country before . . . commencement –

So, Parliament has turned its mind to whether an existing arrangement should have the benefit of 198AHAA and has said that it should. We submit that by that pathway, even if your Honours were attracted to our friends' *Project Blue Sky* argument drawing a distinction between invalidity and unlawfulness, there would be no unlawfulness, because the retrospective removal of the requirements of procedural fairness means that

there was never a breach of the rules of procedural fairness in entering into this agreement.

That is the only source of the contended unlawfulness. So, we can win on this path, even if your Honours think that item 10 has missed its mark, for that reason. Now, the premises, as I say, is that for that argument to work, the power has to be non-statutory executive power. The learned primary judge found that that was the proper characterisation of the power.

I will not take your Honours to his reasons, but the relevant paragraphs are 17(a) and 118 to 127 in the core appeal book. That analysis was reflective of what this Court held in *Plaintiff M68*. *M68*, of course, concerned section 198AHA. That provision formed the model for 198AHB, as his Honour the learned primary judge accepted at paragraph 120 of his reasons.

If your Honours could turn to 198AHB, immediately – well, I was going to say immediately following AHA, there is now the new provision AHAA between them, if your Honours are working from the current version of the Act. I will show you the text of AHA when we come to *M68* in a moment, but AHB is structured, starting with subsection 1, with:

> the Commonwealth enters into an arrangement . . . with a foreign country –

So, if the Commonwealth enters into an arrangement with a foreign country, then the section applies. That temporal sequence, we submit, is not a promising foundation for the idea that the power to enter into the agreement itself comes from 198AHB, because that section can only apply if there is already such an agreement. That, we submit, is a powerful pointer in the direction of the power being sourced from elsewhere.

GAGELER CJ: The existence of the agreement is a – or non-existence – is a justiciable issue.

MR DONAGHUE: Yes, it is.

GAGELER CJ: I know you do not want to talk about what you put in writing, but I cannot see how it fits into your argument.

MR DONAGHUE: You cannot see - - -

GAGELER CJ: I do not see how it fits into your argument.

MR DONAGHUE: The non-justiciability part of it? Well, it is not like a – it is not all or nothing. So, the authorities on the reviewability of

treaty-making exercises and matters of that kind do not draw absolutes. There may be circumstances, as Justice Gummow explained in *Ditfort*, where a Commonwealth statute might render justiciable some aspect of the operation of a – or the existence an international agreement. I do not deny, and I could not deny in the face of *M68*, that at least the question: is there an agreement that enlivens that power – is justiciable.

But, your Honour, there is – the issue raised by the notice of contention arises at about answer 6 or 7 to the number of different ways we can answer ground 1. So, I accept there is some complexity there, but I do not really want to detain your Honours with that complexity in circumstances where it is hard to see how your Honours would get to that question in determining ground - - -

GORDON J: Do you maintain it?

MR DONAGHUE: I am maintaining it, subject to the qualification that I just gave. I could take your Honours through all of the cases, but there may be cases where it will matter but this is not one of them. So, our friends, I think – as I understood the argument – suggest that one can rely on subsections (2), (3), (4) and (5) of AHB to support the argument that the agreement itself is made under the section, and I think that argument was based – in part, at least – on the definition of third country reception functions, but your Honours will note that that defined phrase from subsection (5) is not used at all in subsection (1); it is used in subsection (2).

What this section is doing is saying where you have a condition – an agreement has been made in the exercise of a power that comes from somewhere outside the section, then the section operates to confer certain powers, or to ensure, as subsection (3) says, that:

> the Commonwealth has capacity and authority to take action –

So, you can do things like spend money and take other actions in relation to – but pursuant to a statutory power that arises by reason of subsection (2), that there is no legal or logical difficulty with the idea that a statutory power is enlivened by the prior exercise of a non-statutory power. That is what we submit is happening here, and that is what your Honours held was happening in *M68*. The only other section before going to *M68* I should emphasise is subsection (4), which expressly provides that:

> Nothing in this section limits:
>
> (a) any other power or duty under this Act; or

importantly:

(b) the executive power of the Commonwealth.

