Federal Court of Australia

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AZC20 [2022] FCAFC 52

|  |  |
| --- | --- |
| Appeal from: | *AZC20 v Minister for Home Affairs* [2021] FCA 1234 |
|  |  |
| File number(s): | VID 659 of 2021VID 660 of 2021 |
|  |  |
| Judgment of: | **JAGOT, MORTIMER AND ABRAHAM JJ** |
|  |  |
| Date of judgment: | 5 April 2022  |
|  |  |
| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Court of Australia – where primary judge granted declaratory relief regarding the application of 198AD(2) to the respondent – where primary judge compelled Secretary of Department of Home Affairs to remove respondent as soon as reasonably practicable from Australia – where primary judge ordered detention of respondent occur at property of members of the public – whether orders were interlocutory in character  – whether detention orders related to being “in the company of, and restrained by” an officer or other authorised person – whether *Migration Act 1958* (Cth) s 198AD(2) applied to person subject to favourable decision under s 46A(2) – appeal allowed |
|  |  |
| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 23*Migration Act 1958* (Cth) ss 5(1), 5(9), 5(9A), 5AA, 46A, 46A(1), 46A(2), 198, 198(6), 197C, 198D, 198AD(1), 198AD(2), 198AE, 198AE(1), 198AG*Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth)*Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth)*Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)*Federal Court Rules 2011* (Cth) r 35.13  |
|  |  |
| Cases cited: | *AJL20 v Commonwealth of Australia* [2020] FCA 1305; 279 FCR 549*Al Khafaji v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1369*Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1009; 192 ALR 609*Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562*Anying Group Pty Ltd v Wang* [2012] FCA 702*ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR 157*AZC20 v Minister for Home Affairs* [2021] FCA 1234*Commonwealth of Australia v AJL20* [2021] HCA 21; 95 ALJR 567*Deputy Commissioner of Taxation v Huang* [2021] HCA 43; 96 ALJR 43*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153*Plaintiff M61/2010E v Commonwealth* [2010] HCA 41; 243 CLR 319*Plaintiff M70/2011 v Minister for Immigration and Citizenship* (*The Malaysian Declaration Case*) [2011] HCA 32; 244 CLR 144*Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34; 253 CLR 219*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355*Secretary,* *Department of Immigration and Multicultural and Indigenous Affairs v Mastipour* [2004] FCAFC 93; 259 FCR 576*WAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1625  |
|  |  |
| Division: |  |
|  |  |
| Registry: | Victoria |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 113 |
|  |  |
| Date of hearing: | 8 February 2022  |
|  |  |
| Counsel for the Appellants: | Ms A Mitchelmore SC with Mr P Knowles and Mr B McGlade |
|  |  |
| Solicitor for the Appellants: | Australian Government Solicitor |
|  |  |
| Counsel for the Respondent: | Mr M Albert with Ms K Brown |
|  |  |
| Solicitor for the Respondent: | Clothier Anderson & Associates |

ORDERS

|  |  |
| --- | --- |
|  | VID 659 of 2021 VID 660 of 2021 |
|  |
| BETWEEN: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS First AppellantCOMMONWEALTH OF AUSTRALIASecond AppellantSECRETARY, DEPARTMENT OF HOME AFFAIRSThird Appellant |
| AND: | AZC20Respondent |

|  |  |
| --- | --- |
| order made by: | Jagot, Mortimer and Abraham JJ |
| DATE OF ORDER: | 5 April 2022 |

THE COURT ORDERS THAT:

1. If and to the extent that leave to appeal is required to pursue an appeal from orders 3-5 of the orders of the Court made on 13 October 2021 in Federal Court proceedings VID89/2021 and VID503/2021:
	1. the requirements of r 35.12 and r 35.14 of the Federal Court Rules 2011 (Cth) be dispensed with;
	2. the time for filing of an application for leave to appeal be extended to 11 November 2021; and
	3. leave to appeal from orders 3-5 of the orders dated 13 October 2021 in proceedings VID89/2021 and VID503/2021 be granted.
2. The appellants have leave to rely on the amended notices of appeal filed on 25 March 2022.
3. The appeals in VID 659/2021 and VID660/2021 be allowed.
4. Orders 1-5 of the orders dated 13 October 2021 in each of VID89/2021 and VID503/2021 be set aside and in lieu thereof order in VID503/2021 that the application be dismissed.
5. The appellants pay the respondent’s reasonable costs of the appeals, payable by way of an agreed single lump sum for both appeals, or, in default of agreement, payable by way of a single lump sum to be fixed by a Registrar.

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

REASONS FOR JUDGMENT

THE COURT:

# Introduction

1. This case is an appeal from orders made in two separate proceedings before the primary judge, being orders made on 13 October 2021 in VID89/2021 and VID503/2021. The terms of the impugned orders are relevantly identical, but because of the course the proceedings had taken before the primary judge, orders needed to be made in each proceeding. In summary, the impugned orders compelled the Secretary of the Department of Home Affairs to remove the respondent from Australia pursuant to s 198AD(2) of the ***Migration Act*** *1958* (Cth) as soon as reasonably practicable, and declared s 198AD(2) to be the removal provision applicable to the respondent. Until that occurred, the impugned orders required the respondent to be detained at the property of two members of the public who had volunteered to have him live in their house, while remaining (so it was contended) in immigration detention.
2. The underlying facts of the appeals reveal an extraordinarily long deprivation of the respondent’s liberty by way of executive detention. It is understandable that, having failed to secure a visa in Australia, the respondent has instructed his lawyers to seek any available avenue for him to regain his freedom. However, we are unable to agree with the view taken by the primary judge of the relevant provisions in the Migration Act and the ***F****ederal* ***C****ourt of* ***A****ustralia* ***Act*** *1976* (Cth), and we consider the appeals must be allowed.

