FEDERAL COURT OF AUSTRALIA

Bethell v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 661

File number:	QUD 95 of 2021
Judgment of:	**RANGIAH J**
Date of judgment:	17 June 2021
Catchwords:	**MIGRATION –** *Migration Act 1958* (Cth) **–** detention of unlawful non-citizen under s 189 – application for habeas corpus – whether steps taken to remove the applicant "as soon as reasonably practicable" under s 198(5) – whether applicant is currently detained for a permissible purpose – whether detention unlawful – application dismissed
Legislation:	*Migration Act 1958* (Cth) ss 14, 116, 133C, 133F, 153, 189, 196 and 198
Cases cited:	*AJL20 v Commonwealth of Australia* [2020] FCA 1305 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 385 ALR 405 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 *Murray v Director-General Health & Community Services Victoria* (unreported, Supreme Court of Victoria, Eames J, 23 June 1995) *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship & Ors* (2013) 251 CLR 322 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 *Tran v Commonwealth of Australia* [2021] FCA 580
Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	53
Date of hearing:	16 June 2021

Counsel for the Applicant:	Mr A Morris QC
Counsel for the Respondent:	Mr C Tran with Ms S Spottiswood
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

QUD 95 of 2021

BETWEEN:	**KARL ANTONY BETHELL** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** Respondent

ORDER MADE BY:	**RANGIAH J**
DATE OF ORDER:	**17 JUNE 2021**

THE COURT ORDERS THAT:

1. The proceeding is dismissed.

2. The applicant pay the respondent's costs of the proceeding.

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

REASONS FOR JUDGMENT

RANGIAH J:

1 Since 26 February 2021, the applicant has been detained in immigration detention pursuant to s 189 of the *Migration Act 1958* (Cth) (**the Act**). The applicant claims that his detention has ceased to be for any authorised purpose, and is unlawful.

2 The applicant seeks the issue of a writ of habeas corpus. It is well established that habeas corpus is an appropriate form of relief to be sought for unlawful executive detention: *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 556; *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 385 ALR 405 at [189].

3 The respondent intends to remove the applicant to the United Kingdom (the **UK**) on 21 June 2021. Accordingly, the hearing has been conducted, and these reasons are delivered, on an urgent basis.

Background

4 The applicant is a citizen of the UK. He held a Temporary Worker Visa until it was cancelled on 10 November 2016. The applicant had been charged with what may be broadly described as domestic violence offences. The cancellation was made under s 116(1)(e)(ii) of the Act on the basis that his presence in Australia was or might be a risk to the health or safety of another person.

5 The applicant remained in the custody of the Queensland Corrective Services authorities until he was taken into immigration detention on 15 November 2019. The basis of his immigration detention was that s 189(1) of the Act requires an officer to detain a person whom the officer knows or reasonably suspects to be an unlawful non-citizen.

6 The applicant became an unlawful non-citizen within s 14 of the Act when his visa was cancelled. Section 196(1) provides, relevantly, that, "[a]n unlawful non-citizen detained under section 189 must be kept in immigration detention until…he or she is removed from Australia under section 198…or…granted a visa".

7 On 15 January 2021, the applicant was granted a bridging visa and then released from immigration detention, but that visa was cancelled on 23 February 2021 and he was returned to immigration detention on 26 February 2021.

8 The applicant initially submitted that he had been unlawfully detained throughout his period of immigration detention, but ultimately did not pursue that contention in respect of the period before 26 February 2021.