So, that denies, in our submission, that this statute displaces the non-statutory executive power to enter into an agreement with another country. Our friends' only real answer to that is to point in their reply to *CPCF*, where there was, we accept, an equivalent statutory statement to that you see in subsection (4), but while that subsection was equivalent, the statutory regime was totally different.

So, in *CPCF* – I will not take your Honours to it, but in *CPCF*, there was found in the *Maritime Powers Act* a quite detailed regime by which vessels could be intercepted and removed, and the Commonwealth's argument was that if for some reason the detailed statutory regime and the *Maritime Powers Act* did not work, the Commonwealth could fall back on non-statutory executive power to do the same thing.

Effectively what the Court held, and most relevantly in paragraphs 141 and 283, is that in that context, where you had a whole regime, that would have been circumvented by – I think Justices Hayne and Bell, from recollection, said having failed to come in through the front door, you could come in through the back door and do exactly the same thing, but that was how they characterised what the Commonwealth was trying to do.

They said it does not matter that you have got a provision like subsection (4), one has to construe the Act as a whole. Here, we do not have a front door and a back door, we just have one source of power, the non-statutory executive power to be exercised, and so there is no reason not to treat 198AHB(4) as doing exactly what it says.

Plaintiff M68 (2016) 257 CLR 42, your Honours will find in volume 5, tab 18. If your Honours, when you have it, could go first to paragraph 15, you can see there set out the terms of 198AHA, and your Honours will see the very evident similarity between that provision and AHB, including the first subsection:

> This section applies if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing –

It is the same structure; if there is an agreement, then there are statutory powers conferred. In our submission, all six members of the majority found that the power to enter into the arrangement that enlivened that section was non-statutory executive power. If I could start with your Honour the Chief Justice's judgment at paragraph 178, on page 109 of the report. So, your Honour is there discussing 198AHA. At the end of 177:

> The precondition for the application of the section . . . is therefore met by the Executive Government entering into an arrangement in relation to the regional processing functions of a country –

and then in the second-half of 178:

> Entering into the Second Memorandum of Understanding was not itself an act which falls within the scope of the authority retrospectively conferred by the section, but rather involved the exercise by the Executive Government of its non-statutory prerogative capacity to conduct relations with other countries.

We submit exactly the same is true here. Justice Keane reasoned to the same effect, in paragraph 201, stating:

> For the purposes of s 198AHA(1) . . . and pursuant to the non-statutory executive power of the Commonwealth under s 61 of the *Constitution* –

the Commonwealth entered into the agreement. Justice Bell, at paragraph 68, back on page 77 at the end of that paragraph:

> Each Memorandum of Understanding was entered into in the exercise of the non-statutory executive power of the Commonwealth to establish relations with other countries.

So, those three judgments are perhaps the clearest, but we submit the plurality reasons support the same conclusion. Can I ask your Honours there – so, these are the reasons of Chief Justice French, and Justices Kiefel and Nettle. First, at paragraph 24, you see the Commonwealth's argument recorded:

> The Commonwealth relies upon s 61 of the *Constitution* to authorise its entry into the second MOU with Nauru. The Commonwealth submits that such entry either is within the executive's power to conduct external relations or falls within the express terms of s 61 of the *Constitution*, in that it is for the "execution and maintenance of … the laws of the Commonwealth".

So, that is the argument. At paragraph 45, we submit that their Honours accepted that argument. You do not need read the first sentence:

> The section does not in terms authorise the Commonwealth to enter into any such arrangement. It is, however, within the scope of the executive power of the Commonwealth with respect to aliens to enter into such an arrangement –

Then, if your Honours go forward to page 74 of the report, which is the answers to the question, question (2a) was:

> Was the conduct of the Commonwealth in signing the second MOU authorised by s 61 –

And the answer given is:

> Yes.

In our submission, those six Justices all held, in relation to a materially indistinguishable section, that the power to enter into the arrangement that enlivens the statutory powers that follow is non-statutory power.

Your Honour Justice Gordon dissented, but we do not perceive your Honour's analysis as being inconsistent with the aspects of the reasoning that I have just identified. So, if that is right, then we submit there is no barrier to items 3 and 9 of the Act operating to remove the unlawfulness upon which our friends' argument depends by providing that procedural fairness never governed the exercise of that power.