# Factual background

1. The respondent is a citizen of Iran. He arrived by boat in Australia on 15 July 2013, and falls within the definition of an “unauthorised maritime arrival” in s 5AA of the Migration Act. Since his arrival nine years ago, and at the time of trial before the primary judge, he has been held in immigration detention.
2. The respondent’s status as an unauthorised maritime arrival meant he was prohibited from making a visa application, including a protection visa application, in Australia unless the Minister dispensed with that prohibition by the exercise of a personal power conferred by s 46A of the Migration Act. On 13 August 2015 the Minister exercised that power favourably to the respondent and on 6 October 2015 he applied for a temporary protection visa. A delegate of the Minister refused that application on 9 May 2018.
3. Under Part 7AA of the Migration Act, the delegate’s decision was referred to the **I**mmigration **A**ssessment **A**uthority. On 29 March 2019, the IAA affirmed the decision of the delegate. There was a successful judicial review of the IAA’s decision, but on remitter in February 2021, the IAA again affirmed the delegate’s decision.
4. On 24 February 2021, about two weeks after the IAA’s second decision, the respondent commenced proceedings in this Court, being proceeding VID89/2021. His originating application sought a range of orders, including relief for alleged false imprisonment, orders requiring his removal to Iran, or into “international waters” where he was before he was detained and brought to Christmas Island. He also sought a writ of habeas corpus, relying on *AJL20 v Commonwealth of Australia* [2020] FCA 1305; 279 FCR 549 (**AJL20 FCA)**. The primary judge made orders by consent splitting proceeding VID 89/2021 into two parts, and expediting the hearing of the habeas corpus claim.
5. In the habeas corpus claim, the respondent contended the removal provisions applicable to his circumstances as an unauthorised maritime arrival were those concerning removal to a regional processing country; namely, the power in s 198AD(2). In other words, the failure to remove the respondent as soon as reasonably practicable was said to be a failure to perform the duty in s 198AD(2), whereas in *AJL20 FCA* the alleged failure was a failure to comply with s 198 of the Migration Act.
6. After the hearing of the habeas corpus application, and while judgment was reserved, the High Court delivered judgment in *Commonwealth of Australia v AJL20* [2021] HCA 21; 95 ALJR 567 (***AJL20 HCA***). The High Court overturned *AJL20 FCA*.
7. In response to *AJL20 HCA*, the respondent filed a new originating application seeking an order in the nature of mandamus, requiring the Commonwealth to effect his removal to a regional processing country under s 198AD(2). The Commonwealth challenged the jurisdiction of this Court to hear and determine such an application in its original jurisdiction. The parties agreed on a work around (so to speak), and the respondent commenced another set of proceedings in the Federal Circuit and Family Court of Australia (**FCFCOA**), which were then transferred by consent orders dated 30 August 2021 to this Court, and to the docket of the primary judge. They became VID503/2021. The mandamus application in VID503/2021 was heard by the primary judge, and his Honour then published orders and reasons for judgment dealing with both the habeas corpus application in VID89/2021 and the claim for mandamus in VID503/2021: *AZC20 v Minister for Home Affairs* [2021] FCA 1234.
8. By orders made on 13 October 2021 in both proceedings, the primary judge dismissed the respondent’s habeas corpus application, but granted declaratory relief in the following form:

1. Section 198AD(2) of the *Migration Act 1958* (Cth) (the **Act**) applies to the applicant.

(Original emphasis.)

1. His Honour made an order in the nature of mandamus:

2. The Secretary of the Department of Home Affairs (the **Secretary**) must perform, or cause to be performed, the duty under s 198AD(2) of the Act to, as soon as reasonably practicable, take the applicant from Australia to a regional processing country.

(Original emphasis.)

1. His Honour also made the following orders concerning the respondent’s ongoing immigration detention:

3. From no later than 1.00 pm [AWST] on 27 October 2021:

(a) the Secretary is to cause any detention of the applicant in immigration detention pending performance of the duty described in Order 2 to occur at the address set out in the affidavit of Anette Hermann filed on 8 September 2021; and

(b) the applicant be detained at that address by being in the company of and restrained by one or more “officers” as defined under the Act, or by another person or persons directed by the Secretary or Australian Border Force Commissioner to accompany and restrain the applicant.

4. The parties and Anette and Miguel Hermann are to participate in mediation before a Registrar of the Court, on a date and at a time and place to be fixed by the Registrar after consultation with the participants, to reach agreement upon arrangements for the immigration detention described in Order 3.

5. The parties and Anette and Miguel Hermann each have liberty to apply in respect of Orders 3 and 4.

1. Subject to the Court accepting any submissions to the contrary (which does not appear to have occurred), the appellants were ordered to pay the respondent’s costs in VID503/2021, and the costs in VID89/2021 were reserved.
2. The appellants now appeal from the granting of declaratory relief, the order in the nature of mandamus and orders 3-5 (extracted at [12] above). We will describe those orders 3-5 as the **detention arrangement orders**. The appellants are the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; the Commonwealth of Australia; and the Secretary of the Department of Home Affairs, each of whom was a respondent in the proceedings below. No points were raised on the appeal about whether all three were necessary or appropriate parties, so we will use the term ‘appellants’ to refer collectively to all three parties.
3. The Court was informed that, shortly after the primary judge’s orders had been made, the Minister made a determination under s 198AE(1) of the Migration Act that s 198AD(2) did not apply to the respondent. Effectively, this quelled the controversy between the parties about the application of s 198AD(2) to the respondent. Nauru also communicated to Australia, as it was entitled to do under s 198AG, that it would not accept the respondent.
4. These developments also meant the order in the nature of mandamus was rendered inapplicable, and there was no basis for the detention arrangement orders to be carried into effect. The respondent therefore remained in immigration detention, with no immediate prospect of removal.
5. In summary, the appellants’ grounds of appeal are:
6. first, that the primary judge erred in concluding that s 198AD(2) applied to the respondent; and
7. second, that the primary judge erred in making the detention arrangement orders, because s 23 of the FCA Act did not confer power to make those orders, as ancillary to the grant of relief by way of mandamus.
8. In their original notices of appeal, the appellants sought orders for their costs of the appeals, and the proceedings below. However, in their written submissions the appellants stated:

There were, as at 14 October 2021, approximately 130 persons potentially affected by the primary judge’s conclusion that the applicable duty for persons in the respondent’s position is the s 198AD(2) duty; and there are a number of proceedings on foot in which the issue of whether the Court has the power to make the residential detention orders is being agitated.

1. In light of this submission, and the course of events after the primary judge made the impugned orders, the Court raised with senior counsel for the appellants whether the principal utility of the appeals related to matters of general principle and wider application, of importance to the appellants, but in substance largely unrelated to any ongoing effect of the primary judge’s orders for the respondent.
2. Senior counsel for the appellants undertook to seek instructions whether the appellants would bear the costs of the appeals, and would not seek to disturb the costs orders made below. The appellants were granted leave to file any amended notice of appeal reflecting that position. This took some time, but amended notices of appeal to this effect were filed on 25 March 2022. Leave should be granted to the appellants to rely on those amended notices of appeal.
3. Counsel for the appellants also drew the Court’s attention to the filing, in November 2021 and subsequent to the filing of the notice of appeal, of yet another proceeding in the FCFCOA. In that proceeding, the respondent sought, relevantly, an order in the nature of mandamus for his removal under s 198 of the Migration Act. That proceeding was transferred to this Court by consent orders dated 25 November 2021, and became proceeding VID695/2021. By orders dated 16 December 2021, the primary judge ordered that proceeding be adjourned, pending the outcome of this appeal.