The submissions

9 Section 198(5) of the Act is applicable to the applicant and provides:

> **198 Removal from Australia of unlawful non-citizens**
>
> …
>
> (5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:
>
> (a) is a detainee; and
>
> (b) neither applied for a substantive visa in accordance with subsection 195(1) nor applied under section 137K for revocation of the cancellation of a substantive visa;
>
> regardless of whether the non-citizen has made a valid application for a bridging visa.
>
> …

10 The applicant's case is that s 198(5) of the Act requires the applicant's removal from Australia as soon as reasonably practicable, but that departmental officers have unreasonably delayed in taking steps to remove him. He submits that it has been reasonably practicable to remove him from Australia since some time after 26 February 2021. The applicant submits that as he was not removed as soon as reasonably practicable, his continuing detention is no longer for the purpose of removing him as soon as reasonably practicable. The applicant submits, in particular, that there was unreasonable delay for about two months after 26 February 2021, and that even though more urgent efforts have been made to remove him since then, those efforts cannot convert unlawful detention into lawful detention. The applicant relies substantially upon *AJL20 v Commonwealth of Australia* [2020] FCA 1305.

11 The respondent submits that departmental officers have made ongoing and reasonable efforts to remove the applicant ever since 26 February 2021, and have not failed to remove the applicant as soon as reasonably practicable. The respondent submits that in an application for habeas corpus, it is necessary to determine whether the current detention, not past detention, is

lawful. The respondent submits that the current purpose of the applicant's detention remains to remove him as soon as reasonably practicable. The respondent also submits that *AJL20* is clearly wrong and should not be followed.

Consideration

12 The High Court of Australia has heard an appeal against *AJL20* and reserved its judgment. The parties have not submitted that my judgment should await the outcome of that appeal, given the urgency of the matter.

13 I do not accept that *AJL20* is clearly wrong. I reach that conclusion for the reasons given by Jagot J in *Tran v Commonwealth of Australia* [2021] FCA 580 at [21]-[28].

14 In *AJL20*, Bromberg J held that the effect of ss 196 and 198 of the Act is that an unlawful non-citizen may only be detained, relevantly for, the purpose of removal from Australia, and that the purpose is conditioned by the requirement that the person be removed as soon as reasonably practicable. His Honour said at [75]:

> … For administrative detention under the Act to be lawful it must be detention for a purpose which the Act provides for, removal from Australia being one such permissible purpose. Where there is a departure from the permissible purpose for the detention, the detention will no longer be lawful irrespective of whether one or other of the events specified in s 196(1) has in fact occurred. That is so because it is a condition of the lawfulness of a detention that the detention be for a permissible purpose.

15 Justice Bromberg observed at [89]:

> Consistently with the unanimous view of the Court in ***S4*** *[Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219], the relevant inquiry for determining whether there has been a departure from the permissible purpose of the applicant's detention is whether the removal of the applicant from Australia has been "undertaken" or has been "carried into effect" as soon as reasonably practicable. An objective assessment is to be made of all relevant circumstances including the steps in pursuance of removal which have been taken as well as those steps which were reasonably practicable but were not taken. As Hayne J observed in ***Al-Kateb*** *[Al-Kateb v Godwin* (2004) 219 CLR 562] at [226], the phrase "as soon as reasonably practicable" is a "compound temporal expression" which "recognises that the time by which the event is to occur is affected by considerations of what is '[c]apable of being put into practice, carried out in action, effected, accomplished, or done'". The word "reasonably" in the phrase in question is important. I accept the Commonwealth's submission that the test is not whether everything that could have been done has been done. Perfection is not required, but whether reasonably practicable steps to pursue removal were or were not taken will be relevant.

16 Justice Bromberg continued at [116]:

> The absence of any or sufficient steps being taken to progress removal over a period

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

17 His Honour also observed at [118]:

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

18 I do not understand the respondent to challenge these aspects of *AJL20*.

19 In *Tran*, Jagot J held at [47]:

> …
>
> (1) the issue is not whether the Department took *all* reasonably practicable steps to remove Mr Tran from Australia as soon as reasonably practicable. The issue is whether it should be inferred from all of the circumstances that the Commonwealth abandoned its permissible purpose of removing Mr Tran from Australia as soon as reasonably practicable;
>
> (2) accordingly, a failure to take one or other reasonably practicable step to remove Mr Tran from Australia as soon as reasonably practicable does not, of itself, necessarily prove any abandonment of the permissible purpose;
>
> (3) the relevant circumstances include: "(a) the operational context in which attempts are being made to remove the detainee, constrained by the necessarily finite resources available to the Commonwealth, (b) the cooperation of the country to which the detainee is to be removed, and (c) the degree to which the detainee is in a position, or is inclined, to furnish the Commonwealth with the information and cooperation necessary to effect his or her removal";
>
> …

20 The onus of proof in an application for habeas corpus was considered in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54. The Full Court held at [176]:

> …[I]t is for the applicant to adduce evidence that puts in issue the legality of detention, and then the burden shifts to the respondent to show that detention is lawful, and may be discharged on the balance of probabilities.