Our friends I think say at this point, well, even if everything I have said to this point is correct, 198AHAA in saying the rules of natural justice do not apply to an exercise of executive power, require a valid exercise of executive power. So, again they seek to produce the outcome that the validating provision has missed its target. As to that, we say two things.

First, the argument is completely circular because it seeks to avoid the validating provision by relying on the very invalidity that it sets out to cure. So, the argument, in effect, deprives item 9(2)(a) of any work. That is the first answer. The second answer – and this is the one point of intersection between items 9 and 10 that I flagged - - -

GORDON J: This is the word "before"?

MR DONAGHUE: Well, the word "before" is there in item 9(2), but if this argument – I think the argument is, even if item 9 makes the provision apply retrospectively, if the exercise of executive power to enter into the arrangement was invalid, then it does not attract the operation of 198AHAA(1).

We say to that, well, if the only barrier to the operation of that provision was that there was a purported exercise of executive power rather than an actual exercise of executive power, then that barrier is fixed, on our

friends' own case, by item 10, which your Honours will recall expressly applies to both statutory and non-statutory executive power.

So, item 10 means there was a valid entry into an agreement, and that valid entry into the agreement would then benefit from items 3 and 9. As I say, many different permutations, but I am answering the different – the rather winding pathway by which our friends seek to get home, despite this Act.

The final step in the winding path, your Honours, is that if your Honours held that the power to enter into the agreement was statutory, then I have accepted our second pathway does not work, but in that situation, what our friends are asking of you is to grant an injunction in relation to a valid but unlawful agreement, and they are asking you to do that in the face of section 474 of the *Migration Act*, the privative clause.

On this permutation of the argument, it is a statutory decision. So, it is a decision made or purportedly made under the Act, and the reading-down in *S157* was to say a decision is not made or purportedly made under the Act if it involves a jurisdictional error. But the jurisdictional error has been fixed, on our friends' concession, by item 10, and they say your Honours can nevertheless grant relief in relation to the remaining non-jurisdictional error, but you cannot do that, in our submission, because section 474 prevents review for non-jurisdictional error of that kind.

I will not take your Honours through the many authorities. I think we have given them to you in our outline, but, for example – yes, so at the end of paragraph 6 of our outline we have cited a number of authorities that we submit support the proposition that while it might ordinarily be the case, leaving aside 75(v) and leaving aside privative clauses, that you could get an injunction for a non-jurisdictional error of law, in the context of a privative clause, you cannot. In our submission, those paragraphs we have cited support that proposition.

So, whichever path you take, in our submission, the Amendment Act has hit its target, which was to answer the very case that is raised against us on ground 1. In a sense, the Act was enacted out of very abundant caution, because the learned primary judge found that, in fact, procedural fairness was not owed anyway, in relation to the exercise of executive power to enter into the agreement, and we respectfully agree with what his Honour said on that point. The relevant reasoning is in paragraphs 129 and 130 of his Honour's reasons. I do not seek to add to them.

The only, I think, additional point that I do make in relation to the procedural fairness ground itself is to ask your Honours to note the terms of

the interim third country reception arrangement. Your Honours have, I hope, a respondents' book of further material that includes the three letters that together constitute the agreement. If your Honours could take that book up and go to page 33, you see there the last of the three letters, dated 12 February, the letter from Minister Burke to the President of Nauru. You see there a reference in the first paragraph:

> Thank you for confirming that the Government of Nauru agrees –

That is the letter I am about to come to:

> and for advising that each of the –

I emphasise:

> initial 3 persons will receive a long term stay visa –

and then the Minister says:

> On that basis, my letter of 31 January 2025, your reply letter of 10 February 2025 and this letter –

of 12 February:

> together shall constitute an agreement . . . which will enter into force upon your receipt –

So, the parties have agreed that the three letters together are the third country reception arrangement. The second letter, which is on the previous page of the book, page 32, recognises from the second line of the substantive main paragraph:

> the Government of Nauru agrees to the interim . . . arrangement set out in Attachment A of your letter . . . Further, each of the initial 3 persons, and thereafter any such other persons accepted for settlement while the arrangement is in force, will receive a long-term stay visa –

So, in our submission, if your Honours are just construing the arrangement, it is quite difficult to see how it can be said that, as a matter of the construction of the arrangement, it could only apply to three people. In its terms, it does not seem to say that.