# Evidence

1. Counsel for the appellants and respondent read a number of affidavits in support of their respective submissions, mostly to inform the Court about the somewhat complicated route the proceedings had taken to this point.
2. The appellants read three affidavits. Of these, there were no objections to two affidavits from Mr Cameron Retallick (an Australian Government Solicitor lawyer) dated 10 January 2022 and 3 February 2022.
3. The first of these two affidavits exhibited certain communications between the solicitors for the appellants and the respondent, the respondent’s application in the FCFCOA, the order of the FCFCOA to transfer the associated proceeding to the Federal Court of Australia on 25 November 2021, and the orders of the primary judge dated 16 December 2021 adjourning proceeding number VID695/2021 pending the Full Court’s decision in the present case. The second of Mr Retallick’s affidavits exhibited the transcript from a case management hearing before the primary judge in proceeding number VID695/2021.
4. The appellants also read the affidavit of Mr Paul Anthony Wyllie dated 10 January 2022. At the time of his affidavit Mr Wyllie was the co-Principal Legal Officer, **A**dministrative **A**ppeals **T**ribunal and Removals Injunctions Section, within the Migration and Citizenship Litigation Branch of the Legal Group of the Department of Home Affairs. There were objections by the respondent to [9] and [10] of the affidavit, on the basis that the appellants required leave to file new evidence on the appeal, and that leave should be refused because the paragraphs are not accurate. Counsel for the respondent noted that the respondent had answered that evidence with an affidavit of the respondent’s solicitor, Sanmati Verma dated 24 January 2022, which the respondent sought to read. Senior counsel for the appellants accepted in oral submissions that aspects of Mr Wylie’s evidence in those paragraphs had been overtaken by the evidence in Ms Verma’s affidavit. The Court indicated it would consider the objection in its final decision. Ms Verma’s affidavit also exhibits a number of documents relating to the proceedings, to which no objection was taken.
5. In our opinion, the respondent’s objection should be overruled and both affidavits should be taken as read in their entirety. Their contents go to the wider significance of the issues raised in the appeals, and also to the question of an extension of time, and leave to appeal, rather than the legal issues in the appeals themselves.

# Legislative provisions

1. Section 198AD (1) and (2) provide:

**198AD Taking unauthorised maritime arrivals to a regional processing country**

(1) Subject to sections 198AE, 198AF and 198AG, this section applies to an unauthorised maritime arrival who is detained under section 189.

Note: For when this section applies to a transitory person, see section 198AH.

(2) An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.

1. The term “unauthorised maritime arrival” is defined in s 5AA:

**5AA Meaning of unauthorised maritime arrival**

(1) For the purposes of this Act, a person is an ***unauthorised maritime arrival*** if:

(a) the person entered Australia by sea:

(i) at an excised offshore place at any time after the excision time for that place; or

(ii) at any other place at any time on or after the commencement of this section; and

(b) the person became an unlawful non‑citizen because of that entry; and

(c) the person is not an excluded maritime arrival.

(Original emphasis.)

1. The Minister may, by direction, nullify the effect of these provisions. Section 198AE provides:

**198AE Ministerial determination that section 198AD does not apply**

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, in writing, determine that section 198AD does not apply to an unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

(1A) The Minister may, in writing, vary or revoke a determination made under subsection (1) if the Minister thinks that it is in the public interest to do so.

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

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

(4) If the Minister makes a determination under subsection (1) or varies or revokes a determination under subsection (1A), the Minister must cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination, the determination as varied or the instrument of revocation; and

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

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

(a) the name of the unauthorised maritime arrival; or

(b) any information that may identify the unauthorised maritime arrival; or

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

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

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

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

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) or (1A) in respect of any unauthorised maritime arrival, whether the Minister is requested to do so by the unauthorised maritime arrival or by any other person, or in any other circumstances.

(8) An instrument under subsection (1) or (1A) is not a legislative instrument.

1. Alternatively, the scheme gives the regional processing country an opportunity to inform Australia that it will not accept a particular individual. Section 198AG provides:

**198AG Non‑acceptance by regional processing country**

Section 198AD does not apply to an unauthorised maritime arrival if the regional processing country, or each regional processing country (if there is more than one such country), has advised an officer, in writing, that the country will not accept the unauthorised maritime arrival.

Note: For specification by class, see the *Acts Interpretation Act 1901*.

1. Nauru gave Australia such advice in respect of the respondent, after the primary judge’s orders had been made. The scheme does not require the regional processing country to provide any reason for this decision.
2. The term “fast track applicant” is defined in s 5(1):

***fast track applicant*** means:

(a) a person:

(i) who is an unauthorised maritime arrival and who entered Australia on or after 13 August 2012, but before 1 January 2014, and who has not been taken to a regional processing country; and

(ii) to whom the Minister has given a written notice under subsection 46A(2) determining that subsection 46A(1) does not apply to an application by the person for a protection visa; and

(iii) who has made a valid application for a protection visa in accordance with the determination; or

(b) a person who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (1AA)(b).

Note: Some unauthorised maritime arrivals born in Australia on or after 13 August 2012 may not be ***fast track applicants*** even if paragraph (a) applies: see subsection (1AC).

(Original emphasis.)

1. Relevantly to ground 2 of the notice of appeal, the phrase “immigration detention’ is defined in s 5(1):

***immigration detention*** means:

(a) being in the company of, and restrained by:

(i) an officer; or

(ii) in relation to a particular detainee—another person directed by the Secretary or Australian Border Force Commissioner to accompany and restrain the detainee; or

(b) being held by, or on behalf of, an officer:

(i) in a detention centre established under this Act; or

(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or

(iii) in a police station or watch house; or

(iv) in relation to a non‑citizen who is prevented, under section 249, from leaving a vessel—on that vessel; or

(v) in another place approved by the Minister in writing;

but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b).

Note 1: Subsection 198AD(11) provides that being dealt with under subsection 198AD(3) does not amount to ***immigration detention***.

Note 2: This definition extends to persons covered by residence determinations (see section 197AC).

(Original emphasis.)

1. The word “detain” is also defined in s 5(1):

***detain*** means:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

Note: This definition extends to persons covered by residence determinations (see section 197AC).

# Resolution

1. We first consider two preliminary issues, before turning to the grounds of appeal.

## The Court should deal with the appellants’ substantive arguments

1. First, we do not accept the respondent’s submission that the primary judge’s orders are now entirely “arid” in respect of any effect on his own position, because of the s 198AE determination, and the s 198AG decision by Nauru. It can be accepted that the order for mandamus has been rendered moot by the conduct of the responsible Minister and by Nauru. The appeals from the making of that order (and the declaratory relief) have utility because of the wider significance for a large number of other cases, as we have explained above. In addition, the respondent has VID695/2021 (and possibly some aspects of VID89/2021) before the primary judge, in which he is seeking mandamus to compel his removal from Australia to a country other than Iran. It may be that other or further relief is also still sought – it is somewhat difficult to tell. Nevertheless, a decision about his status under the Migration Act, and which removal provisions apply to him, may be relevant to the issues between the parties in relation to any outstanding relief. As to the detention arrangement orders, the respondent seeks similar orders in VID695/2021. Therefore, determination of the dispute over ground 2 will also clarify some likely aspects of the proceeding still before the primary judge.
2. Second, while the applicant objected to certain parts of Mr Wyllie’s affidavit, on the basis they were not accurate, the core point of relevance from Mr Wyllie’s affidavit is that in three other cases in the FCFCOA and this Court, an *argument* has been made based on the primary judge’s orders, and his Honour’s reasoning. In other words, the primary judge’s orders and reasoning have been employed in litigation relating to other individuals in similar circumstances, and other justices of this Court have been invited to follow it. Once that occurs, given the appellants’ position on the issues, it would place another single judge in a position of deciding if they are convinced the primary judge’s orders and reasoning are wrong: see *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153 at [21], Allsop CJ. These appeals are a suitable vehicle to avoid single judges being faced with those issues of comity, which are not always straightforward.
3. Where the primary judge’s orders and reasoning are presently the subject of an appeal before this Court, it is neither efficient, nor a cost effective use of resources, to refuse to determine the correctness of those orders and that reasoning, and instead insist that another case make its way up the judicial hierarchy. That approach would also introduce uncertainty in terms of *when* the issues raised might be resolved, and might place other judges at first instance in a difficult position. Given there are potentially 130 cases where this argument might be made, plus the three where it has been made (regardless of the outcome), it is in the interests of the administration of justice for this Court to determine both issues raised on the appeals by the appellants.
4. The appellants’ position on costs confirms that this is the appropriate course to take. The appellants have quite properly accepted that the costs orders below should not be disturbed. They do not seek their costs of these appeals, and they accept they should pay the reasonable costs of the respondent on these appeals.