21 In *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 385 ALR 405, Allsop CJ observed at [60]:

> …Another way of expressing the question is whether the party seeking relief has shown a case fit to be considered by the court: *Ex parte Khawaja* at AC 111 (also cited in *Yoxon* at [39]). The necessity not to define precisely or overly finely in the abstract what has to be proved by the applicant can be appreciated if one recognises that in respect of some detentions (such as in *Al Masri* which concerned the possible exhaustion of the Constitutional purpose of the power to detain or, as here, where the detention is based on a mental state of the detainer required to be reasonably founded) the incidents or aspects of the lawfulness of the detention are within the knowledge and power of proof of the detainer: cf *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970 to the effect that evidence is to be weighed according to the proof which it was in the power of one side to produce and the other to contradict.

22 The respondent does not dispute that the applicant has adduced sufficient evidence to put in issue the legality of his detention, and accepts that the burden has shifted to the respondent to show that detention is lawful.

23 In *McHugh*, Allsop CJ noted at [57] that the importance of the issue of personal liberty requires "clear and cogent" proof.

24 In an application for habeas corpus, the issue is whether the applicant's current detention is unlawful, not whether his or her detention has been unlawful in the past: *McHugh* at [288]; *Murray v Director-General Health & Community Services Victoria* (unreported, Supreme Court of Victoria, Eames J, 23 June 1995) at 32.

25 Bearing these matters in mind, the issue to be determined is whether the respondent has demonstrated that the purpose of detention remains the removal of the applicant from Australia as soon as reasonably practicable. In considering this issue, it is relevant to consider whether it became reasonably practicable to remove the applicant at some time between 26 February 2021 and the present time.

26 It is necessary to consider the steps taken by departmental officers to facilitate the removal of the applicant after he was taken into immigration detention on 26 February 2021. The respondent called four departmental officers involved in the making of arrangements for the

removal of the applicant to give evidence. The officers gave their evidence-in-chief by way of affidavit and were cross-examined. I consider that the evidence of each of these witnesses was reliable and should be accepted.

27 The evidence demonstrates that removal of a person from Australia, particularly an involuntary removal, is a complex, difficult and potentially lengthy logistical exercise. One of the issues or barriers to removal has been the lack of commercial flights since the COVID-19 pandemic, until very recently, available to take involuntary removals and escorts. Another is difficulty in organising charter flights, including because of the limited number of such flights accepted by the UK, and the fact that two or three escorts are required for each involuntary removal for safety reasons. The safety reasons include that some of those being removed are convicted criminals. There are requirements for COVID-19 testing and quarantining of escorts. There are requirements by UK authorities for identity documents and other information. There are processes and requirements imposed by the Australian Government, such as ensuring that removal is not outweighed by the interests of any of the applicant's children. There is a need for assessment of the person being removed to determine what supports they may require in the country they are being removed to. The evidence refers to many other significant logistical and organisational issues.

28 I do not propose to comprehensively describe all the steps taken by departmental officers towards removing the applicant from Australia after 26 February 2021, but will summarise some of the more significant ones.

29 Wayne Ruttley is a Status Resolution Officer in the Department of Home Affairs (the **Department**). On 27 February 2021, Mr Ruttley conducted an interview with the applicant by telephone and canvassed whether he was willing to voluntarily return to the UK. The applicant, who was still facing charges in Queensland, said he believed that for him to voluntarily leave would breach his bail conditions. There was discussion about whether the Department would issue a Criminal Justice Stay Certificate allowing the applicant to remain in Australia until the criminal proceedings were finalised. Mr Ruttley gave evidence that he conducted some research to see if the applicant could be "placed on a removal pathway".