Our friends I think accepted that if there was fluctuating membership to which the agreement could apply then that would be a powerful factor – I do not have an exact note, but I think my friend said it may well reduce

procedural fairness to nothing. Now, it is true – and I will not take your Honours to it, because the relevant paragraph of the reasons is in the redacted section, but it is true, in paragraph 69 of the redacted reasons, that there is evidence that a Commonwealth officer appears to have taken the view that a new agreement might have been needed if more people were sent.

I think I can go that far, but our basic point is, whatever the rights or wrongs of that view, it was a view taken after the agreement had already been reached. If the question is: was procedural fairness owed at the time that this agreement was entered into – at the time that this agreement was entered into, it was entered into in terms that included what you see in the Nauruan letter of 10 February expressly contemplating an:

> initial 3 persons, and thereafter any such other persons accepted –

So that the, in addition to the analysis you see at 129 and 130, we submit that the point is magnified by the difficulty of knowing who it is said was entitled to receive the procedural fairness that was supposed to be provided at some point when the Minister and the President were engaging in the negotiation of this international agreement.

Now, your Honours, the final point that I address orally is the – that is all I seek to say about ground 1. On ground 2, Mr Knowles has addressed your Honours on the construction of the provision. It is part of our friends' case that if your Honours accept the construction that Mr Knowles developed then, in that circumstance, section 198 is partially invalid and should be partially disapplied, pursuant to section 3A of the Act or, I assume, also 15A of the *Acts Interpretation Act*.

That is on the basis that it is said, in particular applications of the provision, it is punitive, and so infringes the Chapter III limit that your Honours developed in *NZYQ* and *YBFZ*. In our submission, the starting point in evaluating that argument is the longstanding acceptance in this Court, going right back to *Robtelmes v Brenan*, that the power to expel or remove an alien who does not have permission to remain is executive power.

What your Honours have been asked to do in relation to a provision – 198 – that expressly authorises and requires the removal of certain aliens is to find that that removal power itself should be identified as an exclusively judicial power. So, we are not here in *NZYQ* territory where we are talking about detention pending removal, where the detention is itself detrimental, and the question is: is that detriment able to be authorised as necessary, in pursuit of the legitimate purpose of removal?

We are not in *YBFZ* territory where there is curfews or monitoring conditions, which again impose detriments in aid of removal. Here, your Honours face the much more ambitious submission that the section that requires removal is punitive in giving effect to the removal.

EDELMAN J: But not in every circumstance. So, apart from the *NZYQ* group, it would usually be said – and this is effectively the point in *Falzon* – that the commission of offence, or whatever the factum is that enlivens the decision of the Executive to remove, is something that involves the failure of a condition subsequent that has been imposed upon the grant of the permission to enter, but that argument does not work where the visa – that is the bridging visa that has been granted to a particular group of people – even if one removed that visa, they would still be entitled to habeas corpus.

MR DONAGHUE: They would be entitled to habeas corpus until it is reasonably practicable to remove them. Here we have a country that is prepared to accept them, to give them a 30-year visa to let them work, to let them enter and leave as they wish, of course dependant on there being another country that agrees.

So, if it be the case that that arrangement means that the constitutional limit in *NZYQ* is no longer engaged, we submit that all one has is an alien who can be removed to another country, and our friends saying: well, but to remove us to that other country is punitive, but - - -

EDELMAN J: If the reason for removal is because of the commission of a crime.

MR DONAGHUE: Well, your Honour asked if that was the case against us, and the answer is that it is not.

STEWARD J: Can you remind me, Mr Solicitor, was it a condition of the bridging visas that you had to be someone who continued to be unable to be removed in the *NZYQ* test? So, that had to be a continuing state of affairs.

MR DONAGHUE: I think, your Honour, the answer is no. So, that state of affairs has to exist - - -

STEWARD J: At the start.

MR DONAGHUE: - - - at the start, and the visas have – but one of the reasons for the 76AAA regime that you see is that it brings an end - - -

STEWARD J: No, I understand.