## Leave to appeal is required for ground 2, and an extension of time should be granted

1. The respondent submitted all of the orders made by the primary judge were interlocutory in character. He relied on the decision of Flick J in *Anying Group Pty Ltd v Wang* [2012] FCA 702, where at [8] his Honour said:

In circumstances where orders are made, some of which are final in nature and some of which are interlocutory, all of the orders are “*interlocutory*” for the purposes of s 24(1A).

(Original emphasis.)

1. This proposition is not self-evident. Nor was any authority cited in support of it. In any event, no argument was developed before the Full Court to support this proposition and it is not appropriate to decide it. In our opinion, two of the impugned orders were final in nature, and the detention arrangement orders were interlocutory.
2. The declaratory relief granted by the primary judge was final relief, deciding a controversy between the parties about whether the respondent’s circumstances engaged s 198AD(2). The same is true of the relief by way of mandamus, directing the performance of a statutory duty the primary judge found on the evidence should have been performed, but had not been. At least at the date the order was made, it finally quelled the controversy between the parties about whether the Minister was obliged to remove the respondent to Nauru. No leave to appeal is required from those orders.
3. The primary judge contemplated that the detention arrangement orders were interlocutory in character: see [174] of the reasons. On their face, it was clear there was much to be worked out about how those orders were to apply in practice and, indeed, legally. The order for mediation is a strong indicator that the orders in and of themselves did not finally determine any controversy between the parties. On the face of the orders, the mediation process may have thrown up some insuperable obstacles to the detention arrangement orders being workable and manageable, or indeed their capacity to be lawfully carried into effect.
4. Therefore, we proceed on the basis that the detention arrangement orders were interlocutory in nature and leave to appeal is required. For the reasons advanced by the appellants in their affidavit material and in argument, leave should be granted. As explained, the appeals raise two issues of wider importance to the interpretation, application and operation of the Migration Act, issues that are likely to arise in other cases in this Court and/or in the FCFCOA. The most efficient and cost effective way to deal with those issues is to hear and determine them on these appeals. That is especially so given the appellants’ position on costs.
5. The same reasoning applies to any extension of time that is required, because the orders are interlocutory and the notice of appeal was not filed within the 14-day time limit in r 35.13 of the *Federal Court Rules 2011* (Cth). An extension of time should be granted.

## Ground 1

1. We consider that the primary judge erred in his construction of s 198AD(2). That provision does not apply to a person who has been the subject of a favourable decision under s 46A(2) of the Migration Act. A person in those circumstances is subject to the removal powers in s 198 of the Act, not s 198AD(2).
2. The Migration Act is a complex piece of federal legislation, subject to numerous amendments from time to time. It may be the case that persons who remain subject to the legislative scheme for several years are likely to find themselves affected by changing and amended provisions of the legislative regime at different times. For example, when the respondent entered Australia in 2012, he was – by operation of the provisions then in effect – an “offshore entry person”. However, with the introduction of the 2013 legislation (as described further at [52], below), he became an “unauthorised maritime arrival”, and that status had certain consequences under the Act. None of these matters are within the control of an individual like the respondent, but they affect how he may, or must, be treated under this legislative regime at particular times.
3. The complexities and frequent amendments of the Migration Act make the principles enunciated by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ) all the more material. In ***Plaintiff S4****/2014 v Minister for Immigration and Border Protection* [2014] HCA 34; 253 CLR 219 at [42], the Court described those principles:

As was said by four members of this Court in *Project Blue Sky Inc v Australian Broadcasting Authority*, “[t]he meaning of [a] provision must be determined ‘by reference to the language of the instrument viewed as a whole’”. And an Act must be read as a whole “on the prima facie basis that its provisions are intended to give effect to harmonious goals”. Construction should favour coherence in the law.

(Footnotes omitted.)

1. Therefore, the question is whether there is a construction that yields a “harmonious operation” (see *Plaintiff S4* at [47]) to the terms of ss 46A, 198, 198AD, and to Part 7AA. We consider there is such a construction, but it is necessary to trace some of the legislative history of the relevant provisions to understand how that comes about.
2. The enactment of the “offshore processing” regime in 2001 and the identification of certain people as “offshore entry person(s)” were described by the High Court in *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41; 243 CLR 319 at [29]-[30]:

In 2001, the Parliament enacted six Acts, one after the other, which affected the entry into, and remaining in, Australia by aliens. Those six Acts were all assented to, and for the most part came into operation, on the same day. The first of those Acts, the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) (the Border Protection Act), sought to validate certain actions taken between 27 August 2001 and the commencement of the Act. The actions in question were actions taken by the Commonwealth, by any Commonwealth officer, or by any other person acting on behalf of the Commonwealth, in relation to the MV *Tampa* and certain other vessels, and actions in relation to persons who were on board those vessels during the relevant period. The circumstances that gave rise to those actions are sufficiently described in *Ruddock v Vadarlis*. In addition, the Border Protection Act, and several of the other five Acts, amended the *Migration Act* to change the way in which persons who arrived in, or sought to enter, Australian territory without a valid visa were to be dealt with.

Those changes had a number of features of immediate relevance to the present matters. First, certain Australian territory, including the Territory of Christmas Island, was excised from the migration zone, thus introducing the category of places called excised offshore places. A person who entered Australia at an excised offshore place, after the excision time, and who became an unlawful non-citizen because of that entry, was identified as an “offshore entry person”. The *Migration Act* was amended, by inserting s 46A, to provide that an application for a visa is not a valid application if it is made by an offshore entry person who is in Australia and is an unlawful non-citizen.

(Footnotes omitted.)