30 On 8 March 2021, Mr Ruttley conducted another interview with the applicant. The applicant said that he wanted to stay in Australia to help his children and said that he was "appealing the cancellation" of his bridging visa. This appears to be a reference to seeking the revocation of the decision.

31 On 22 March 2021, Mr Ruttley referred the applicant's case to the Removals Team because he considered that "removal from Australia" was the most likely pathway for the applicant. I understand this to mean that Mr Ruttley considered that it was unlikely the applicant would volunteer to be removed. Mr Ruttley had not referred the applicant until then because he was waiting until towards the end of the timeframe during which the applicant was eligible to seek revocation of the Minister's decision to cancel his bridging visa. He says he did this because if the applicant had sought revocation, it would have been an impediment to his removal until a decision upon revocation was made.

32 Brendan Spendelove is a Removals Officer, who was allocated the applicant's case on 29 March 2021. Mr Spendelove did not interview the applicant until 19 April 2021 because of a COVID-19 lockdown, Easter holidays, his attention to other duties and annual leave. At the interview, the applicant indicated that he would not consent to being removed because he wanted to get his property back from the police. Mr Spendelove's impression was that the applicant would not voluntarily request removal.

33 On 21 April 2021, Mr Spendelove made enquiries about a Criminal Justice Stay Certificate. The next day, he received an email saying that it was unlikely that a Criminal Justice Stay Certificate would be issued, but that the police had been contacted to check their position. On 6 May 2021, Mr Spendelove received an email saying that there had been no response from the police, and he asked the writer to follow up on 11 May 2021.

34 Mr Spendelove was responsible for arranging travel documents for the removal of the applicant. On 29 April 2021, he ascertained that the detention centre did not have the applicant's passport and proceeded to make enquiries about the location of the passport. Mr Spendelove concluded that the applicant's passport had been returned to him, but that the applicant was unlikely to cooperate by providing the passport to the Department. He therefore started to make arrangements for the applicant to be issued with travel documents by the UK Consulate-General.

35 On 6 May 2021, Mr Spendelove contacted the UK Consulate-General to check whether the UK was currently accepting involuntary escorted removals and entry requirements and whether a travel document could be issued for the applicant. The next day, Mr Spendelove received a response indicating that it was possible for an emergency passport to be issued and stating that Mr Spendelove's other enquiries would be checked. Mr Spendelove did not apply immediately for an emergency passport for the applicant, as he had not yet found a flight or escorts for the

applicant's removal. On 11 May 2021, Mr Spendelove telephoned the UK Consulate-General to follow up on his enquiries and was told answers had not yet been provided.

36 On 10 March 2021, an email had been distributed stating that a charter flight to the UK had been arranged for 4 May 2021 and that persons were required to be nominated for that flight by 15 March 2021. Mr Spendelove said that as the applicant's case had not been referred to him by then, he was unable to nominate the applicant for that flight.

37 Josephine Sergi, a Removals Officer, deposes that she was assigned the applicant's case on 12 May 2021. On 6 May 2021, Ms Sergi had sent an email to Serco (a contracted security provider) requesting escorts for a proposed commercial flight for the removal of the applicant on 15 June 2021.

38 On 11 May 2021, Serco indicated that they were only able to provide security escorts and flights to the UK if they had a same day return flight and could remain in transit rather than undertaking quarantine in the UK. Ms Sergi then made enquiries as to whether that was possible, as well as making further enquiries and attempting to make arrangements for the escorts, including testing for COVID-19. On 18 May 2021, Serco provided the names of the escorts. Ms Sergi could not make a flight booking until she had those names. The applicant required three escorts because he was an involuntary removal and because of the duration of the flight from Australia to the UK. Arrangements for the flight on 14 June 2021 were then finalised on 24 May 2021. This was the first commercial flight to be carrying an involuntary removal with escorts since the pandemic. On the same day, Ms Sergi sought the provision of an identity document called a Certificate of Identity that would allow UK authorities to link the applicant to his passport.