MR DONAGHUE: And without that, the visa might run for a period of time, even though removal is practicable. I will make sure I am not misspeaking there, but I do not think that I am. In our submission, this aspect – sorry, before I develop that submission, can I just ask your Honours to go to *Falzon* that Justice Edelman just mentioned as a convenient way of really making the point that I seek to develop.

Falzon (2018) 262 CLR at 333 is volume 4, tab 12. So, if your Honours could start – this is in the joint reasons of Chief Justice Kiefel and Justices Bell, Keane and Edelman – at paragraph 26, there is a discussion of *Lim* and the permitted purposes of deportation or enabling an entry permit to be made are both identified in the middle of that paragraph, and then their Honours say:

> If the detention is not limited to those purposes, their Honours said, the authority conferred on the Executive "cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien.

So, *Lim* itself identifies deporting aliens as an executive power. Then in paragraph 29 in *Falzon*, it said:

> The starting point for the enquiry referred to in *Lim* is that the power to remove or deport aliens from a country is executive in nature and it is non-punitive.

So, your Honours are being asked to reverse that starting point it released in relation to some subclass. Paragraph 39 identifies vulnerability to exclusion or deportation as an important distinction between aliens and others. So, halfway through the paragraph:

> the most important difference lies in the vulnerability, arising under the common law and provisions of the *Constitution*, of an alien to exclusion or deportation.

And then skipping a sentence:

> The sovereign power to make laws providing for the expulsion and deportation of aliens extends to authorising the Executive to restrain them in custody –

Then finally, in the plurality reasons, paragraph 47 in the middle of the paragraph:

> It has long been recognised that the deportation of aliens does not constitute punishment. The cancellation of a visa as a step necessary

to achieve the removal of a person from Australia should be viewed in the same light.

EDELMAN J: If that is saying anything more than the cancellation of a visa for any reason that involves a failure of a condition subsequent is not punitive, then – I had not intended to take part in such a broad statement. The case did not involve anything more than a visa with express or implied conditions that had been subsequently invalidated.

MR DONAGHUE: But subsequently invalidated by the commission of crime.

EDELMAN J: Yes.

MR DONAGHUE: So, the thing that brought about the loss of the visa status and the deportation was the commission of a crime and that was the hook for the proposition that this was punitive, which your Honours rejected.

EDELMAN J: Yes.

MR DONAGHUE: Here we do not have any such – not only do we not have any such argument but we do not have any such hook, because it is not necessarily the case, there is no fact before your Honours that would allow you to conclude that the only people who can be captured by a third country resettlement arrangement are people with serious criminal records, but - - -

EDELMAN J: Well, it may be a very different case, but if there were facts that said the reason these three people have been chosen was because they had committed criminal offences, then it would look very much like a response to a criminal offence involving removal from the country.

MR DONAGHUE: Your Honour, on one view – well, two answer to that.

EDELMAN J: Which cannot be tied to as a condition subsequent because you remove the visa and there is still the *NZYQ* issue.

MR DONAGHUE: I understand what your Honour is putting to me. My two answers to that are, one, obviously had a case been run about the way these three people are chosen, that would have been a different factual case, and it is - - -

GORDON J: I do not know about that. That is true, but we do have, to the extent that the translation is accurate, the interview with the President.

MR DONAGHUE: Well, that does not tell you about these three people.

GORDON J: No, I do not know if that is quite right. It does explain that – it seeks to explain and justify the concerns raised about the fact that they had criminal records.

MR DONAGHUE: Yes, it does go that far.

GORDON J: It at least goes that far, Mr Solicitor.

MR DONAGHUE: That paragraph your Honour is referring is part of the suppressed reasons. I do not think there is a problem with what your Honour and I are saying about it now, but it is true, and I think notorious, that many of the people in the *NZYQ* cohort do have criminal records.

I do not deny that, but it is also possible for a person – for example, a stateless person – to not be able to be removed and to meet the *NZYQ* limit with no criminality there, and these same sets of provisions would apply to such a person. So, I am denying that the statute draws a link that would allow the provisions to be characterised as punitive in that way, and basically our point is - - -

GORDON J: Sorry, and if you took it to the other extreme, you would reject the proposition that banishment to a country about which I do not consent and which I have no connection to, picking up the matters relied upon by the appellant, are not sufficient to give rise to something which is punitive?