1. Relevantly, in 2012, and after the High Court’s orders in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (*The Malaysian Declaration Case*) [2011] HCA 32; 244 CLR 144 had precluded the then-existing arrangements with Malaysia for “regional processing” going ahead, the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) introduced new “regional processing” arrangements. It was this legislation that introduced Subdiv B into Div 8 of Pt 2 (including s 198AD), authorising (in accordance with its terms) removal of an “offshore entry person” to a regional processing country, being a country designated by the responsible Minister. In the extrinsic material, the objective of these amendments is described as “replac[ing] the existing framework in the Migration Act for taking offshore entry persons to another country **for assessment of their claims to be refugees**”: see Explanatory Memorandum to the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 (Cth) at p 1 (emphasis added).
2. Then, in 2013, the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) was introduced. This Act removed the statutory status of “offshore entry person” from the Migration Act, and introduced the statutory status of “unauthorised maritime arrival”, including by the introduction of s 5AA, to which we have referred above. This Act also amended, relevantly, ss 46A, 198AD and 198AE to change “offshore entry person” to “unauthorised maritime arrival”.
3. A year or so later, the “fast track” merits review process, through Part 7AA, was introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). These amendments came into effect on 18 April 2015. These amendments introduced the definition of “fast track applicant”. The extrinsic material states that the amendments “fundamentally change[s] Australia’s approach to managing asylum seekers”: see Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014(Cth) (**2014 explanatory memorandum**) at p 2. One of the ways it was said to do this was by (at p 2):

Introducing more rapid processing and streamlined review arrangements, creating a different processing model for protection assessments which acknowledges the diverse range of claims from asylum seekers, helping to resolve protection applications more efficiently.

1. The 2014 explanatory memorandum goes into some detail about the fast track processes, describing their rationale and their proposed operation. There is no doubt that these are intended to be onshore processes.
2. The lacuna revealed by the issue in these appeals is apparent in the extrinsic material. There are no references in the extrinsic material to the applicability of the amendments to persons who were *liable* to removal to an offshore processing country, but had not in fact been removed, and had subsequently received a favourable decision under s 46A(2).
3. However there is a reference, in the Statement of Compatibility with Human Rights at Attachment A to the 2014 explanatory memorandum (at p 18), to one purpose of the fast track process being to address the

backlog of Unauthorised Maritime Arrivals (UMAs) who entered Australia on or after 13 August 2012 and ensuring their cases progress towards timely immigration outcomes.

1. There is no explanation of how it is that a person who is an unauthorised maritime arrival and whose removal to a regional processing country is contemplated by s 198AD has nevertheless remained in Australia so as to be incorporated into this described “backlog”. Implicitly, because of the reference to 13 August 2012, it seems clear such people, where they had been able to make a protection visa application because of a favourable exercise of the s 46A(2) discretion, were intended to be covered by the fast track processes. As the Minister submitted, the text of the definition of “fast track applicant” confirms this because a precondition to inclusion in that definition is that the Minister has lifted the s 46A(1) bar.
2. Indeed, the respondent does not complain about his treatment as a person who had access to the fast track process under Part 7AA. He accepts that as a result of the 2014 amendments, the legislative scheme intended that if his protection visa application were refused, he would have access to the “fast track” merits review process.
3. The Court’s task is to reconcile how the 2014 amendments operate on a person such as the respondent – a person who was subject to the s 198AD removal power initially, but was not in fact removed, and who then was permitted to make a (domestic) protection visa application while remaining in Australia.
4. There are two stages to that reconciliation exercise.
5. First, it is important to recall s 46A was in the legislative scheme at all relevant times – that is, prior to the 2012 regional processing amendments, and prior to the introduction of Part 7AA in April 2015. Specifically, for two years (from July 2013 to April 2015), the Minister was able to “lift the bar” to the respondent making a valid visa application, but did not do so. Instead, the respondent remained in immigration detention in Australia and was not taken to Nauru (or PNG). *Why* that occurred, when from July 2013 to April 2015 the respondent was clearly subject to s 198AD, was not explored in the evidence or argument.
6. Up to 18 April 2015, if the Minister had exercised the power under s 46A(2) and permitted the respondent to make a valid visa application, it is unclear whether the appellants’ argument would be that the proper construction and operation of the Act was that the terms of s 198AD(2) ceased to apply to the respondent. Critically, at this point, the construction arguments do not depend at all on the introduction of Part 7AA and the definition of “fast track applicant”; rather, they depend on what the effect of a decision is under s 46A(2) to “lift the bar” and allow a person to make a valid visa application.
7. In our opinion, it was not the introduction of Part 7AA that changed the proper construction of s 198AD(2). The respondent remained subject to s 198AD *before* and *after* the introduction of Part 7AA in April 2015, as senior counsel for the appellants conceded in oral argument.
8. What changed the application of s 198AD(2) to the respondent was the Minister’s exercise of power under s 46A(2) of the Act in relation to the respondent, on 13 August 2015. This was, in fact, only a few months after Part 7AA came into effect. But if, during those preceding months, it was otherwise reasonably practicable to take the respondent to Nauru, the duty under s 198AD(2) should have been performed. Part 7AA was at this time irrelevant to the respondent. Of course, there is no evidence whether it was or was not in fact reasonably practicable to take the respondent to Nauru or PNG. The important point for present purposes is that s 198AD(2) remained applicable, as the appellants concede.
9. Thus, whether before or after Part 7AA came into force on 18 April 2015, in our opinion the event that interfered with, and is intended by the legislative scheme to interfere with, the operation of s 198AD(2), is an exercise of power under s 46A(2) to lift the bar and allow an individual to apply for a visa.
10. *Prior* to 18 April 2015, when the s 46A(2) power was exercised, a person would have access to what were the existing decision-making processes under the Migration Act – a decision by a delegate, and an entitlement to merits review in the AAT.
11. *After* 18 April 2015, when the s 46A(2) power was exercised, a person would only have access to the “fast track” system under Part 7AA, by reason of the decision of “fast track applicant”.
12. In *either* case, in our opinion, the intention of the legislative scheme is that those individuals who are permitted, by an exercise of Ministerial power under s 46A(2), to apply for a visa, are thereafter not intended to be subjected to being taken to a regional processing centre under s 198AD. The reason is the same in each situation: such individuals have been given access to an onshore, domestic process to have their claims for protection heard and determined. The purpose of taking them to a regional *processing* centre no longer exists. Their claims will be processed in Australia, under Australian domestic legislation; the Minister has made a conscious and deliberate decision to that effect. Thus, once the s 46A(2) power was exercised, it was no longer “reasonably practicable” for a person such as the respondent to be removed to a regional processing country.
13. Once any visa application has been finally determined, as that phrase is defined in ss 5(9) and 5(9A) of the Act, a person in the respondent’s position would be exposed to removal under s 198(6) of the Act, read now with s 197C of the Act. That duty would again remain subject to removal being “reasonably practicable”: for example, depending on whether there is an outstanding judicial review application.
14. Therefore, the appellants are correct to submit that the reasoning of the primary judge is in error, but not quite for the reasons the appellants submitted. The critical factor in reaching a harmonious construction of the relevant provisions is not the definition of “fast track applicant”; rather it is the fact that an exercise of power under s 46A(2) renders a person’s removal no longer “reasonably practicable”, because the legislative scheme contemplates that such a person has the capacity to make a visa application that is to be processed onshore.
15. Turning to the identification of the error in the primary judge’s reasoning, it can be accepted that the primary judge was correct in concluding at [82] that the definition of “fast track applicant” implies that there is “some lawful basis for not taking the person to a regional processing country”.
16. His Honour was incorrect (at [83]) to regard the Minister’s determination under s 46A(2) as immaterial to the question of whether it was reasonably practicable to take an unauthorised maritime arrival to a regional processing country. The Minister’s determination under s 46A(2), permitting the making of a protection visa application domestically, meant that it would thereafter not be reasonably practicable to take a person such as the respondent to an offshore processing country. As we have explained above, the statutory scheme contemplates that once a determination is made by the Minister under s 46A(2), a person’s visa application is then processed domestically. It is that event which takes the person out of the intended scope of s 198AD(2), and any regional *processing* arrangements.
17. Thus, it was also erroneous for the primary judge at [86] to accept the respondent’s contention that the Migration Act has a:

legislative intention … that an unauthorised maritime arrival becomes a fast track applicant only through the making of a determination by the Minister under s 198AE.