39 Ms Sally Davis is an Inspector of Removals Operations. She is responsible for the organisation of charter flights for removals to the UK and elsewhere. She said that the next charter flight is scheduled for 21 June 2021. Ms Davis gave evidence, which I accept, that the UK allows charter flights only every ten to twelve weeks. The planning for the charter flight of 21 June 2021 commenced about a month ago. A charter flight on 4 May 2021 carried 15 involuntary removals to the UK. Because of the number and nature of the persons being removed and the length of the flight, they were accompanied by 57 escorts.

40 Arrangements were made for the applicant to be removed on a commercial flight on 14 June 2021. On 3 June 2021, the applicant sought and was granted an injunction by Collier J

restraining the respondent from removing the applicant until 21 June 2021. That order was made in light of the hearing of the habeas corpus application being listed for 16 June 2021.

41 The respondent now proposes that the applicant be removed to the UK on the charter flight departing on 21 June 2021 and arriving on 22 June 2021.

42 The applicant criticises the departmental officers for inaction and delay in the period from 26 February 2021 to about 11 May 2021 when Ms Sergi took over the applicant's case. The applicant does not allege that there was any relevant inaction or delay after 11 May 2021. The applicant's criticisms must be examined in the context that he refused voluntary removal so that his removal had to be arranged on the basis that it was involuntary.

43 The criticisms seem to be particularly in respect of the period from 26 February 2021 to 22 March 2021 when Mr Ruttley referred the applicant's case to Mr Spendelove. It appears that all that occurred in that period were two interviews by Mr Ruttley at which he ascertained that the applicant would not consent to being voluntarily removed and the conduct of some research about removal. The existence of criminal proceedings in that period did not, under s 153 of the Act, provide a barrier to removal in the absence of a Criminal Justice Stay Certificate.

44 Mr Ruttley's lack of more urgent action to effect the removal was influenced by the fact that the time for an application for revocation of the Minister's decision to cancel his bridging visa had not yet expired and the applicant had indicated that he would seek revocation. It appears that Mr Ruttley's understanding was that the reasonable practicability of removal was influenced by the making of representations about revocation and a decision by the Minister. There are provisions, ss 198(2A), (2B) and (5) of the Act, that indicate that the requirement to remove as soon as reasonably practicable does not arise until a decision about revocation has been made. However, in the circumstances of the case, the requirement under s 198(5) is simply for an officer to remove as soon as reasonably practicable, and the requirement does not commence when the Minister has made a decision not to revoke. The applicant's bridging visa was cancelled under s 133C and revocation could be sought under s 133F. There appears to be an anomaly in s 198 whereby an applicant who applies for revocation of a cancellation under s 133F is liable to be removed even before the application for revocation has been decided. The error in Mr Ruttley's understanding is explicable. In fact, the applicant's counsel made a related error in submitting that the applicant's case falls within s 198(2A)—I do not say this to be critical, but to demonstrate that genuine mistakes may readily happen. The comments

made in *AJL20* are apt at [118]. Mr Ruttley's error does not indicate any loss of the purpose of removal as soon as reasonably practicable. Further, it could be expected that if the applicant made an application for removal and an attempt to remove him were made before the Minister had made a decision, it might well be met with an application for an injunction to restrain the removal given that the applicant had indicated he would not return voluntarily. The issue of whether Mr Bethell could apply for revocation was, in that sense, a consideration relevant to the reasonable practicability of removing him.

45 There was some criticism by the applicant of inaction and delays by Mr Spendelove. I do not consider that any such inaction and delays were substantial, significant or unreasonable. It is apparent that Mr Spendelove continued to make enquiries and arrangements to facilitate the removal of the applicant. That there might have been some gaps between the actions that Mr Spendelove took or that he might have been able to proceed more speedily does not indicate a departure from the purpose of removing the applicant as soon as reasonably practicable.