MR DONAGHUE: I would, your Honour, and I would urge upon your Honours caution in respect of the language of "banishment" that our friends were drawing upon, because that is language – when your Honours used it *Alexander* we were talking about citizens; we were talking about removing from Australia a person who otherwise had a right to be here. *NZYQ* does not confer such a right. It confers a right not to be detained until removal is - - -

GORDON J: But you cannot use "deportation", because deportation in its true sense is talking about removal to a country to which I have some right to be there, or connection. So, you are left with "removal".

MR DONAGHUE: But the Act, as your Honour knows – I cannot even remember what the provisions are in the Act, but there are deportation provisions in the *Migration Act* – at 200.

GORDON J: There are.

MR DONAGHUE: They have not been featured in the operation of this Act for decades now because of the removal powers, and *Al-Kateb* and cases following construed - - -

GORDON J: That is true, but when you are thinking about the concept of what is punitive and not, it does make a difference, I think, which is the point you are making, because you are talking about banishment and the context of citizens.

MR DONAGHUE: Well, I am saying that insofar as banishment brings us within a Chapter III universe, following *Alexander* and *Benbrika (No 2)*, we were talking about citizens. Here, the objects of the Act in section 4 say this Act is about regulating the admission and presence of noncitizens in Australia. The way that is done is through a visa regime. Your Honour Justice Edelman points out that the visa regime does not operate in the way that it normally operates for *NZYQ* people, and I accept that.

Ultimately, all one can take, in our submission, from 198 requiring the removal of a noncitizen to a country where they can be removed is that that is the legal and logical consequence of the absence of a right to stay. Your Honour Justice Steward I think said: well, are we effectively creating another class of visa? If you cannot remove a person who can be removed, then yes is the answer to that question, because it is effectively to confer a de facto right to stay if, despite the practicability of removal, removal cannot occur.

So that, when we come to the *NZYQ*-type analysis echoed in *ASF17* and *CZA19* – and I will not go back to it, your Honours are well familiar with it, but the key point is there is a single question of characterisation – is the law punitive – and as part of that exercise there is an analysis of the connection between means and ends. We submit that is a very easy analysis where the means and the ends are the same. The means is the removal of an alien in order to achieve the end of the removal of an alien. By definition, there cannot be disproportion between removal and removal.

It is quite different from the situation where it is detention in aid of removal or electronic monitoring pending removal, where the means and ends inquiry makes sense. Here, all that is happening is that effect is being given to the absence of the right to remain. That is consistent with the *Fong Yue Ting* judgment and the old case in the United States Supreme Court that our friend relied on and *Robtelmes*, and all of those cases, to say that it is a fundamental aspect of sovereignty that where an alien – where the Executive decides that an alien shall not be permitted to remain, then effect can be given to that by removing the noncitizen.

The final, I suppose, aspect of this really builds on the last point that Mr Knowles made, which is that there has been some fluidity in the nature of both the limit that is proffered as a limit of statutory construction, but I think also the limit that would guide any partial disapplication. So, your Honours saw "real risk" or "serious risk" in the outline our friends handed up. It has turned into an imminent risk of risk to life. "Imminent" is new, as of the oral argument this morning.

We would just emphasise about that that, one, it is not at all clear exactly what it means – it is a far from precise constitutional concept to guide when removal is possible and when it is not – and second, conceptually, it is not really clear on our friends' case why the constitutional limit would require imminence.

The argument seems to be the *Constitution* will permit someone to be removed to face a real risk to their life that will crystallise only in the medium term, but it will not permit them to be removed to face a real risk to their life that is imminent. Why? What is the rational basis for that suggested demarcation?

Furthermore, the formulation that has been used – and Mr Knowles made this point as well – the proposition was real risk of imminent or premature death from a cause that is not non-refoulement, but that leaves out completely the fact that a person like the appellant in this Court already faces an imminent risk of premature death because he has a very serious medical condition. He faces that risk in Australia. The expert evidence that our friends took your Honours through this morning from Professor King was that acute asthma is not well treated even in Australia; it is best treated in teaching hospitals, it is not well treated in other places.