1. The respondent’s argument and the primary judge’s finding involve at least two errors.
2. The first error was in not identifying the key event as the favourable exercise of discretion under s 46A(2) and the legislative consequence that a protection visa application can be made, which will be processed onshore under the domestic regime in the Act. While it is correct that this event also brings a person within the definition of “fast track applicant”, even before the fast track merits review stage has been reached, this event renders it not reasonably practicable to remove a person under s 198AD for regional *processing*. The statutory scheme contemplates that the person will have a visa application, which will be processed in Australia and not offshore.
3. The second error was in seeing s 46A(2) and s 198AE(1) as mutually exclusive. Section 198AE(1) operates on all unauthorised maritime arrivals, not only those who have had the s 46A(1) bar lifted. The Minister might decide, for a range of reasons, that it is not appropriate to take a person to a regional processing country – perhaps because of the health of the person, or their age, or the circumstances in that regional processing country. Subject to considerations of rationality and legal unreasonableness, so long as the Minister considers it is in the public interest (a wide concept), the Minister may make a determination under s 198AE. The discretions are directed at different subject matter, and there is nothing incompatible about their operation.
4. Ground 1 should be upheld.

## Ground 2

1. The appellants accepted the primary judge was correct (at [134]-[135]) to identify the definition of “immigration detention” in s 5 of the Act as contemplating three distinct kinds of custody, and to identify the first form of detention as “short term”. His Honour said:

The Act establishes three forms of “immigration detention”. They cover different, although overlapping, territory. The first form, in paragraph (a) of the definition of “immigration detention” in s 5(1), involves an unlawful non-citizen being “in the company of, and restrained by” an officer or other authorised person. The second, in paragraph (b) of the definition, requires the person to be “held” by, or on behalf of, an officer, in a detention centre; or in a prison or remand centre; or in a police station or watch house; or on a vessel (where s 249 applies); or in another place approved by the Minister.

The difference between the first form and the second form may be illustrated by using an example of an unlawful non-citizen who is in immigration detention when “held” in a detention centre and remains in immigration detention while “in the company of, and restrained by” an officer when taken to a hospital. It can be accepted that the first form will generally be used in the short-term, whereas the second form may be used for both short-term and longer-term detention.

1. The third form, to which the primary judge referred, was a residence determination made under s 197AB of the Migration Act. In summary, that provision confers a personal power on the Minister, if the Minister thinks it is in the public interest to do so, to make a determination to the effect that a specified person is to reside at a specified place. That form of detention was clearly not in issue in the respondent’s case.
2. On the primary judge’s analysis, the detention arrangement orders related to the *first* form of detention. His Honour found (at [142]) that he had not:

been referred to any authority which dictates that the Court cannot, under the power conferred by s 23 of the FCA Act to make orders that are appropriate, direct that officers are to detain an unlawful non-citizen at a particular place using the first form of immigration detention.

1. The appellants submitted that the detention arrangement orders were not “short term” orders, but were potentially of a longer duration. The detention arrangement orders also specified the location of the detention and were prescriptive. In substance, the appellants submitted they were orders in respect of the *second* form of detention, which the primary judge recognised (see especially at [140]) was not a form of detention the Court could compel the Minister to observe.
2. We accept the appellants’ submissions. In substance, by those orders, the primary judge determined a “place” of detention (the address set out in the affidavit of Anette Hermann filed on 8 September 2021), and determined that the respondent should be “held” in that place (“detained at that address”). At [165], the primary judge found it might take “weeks, or months, or longer” before the respondent would be removed to Nauru. These orders could not be described as short term, especially given the delays to this point in any action being taken by the executive about the respondent’s circumstances.
3. Further, the text of the definition also indicates that it was erroneous for the detention arrangement orders to be characterised as falling within para (a) of the definition of ‘immigration detention’.
4. The textual distinctions between paras (a) and (b) of that definition are critical, and disclose the very different circumstances of deprivation of liberty authorised by paras (a) and (b), read with s 189 and s 196 of the Act.
5. “[B]eing in the company of, and restrained by” in para (a) concerns temporary, transitory custody, hence the use of the word “company”. That definition does not focus on the prescription of a *place* where a person is detained; rather, it looks to the *presence* of a detainer, who is the person with a capacity, and lawful authority, to restrain an individual. The first and obvious situation in which this aspect of the definition of “immigration detention” would be engaged is when an individual is first detained under s 189 of the Act. At that point, it is highly likely a person will not be in a place of detention, but will be in a public or private location. However, for the “arrest power” in s 189 to operate, there will need to be a person present who is either an officer or falls within sub-para (a)(ii). Being “in the company of” an officer (or a person who falls within para (a)(ii)) enables a person to be taken to a place of detention by that officer, or other officers.
6. Examples such as those given by the primary judge at [137] about an individual requiring surgery may well be covered by (a), insofar as transit to and from a hospital is concerned, and perhaps insofar as a short term stay in hospital is concerned. However, in this example there will come a point where the transitory nature of (a) is exhausted and an individual is, in substance, being “held” in a particular location. If and when that occurs, the detention ceases to be authorised by para (a), and the place of detention must fall within the terms of para (b).
7. In contrast to the term “in the company of”, para (b) of the definition of immigration detention uses the term “held by or on behalf of”. The verb “held” indicates custody in a place, a meaning confirmed by sub-paras (i)-(v) in (b), all of which focus on the *location* at which a person is to be kept. The detention arrangement orders are properly understood as being orders within para (b), not para (a), and there being no approval by the Minister under (v), and no suggested application of sub-paras (i)-(iv), the detention arrangement orders fell outside the terms of para (b). The primary judge correctly understood he could not make orders compelling a form of immigration detention covered by para (b). Yet, in substance, that is what he did.
8. In [144] of his Honour’s reasons, the primary judge made the following findings about immigration detention falling within para (a) of the definition:

Under the first form of immigration detention (an unlawful non-citizen being in the company of, and restrained by an officer) it is for officers to decide where the person is to be detained. Further, it is for officers to determine whether that form of detention will be used. The Minister does not make such a determination, or is at least not conferred with the exclusive power to make that determination: cf. *WKMZ v Minister for Home Affairs* [2020] FCA 1127 at [115]. These officers are the same officers who are required to perform the duty under s 198AD(2) to take an unauthorised maritime arrival to a regional processing country.