46 The applicant made some criticism of the failure of departmental officers to place the applicant on a charter flight leaving for the UK on 4 May 2021, or to organise another charter flight for him. The evidence indicates that 15 persons were placed on the 4 May 2021 charter flight for removal. The applicant's name had not been put forward for the flight by the required date of 15 March 2021, that date being set because the UK requires the names to be submitted some weeks in advance of a flight. The factors relevant to who was on that charter flight included the length of time persons had been waiting for removal and whether they were voluntary or involuntary removals. There are in the vicinity of 30 to 40 persons who are currently awaiting removal to the UK. It seems quite unlikely that the applicant, having been taken into detention on 26 February 2021, could have been placed on the charter flight even if departmental officers had acted more expeditiously. It must be remembered that arrangements had to be made for the applicant, including ascertaining whether a Criminal Justice Stay Certificate would be issued and obtaining appropriate identity documents and other clearances.

47 As was observed by Jagot J in *Tran* at [41], the efforts of the departmental officers did not need to meet a standard of administrative and systemic perfection in order to prove that there was no abandonment of the continuing permissible purpose authorising detention. I understand her Honour to have used "abandonment" to refer, not to a conscious decision to abandon the purpose of removal as soon as reasonably practicable, but to a neglect or failure to carry out that purpose.

48 I find that there has not been any abandonment of, or departure from, the permissible purpose. The departmental officers have taken reasonable and adequately prompt steps to remove the applicant as soon as reasonably practicable since 26 February 2021. Arrangements were made for the applicant's removal on 14 June 2021 and have now been remade for 21 June 2021. That demonstrates that the current purpose remains to remove the applicant as soon as reasonably practicable.

49 An issue that was argued during the hearing was whether the applicant's current detention would be lawful if the purpose of removal had been "departed from" at some point during the period of detention, but that purpose had been regained by the time of the hearing. That argument arose in the context of the applicant's submission that departmental officers had not made adequate efforts to arrange for the applicant's removal between 26 February 2021 and about 11 May 2021, but acceptance that adequate efforts had been made since then. I have found that the purpose of removal as soon as reasonably practicable was not departed from in that period, but will consider the position on the assumption that I am wrong in that conclusion.

50 I was not taken to any cases which have directly decided whether a permissible purpose once lost can be regained. The issue identified by Bromberg J in *AJL20* at [89], by reference to *Plaintiff S4/2014*, focusses on whether there has been a departure from the permissible purpose of detention. The enquiry is not directly whether there has been a failure to remove a person as soon as reasonably practicable, but whether there has been departure from that purpose. Once there has been such a departure, the detention becomes unlawful. However, the idea that once there has been a departure, it is irrelevant that the purpose is regained, is inconsistent with the requirement that in an application for habeas corpus the detention must be unlawful at the current time. If the current purpose is to remove the person as soon as reasonably practicable, then that is a permissible purpose of detention, and detention is not unlawful. This would not leave a person without a remedy in respect of an earlier period where the purpose was departed from, but the remedy may be damages for false imprisonment, not habeas corpus.

51 As a matter of construction of ss 196 and 198 of the Act, it is unlikely that it was intended that once the purpose of removal as soon as reasonably practicable is departed from, it is lost forever for the purposes of the lawfulness of detention. Such a construction would mean that, if released, a person who is not willing to be removed, could not later be removed, since they could not be detained in order to effect their removal. That would be inconsistent with the scheme of the Act which distinguishes between lawful non-citizens and unlawful non-citizens

and usually requires those in the latter category to be detained until, relevantly, they are removed: cf *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship & Ors* (2013) 251 CLR 322 at [118].

52 Even if, contrary to my finding, it was reasonably practicable to have removed the applicant between 26 February 2021 and mid-April 2021 and the purpose of detention had been departed from, that purpose has been regained. In my opinion, the current detention of the applicant is not unlawful.

53 The application will be dismissed with costs.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah.

Associate:

Dated: 17 June 2021