So, for this constitutional limit to make sense, there would have to be overlaid, on the real risk of an imminent and proximate death, some additional criteria that identified how much worse that imminent risk had to be in the removed country rather than in Australia. What is that criteria? Where does it come from? Again, how is it sufficiently certain to guide this application process that is being – that your Honours are being invited to undertake?

In our submission, really all your Honours need to do to resolve the constitutional challenge is to say that applying *NZYQ* at 44 and assessing the relationship between means and ends, there is a perfectly congruent relationship between the purpose of removal and a provision that requires removal. Removal from Australia has for over 100 years been accepted as a quintessential aspect of the sovereign power of the Executive, and it cannot be properly characterised as punitive and contrary to Chapter III.

Unless your Honours have any questions, those are my submissions.

GAGELER CJ: Thank you. Mr Nekvapil, you have a reply?

MR NEKVAPIL: Yes. Thank you, your Honour. We do embrace a risk of imminent and premature death and, this is I think implicit, but as a consequence of the unlawful noncitizen being removed to a particular country, it has to obviously be connected to the removal.

GAGELER CJ: So, "imminent", you just mean non-contingent, do you not? I mean, it is just a risk that will be there when he arrives.

MR NEKVAPIL: Yes, it is - - -

GAGELER CJ: And continuing.

MR NEKVAPIL: An immediate continuing, but something known about in the near term.

GAGELER CJ: Yes.

MR NEKVAPIL: Now, just to address the last points first, I may have been unclear about this, but our sixth point – which I think is in point 7(1)(f) in our oral outline, our sixth salient feature was that the deportation is the direct consequence of visa cancellation on character grounds in many cases, including that of the appellant that is the result of mandatory visa cancellation following upon a criminal offence.

What I meant to convey is that we recognise that, in *Falzon*, that was held to be inadequate on its own, but we rely on it here as part of the scheme. We just would note that there is some evidence before your Honours, including our client, and as your Honour said in *NZYQ* at paragraph 61, it is for the parties seeking to uphold the constitutional validity to establish the facts.

So, to the extent – obviously, we might have some sort of burden, but to the extent that the facts are before the court, it is not clear that it would have been our onus below in terms of the *Coulton v Holcombe*-type point that was taken – I am sorry, *NZYQ*, paragraph 59.

GAGELER CJ: This is a question of characterisation. I think you accept that.

MR NEKVAPIL: Yes, I do.

GAGELER CJ: So, what are the provisions that you are characterising as a scheme that is punitive?

MR NEKVAPIL: Yes, it is section 198, with 76AAA as interpreted and adjusted with 198AHB in their application to the interim arrangement that is demonstrated by their operation on the interim arrangement.

GAGELER CJ: But only – as I understand your case, only where your paragraph (a) is satisfied.

MR NEKVAPIL: Yes. Only if and to the extent that section 198 is construed with *NATB* to require – to make it reasonably practicable to remove to a risk of imminent and premature death.

GAGELER CJ: All right.

MR NEKVAPIL: Yes. There are a few bits to it, but it is only in that operation, that is right, and I gave your Honour that answer in our primary submissions. Now, just going then to the construction point on ground 2, we would submit that there is no perversity of non-refoulement claims being carved out by section 197C(1) but not non-non-refoulement claims, and that is because of the special administrative regime in the Act and finding a specific reflection in 197C(3).

In terms of the submissions that were made about "remove", as we said in our primary submissions – and I say this by way of reply – it all depends on how you define and constrain the meaning of "remove". The way our learned friends did that is "remove" means something more than just expel, it at least means get into the safekeeping – internationally and legally speaking – of another country, but then it stops. The point we make is it is unclear why it would – if it is more than expel – need to get to another country.

As to the transitory problem, it is also unclear why one would need or why there would be a diplomatic problem of the type described in *ASF17* at paragraph [9] as part of a process of removal. That really concerns what happens as a consequence of removal in the country to which they are removed. So, we say that is inconsistent with a tight constraint on process. We also say that the real expansion is to removal to a country for the reasons that we have explained in primary submissions.

GAGELER CJ: Do you give a different meaning to the word "remove"?