1. Two matters arise from this finding. First, it may not be correct that the form of immigration detention in para (a), in terms of location, is determined by the officers. Visits to a medical centre, or taking a detained child to school – both forms of immigration detention covered by para (a) in our opinion – are not locations determined by the officer concerned. Paragraph (a) is not about location at all: it is about temporary or transitory custody by an officer; if anything, it is purposive in character.
2. Second, even if it was “for officers to determine whether that form of detention will be used” under para (a), the detention arrangement orders take that decision-making out of the control of Commonwealth officers and place it in the hands of the Court.
3. Orders that completely remove the capacity of those legally responsible for the detention of an individual to determine where that individual should be held were disapproved by the Full Court in *Secretary,* *Department of Immigration and Multicultural and Indigenous Affairs v* ***Mastipour***[2004] FCAFC 93; 259 FCR 576. At [139], Lander J (with whom Finn and Selway JJ agreed) stated that a “mandatory injunction” (on an interlocutory basis) was inappropriate. The Full Court reframed the interlocutory order so that it was expressed in the negative: that is, precluding Mr Mastipour’s detention at certain facilities (Baxter and Port Hedland detention centres) (at [143]). As Lander J stated at [141]:

Both counsel, however, accepted that the spirit of the order was that Mr Mastipour be removed to one of those places and kept there. If that is the way in which the order should be read, it would mean that the Secretary could not move Mr Mastipour to a hospital or to some other Detention Centre. Again, if the order was understood in the way that counsel accepted, it might mean that the Secretary was not able to remove Mr Mastipour from Australia if the occasion arose for a power to be exercised under s 198 of the Act. The order sought was an interlocutory order. The terms of the order made were more akin to a final order. For those reasons, the terms of the order were inappropriate.

1. His Honour continued at [144]:

That order will leave the Secretary free to detain Mr Mastipour at an appropriate place whilst he is subject to immigration detention. It will also give the Secretary the flexibility to move Mr Mastipour if that is required.

1. In this decision, both Finn and Selway JJ expressed concern (respectively at [2] and [18]) at the “vacuum” that existed in the legislative scheme of the Migration Act concerning the manner and conditions of immigration detention. That vacuum persists. What we have said above should not be taken as a finding that there is unlimited power or authority to hold an individual in immigration detention wheresoever and howsoever the repository of the power may choose. For example, *Mastipour* itself is authority for the existence of a duty of care owed to those detained under the Migration Act. The limits on such decision-making need not be pursued in these appeals. The important point from *Mastipour*, on the question of the proper construction of the definition of “immigration detention”, is that both para (a) and para (b) contemplate some level of decisional freedom for the detainer in the form of detention that is appropriate at any given time, and for any reasonable and lawful purpose. The approach taken by the primary judge removed that decisional freedom, contrary to Parliament’s intention about the flexibility likely to be required within a system of mandatory detention such as that under the Migration Act, including to ensure that the duty of care acknowledged in *Mastipour* can be discharged.
2. It is also important to recognise that para (a) employs the phrase “being in the company of, **and restrained by**” (emphasis added) an officer, or a person within sub-para(a)(ii). Restraint in this context means lawful restraint, but it encompasses the use of such force, viewed objectively, as is reasonably necessary in the circumstances: see the definition of “detain” extracted above at [34]; and see also *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98 at [73], Rares J. Read together and within their limits, these definitions authorise what would otherwise be tortious conduct, for the sole purpose of carrying into effect the scheme of executive detention for which the Migration Act provides. The definitions plainly contemplate that those who are authorised to restrain an individual, and to use force if reasonably necessary, will be subject to direction and control by the executive, rather than being mere members of the community such as the Hermanns. We accept the primary judge is correct in [136] of the reasons to observe that the statutory context in which the verb “restrain” is used throughout the Migration Act suggests it may not be limited to “direct physical restraint”, but rather includes a variety of constraints on a person’s liberty and freedom of movement. Nevertheless, in the particular context of the definition of “immigration detention”, and read with the definition of “detain”, para (a) is contemplating a form of deprivation of liberty that extends to the use of reasonable force where reasonably necessary, but for a short period of time or temporary purpose.
3. The detention arrangement orders contemplate that an officer, or officers, would reside at the Hermanns’ house with the respondent. At [161] of the reasons, the primary judge said:

If the applicant is to be required to be detained in the home of one of his supporters, it should be Ms Hermann’s home. Ms Hermann’s home has six bedrooms, which should be large enough to accommodate the applicant and one or more officers to guard him. It also has the advantage of being in Perth, so that transport of the applicant from the Perth Immigration Detention Centre should be less complex than transporting the applicant to Brisbane.

1. And at [168]:

The respondents submit that Ms Hermann’s evidence fails to demonstrate that she and her husband are willing to have two or three officers in their home at all times. I understand this submission to refer to Ms Hermann’s statement that she is content for […] “a guarding officer to remain stationed on our property”. It is too pedantic a reading of Ms Hermann’s affidavit to suggest that she is saying that she is willing to have one officer stationed at her home, but not more than one. It is unsurprising that the affidavit would emulate the language of the Act, which uses the singular, “an officer”. It is also a misreading of Ms Hermann’s evidence to suggest that she is not willing to have officers inside her home, when she expressly states that she will make available ablution facilities needed by any officer. I also observe that this submission was not foreshadowed, so the applicant did not have the opportunity to meet it through further evidence.

1. Also at [172]:

I intend that the applicant be detained within the external boundaries of the property, rather than being confined to the house itself.