MR NEKVAPIL: No, we do not, but we say that it is not on its text, even as defined in the Act and in its place in the Act – there is an assumption that

it means the process of removal until the person is admitted into another country, but the word does not need to mean that.

GAGELER CJ: What does it mean if it does not mean that?

MR NEKVAPIL: It means, in our conception of it: removed from Australia to another country where the person can live. That is what it means. One can say it is the practical process, and once one says that, of course it ends with the Commonwealth officers dropping the person off, but that assumes the validity of the premise that it is about a process. The section does not say: the process of removal. It says "remove", which we say as a verb in a context of an unlawful noncitizen in a statute with this history has a broader conception of remove to a country where a person - - -

GORDON J: Put neutrally, as I understand your argument – and if I have not got this right, you should tell me – in the same way that "transitory" is not removal to a country where the person can live, you would say it is not removal of a person to a country where they can live where they face the imminent risk of death caused by the removal?

MR NEKVAPIL: That is exactly how we say it, and therefore "reasonably practicable", on that conception of "remove", must at least be able to take cognisance of that, otherwise there is no purposive or contextual difference from dropping them in the sea or on a rock if it cannot cognise whether they will actually live once they get to the other country.

GLEESON J: "Remove" is a defined term in section 5.

MR NEKVAPIL: It is, but that is the problem – that proves too much, or perhaps too little, because if it just means:

> remove from Australia.

It must mean "expel", but we say it must mean more than that. So, obviously, that is what it means, but it has a purpose which goes beyond that. We just – I will just reiterate the point, because I may not have got to it in point 5(5) of our oral outline, which is in response or reply to the submission that section 197C(1) had in fact a different origin, and there was reference to intention of Parliament.

The simple point we would make is just section 197C(1) would be unnecessary if 198 is to be construed the way that the respondents say, because if one could never look at what will happen in another country, non-refoulement would always be irrelevant to 198. So, on its actual text on the face of the Act, regardless of what the subjective intention might

have been as revealed in the extrinsic materials, it would be a provision which does no work.

Just as to the points that the learned Solicitor made about our arguments on this being a statutory power because of the effects of the condition being satisfied, which on his case is non-statutory executive power, we would just reiterate in reply to that that the statutory process that is enlivened by this exercise of power has a direct and unmediated result of visa cancellation, detention removal to another country to live for 30 years where one has no connection, and all of those matters I have said. So, that is a very stark, immediate statutory consequence of this exercise of power, which is again different from 198AHA.

The point was made about section 474, and our argument, which we have given your Honours in reply, but just to give your Honours some references for this, we say that section 474 does not preclude a section 75(v) injunction other than for jurisdictional error, because the jurisdiction to grant an injunction to enforce the law, even without jurisdictional error, is a jurisdiction in section 75(v) and cannot be cut down by legislation.

If I can just give your Honours the reference – which is in paragraph 42, footnote 50, of our written submissions – to *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at paragraph [47]. What was said by Justice Gaudron there about section 75(v) injunctions and jurisdictional error, and that was referred to by your Honour Justice Gordon in *Smethurst* in paragraph 180 and by your Honour Justice Edelman in *Smethurst* at paragraph 234. Your Honour Justice Gordon also referred to Justice Gaudron's comments in the same regard in *Abebe v Commonwealth* (1999) 197 CLR 510, at paragraph 105.

Just one final point is that, as to the idea of that this interim arrangement might have a fluctuating operation for some persons other than the three, the learned Solicitor referred to paragraph 69 and we just would invite your Honours to pick up the fifth point that I made right at the start about the factual circumstances here and what is said in the last two lines of paragraph 40 in the redacted judgment, which I took your Honours to, and then what is revealed about the subsequent sequence of negotiations from paragraph 69 to show that there is real issue about that.

Now, the learned Solicitor's point is, well, that is after the arrangement is formed, but there is a real difficulty in terms of the arrangement as formed on its terms with treating it as though it operated to anyone else other than those three, but I do not seek to develop that in open court.

If the Court pleases, those are our submissions in reply.

GAGELER CJ: Thank you, Mr Nekvapil. The Court will consider its decision in this matter and will adjourn until 10.00 am tomorrow for the delivery of judgments in other unrelated matters.

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AT 4.14 PM THE MATTER WAS ADJOURNED