1. It is not apparent how, if these were the proposed arrangements, the respondent was to be considered “restrained” by the officer or officers. While, taking an extended approach, it might be said he was “in the company” of the officers because he was in the same house, para (a) authorises detention by an officer who has an individual in their company **and** is restraining them. It is not apparent how an officer, who is by the Court’s orders indirectly compelled to reside in a private residence, on private property, could be described as “restraining” the respondent, and how any “restraint” was, in a practical sense, to be exercised. This is not a visit to a location such as a medical centre or school, or even a visit to a private property, where an individual would plainly be under the control of the officers in terms of being brought to a place, supervised while at a place, and taken away from a place, and would be subject to their restraint throughout. This is a longer-term living arrangement, including for members of the community who reside there, as well as officers and the respondent, all of whom would be living and sleeping in the house. The comings and goings of members of the public other than the respondent and the officers in and out of the house and the property would be subject to decisions by the Hermanns. It would seem likely the officers themselves might also have had limits placed on them by the Hermanns, about where on the Hermanns’ property, and in the Hermanns’ house, they might have been able to go. A longer term living arrangement of this kind, mixed as between members of the public and officers of the Commonwealth, and an individual intended by Parliament to be deprived of his liberty, is not an arrangement which can be characterised as “being in the company of, and restrained by” those officers. Neither the officers nor their superiors have any control over the premises or the property, and they would at least in some respects be subject to long-term direction by the Hermanns, it being their private residence.
2. The primary judge erred in seeing this arrangement as falling within the terms of para (a) of the definition of immigration detention. That paragraph is directed at much more transitory and temporary circumstances, likely purposive, where the officers concerned can retain more direct and immediate control over the detained individual.
3. For that reason, ground 2 should be upheld. The detention arrangement orders were made on a misunderstanding or misapprehension about the proper construction of para (a) of the definition of “immigration detention”.
4. Although we have not characterised the critical error of the primary judge in this way, we consider the appellants were also correct to submit that the power in s 23 of the FCA Act did not extend to making the detention arrangement orders. We consider it was erroneous for the primary judge to characterise the detention arrangement orders as ancillary to mandamus, and therefore supported by s 23.
5. As senior counsel for the appellants accepted, there may be orders that can properly be characterised as ancillary to an order in the nature of mandamus, and could therefore be made under s 23 of the FCA Act. There is no doubt s 23 is a wide power. It is conferred to ensure the Court can make those orders that are necessary to ensure the effective determination of a matter, or orders that are reasonably required or legally ancillary to ensuring the Court’s order is effective according to its tenor: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; 262 CLR 157 at [109], Keane, Nettle and Gordon JJ. See also *Deputy Commissioner of Taxation v Huang* [2021] HCA 43; 96 ALJR 43 at [16] (Gageler, Keane, Gordon and Gleeson JJ).
6. In this case, the question is how the detention arrangement orders were reasonably required to ensure mandamus was effective. The mandamus order was intended to compel the executive, through its officers, to perform the removal duty in s 198AD(2), by taking the respondent to a regional processing country as soon as reasonably practicable. Making an order about detaining the respondent at the Hermanns’ house was not reasonably required to make the mandamus order effective. Contrast, for example, an order about re-locating an individual to a particular immigration detention centre to facilitate removal, or to ensure adequate communications with that individual and their lawyers so as to facilitate removal.
7. Nor were the detention arrangement orders legally ancillary to the mandamus order. They did not advance or support the performance of the removal duty in s 198AD(2). Contrast, for example, an order concerning adequate communications between the officers charged with removing an individual (and thus complying with the mandamus order) and any medical practitioners treating an individual who may need to be consulted about the conditions under which an individual was to be removed. These examples are not intended to be exhaustive or prescriptive, but rather to illustrate how s 23 may have proper application when the Court makes an order in the nature of mandamus in these circumstances.
8. The detention arrangement orders constituted a remedy without any connection to the mandamus order. They are instead based only on consideration of the personal circumstances of the respondent, in particular his mental health issues and the already extraordinary length of time over which he had been deprived of his liberty, and not on the (required) sufficient connection between those circumstances and the respondent’s lawful removal from Australia. Even if there had been no misconstruction of para (a) of the definition of “immigration detention”, we would have accepted the appellants’ submissions that the detention arrangement orders are not supported by s 23 of the FCA Act.
9. The respondent’s submissions are not assisted by reliance on *Mastipour*. In that proceeding, the applicant sought damages for breach of a duty of care in relation to the circumstances of his detention, including damages for being held in solitary confinement. As part of final relief, the applicant also sought orders that he be transferred to a different immigration detention facility, being one appropriate to his own circumstances. Prior to trial, and on an interlocutory basis, the primary judge in *Mastipour* had ordered the applicant be transferred to another immigration detention centre. The Secretary challenged the making of this order before the Full Court. The Full Court upheld the primary judge’s decision (subject, importantly, to correcting the form of the order, as we have explained above). Justice Lander (with whom Finn and Selway JJ agreed) said (at [128]-[133]:

The primary judge found that there was a serious question to be tried. He said: “the present form of detention of the applicant, if it were to continue in the circumstances, may involve a breach of the duty to take reasonable care for the applicant’s safety”.

It was because of the finding that there was a serious question to be tried in respect of that issue that the primary judge made the order which he did.

On this appeal, the Secretary argued that the primary judge’s finding meant that the Court had intervened not in relation to the lawfulness of the immigration detention as such, but for the purpose of determining what precise place or circumstances of detention are lawful and what are unlawful.

In my opinion, that argument misconceives the primary judge’s approach.

The primary judge, in my opinion, properly recognised that the application for an injunction was dependent upon Mr Mastipour establishing that there was a duty of care. Once he established that there was a duty of care which, as I say, is admitted, the question for the trial judge was whether there was a serious question to be tried in relation to the breach of that duty.

There can be no doubt that if there was a serious question to be tried in relation to the continuing breach of duty by the Secretary, the balance of convenience favoured Mr Mastipour, notwithstanding Mr Wallis’ protestations that it would not be viable to move Mr Mastipour to another Detention Centre.

1. This was an orthodox approach to the grant of interlocutory relief, where the applicant sought final relief of the same kind, based on the content of the duty of care he alleged existed (and which was admitted), and the alleged breaches of that duty. The interlocutory orders were thus compatible and consistent with the final relief sought, and were made out on the usual basis, as the Full Court held. There is no analogy with the detention arrangement orders, which could not have been sought by way of final relief, since the principal relief sought by the applicant in the present proceeding was removal from Australia. The detention arrangement orders, while undoubtedly intended to address what appeared on the uncontested evidence to be the dire circumstances of the respondent, were unconnected with the respondent’s cause of action.
2. Nor does the decision in ***WAIS*** *v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1625 assist the respondent’s submissions in supporting the approach taken by the primary judge. At [125] of the reasons, the primary judge extracted [56] from the judgment of French J (as his Honour then was) in *WAIS*, being the passage on which the respondent relied in the appeal. At [56], French J said:

The remedy for a failure in the discharge of that duty may be mandamus, possibly directed to the Minister. And it may be that, as an incident of such a mandatory order, the Court might direct conditions of detention which are calculated to minimise the harm suffered by the detainee as a consequence of the delay in effecting removal.

1. That statement must be read in the context of the issues in *WAIS*. That was a case where the applicant, an Iraqi national, had requested removal from Australia, but had not been removed. There was a debate on the evidence about whether there was any real likelihood he would be removed, although the Minister contended all reasonable efforts were being made and there was such a likelihood. The case was decided before *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562, and at a time where on the (then recent) authority of ***Al Masri*** *v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1009; 192 ALR 609, followed in ***Al Khafaji*** *v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1369, there were said to be temporal and purposive limits on the authority in s 196 of the Migration Act to keep an individual in immigration detention. Ultimately, French J rejected the applicant’s contentions about his factual circumstances falling within these authorities.
2. However, at [56], French J doubted the correctness of *Al Masri*, and by extension, *Al Khafaji*. In passages prescient of both *Al-Kateb* and *AJL20 HCA*, his Honour described the language of s 196 as “intractable” and noted the availability of mandamus.
3. Having made this observation, his Honour went on to make the observation extracted by the primary judge and quoted at [108] above.
4. In this passage, his Honour is speaking of “conditions” of detention, not the location of detention. Further, there is nothing in this passage that suggests his Honour had in mind a form of detention other than detention at an immigration detention centre. In our opinion, his Honour’s observation was more likely directed at the kind of concerns that occupied the Full Court in *Mastipour*.

# Conclusion

1. The appeals must be allowed, on both grounds 1 and 2. The substantive orders and declaratory relief made by the primary judge must be set aside. In accordance with the Commonwealth’s position, properly taken on the appeals, there will be an order that the appellants pay the respondent’s reasonable costs of the appeals, and the costs orders made by the primary judge will not be disturbed.

|  |
| --- |
| I certify that the preceding one hundred and thirteen (113) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Jagot, Mortimer and Abraham. |

Associate:

Dated: 5 April 2022