HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

AHMED ALI AL-KATEB APPELLANT

AND

PHILIPPA GODWIN, DEPUTY SECRETARY,
DEPARTMENT OF IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS
AFFAIRS & ORS RESPONDENTS

Al-Kateb v Godwin [2004] HCA 37
6 August 2004
A253/2003

ORDER

1. *Appeal dismissed.*

2. *The respondents to pay the appellant's costs in this Court.*

Cause removed under s 40 of the *Judiciary Act* 1903 (Cth)

Representation:

C M O'Connor with A Hamdan for the appellant (instructed by Hamdan Lawyers)

D M J Bennett QC, Solicitor-General of the Commonwealth with H C Burmester QC and S J Maharaj for the respondents (instructed by Australian Government Solicitor)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with H C Burmester QC and S J Maharaj intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D S Mortimer SC with J K Kirk intervening on behalf of the Human Rights and Equal Opportunity Commission (instructed by Human Rights and Equal Opportunity Commission)

CATCHWORDS

Al-Kateb v Godwin

Immigration – Unlawful non-citizens – Detention pending removal from Australia – No real prospect of removal from Australia in reasonably foreseeable future – Whether detention lawful under *Migration Act* 1958 (Cth) – Whether detention is temporally limited by purpose of removal – Whether requirement to remove as soon as reasonably practicable implies time limit on detention.

Statutes – Acts of Parliament – Construction and interpretation – Where meaning ambiguous or uncertain – Presumption of legislative intention not to invade personal common law rights.

Constitutional law (Cth) – Judicial power of the Commonwealth – Unlawful non-citizen in immigration detention – No real prospect of removal from Australia in reasonably foreseeable future – Whether provision for indefinite detention without judicial order infringes Chapter III of the Constitution – Whether detention involves an exercise of judicial power of the Commonwealth by the Executive – Whether detention is for a non-punitive purpose.

Constitutional law (Cth) – Construction and interpretation – Whether Constitution to be interpreted to be consistent with international law of human rights and fundamental freedoms.

Constitution, Ch III.
Migration Act 1958 (Cth), ss 189, 196, 198.

1 GLEESON CJ. The *Migration Act* 1958 (Cth) ("the Act") provides for administrative detention of unlawful non-citizens. For present purposes, unlawful non-citizens are aliens who have entered Australia without permission, or whose permission to remain in Australia has come to an end. In this context, alien includes a stateless person, such as the appellant. Detention is mandatory, not discretionary. It is not a form of extra-judicial punishment. It exists "in the context ... of executive powers to receive, investigate and determine an application by [the] alien for an entry permit and (after determination) to admit or deport"[1]. It is an incident of the exercise of those powers. The Act envisages that the detention will come to an end, by the grant of a visa which entitles the alien to enter the Australian community, or by removal of the alien from Australia, either at the request of the alien, or following the conclusion of an unsuccessful attempt to obtain a visa. Applications for visas may involve a lengthy process of decision-making, and administrative and judicial review. The time taken by the process may be difficult to predict. In that respect, the period of administrative detention may be uncertain. Similarly, the process of removal may take some time to arrange. In the ordinary case, however, the period, although uncertain, is finite. Furthermore, as was pointed out in *Chu Kheng Lim v Minister for Immigration*, in the ordinary case, the detention can be brought to an end upon the alien making a request to be removed[2]. There are, however, exceptional cases, where a visa application has been determined adversely to an alien, or an alien has requested removal, but removal is not possible in the circumstances which prevail at the time and which are likely to prevail in the foreseeable future. What happens then? Is the consequence indefinite, perhaps permanent, detention? The Act does not, in express terms, address that problem[3].

2 The appellant, a stateless person, arrived in Australia without a visa. He was taken into immigration detention, and applied for a visa. His application failed. He wrote to the Minister requesting to be removed. Removal did not take place, not because of any want of trying on the part of the Australian authorities, or because of any personal fault of the appellant, but because attempts to obtain the necessary international co-operation were unsuccessful. The Federal Court found that there was no real likelihood or prospect of removal of the appellant in the reasonably foreseeable future.

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1 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 10 per Mason CJ.

2 (1992) 176 CLR 1 at 34 per Brennan, Deane and Dawson JJ.

3 Amendments to s 196 of the Act in 2003 apply to certain classes of detainee, not including the appellant.

3 In a similar case, *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*[4], the Full Court of the Federal Court held that a person in the position of the appellant is entitled to be released from immigration detention, if and when the purpose of removal becomes incapable of fulfilment. For the reasons that follow, I agree with that conclusion. A similar problem has arisen, and a similar answer has been given, in the United Kingdom[5], the United States[6], and Hong Kong[7]. However, in each country the constitutional and statutory context is controlling, and differs. In particular, while in those jurisdictions provision is made for administrative detention of aliens, such detention is discretionary rather than mandatory, and the courts are concerned with powers, rather than obligations, to detain. Questions of reasonableness in the exercise of administrative powers may give rise to considerations that are not directly relevant to a system of mandatory detention.

4 In Australia, the constitutional context is as follows. The Parliament, subject to the Constitution, has power to make laws with respect to naturalization and aliens (s 51(xix)), and immigration and emigration (s 51(xxvii)). The qualification, subject to the Constitution, directs attention to Ch III, concerning judicial power and courts, and the separation of powers which is part of the structure of the Constitution. Parliament has no power to make laws with respect to aliens which confer judicial power on the Executive. The Act's scheme of mandatory administrative detention is a valid law with respect to aliens on the basis earlier stated, that is to say, that a limited authority to detain an alien in custody is conferred as an incident of the exercise of the executive powers of excluding and removing aliens, and investigating, considering and determining applications for permission to enter Australia[8]. So characterised, the power is not punitive in nature, and does not involve an invalid attempt to confer on the Executive a power to punish people who, being in Australia, are subject to, and entitled to the protection of, the law.

5 The history of the relevant provisions of the Act, and of earlier legislation on the subject, is set out in the reasons of Gummow J and of Hayne J. The critical provisions are ss 189, 196, and 198 which are contained in Pt 2 dealing with "Control of arrival and presence of non-citizens". Division 7 of Pt 2, which

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4 (2003) 126 FCR 54.

5 *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704; [1984] 1 All ER 983.

6 *Zadvydas v Davis* 533 US 678 (2001).

7 *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

8 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 10 per Mason CJ.

contains ss 189 and 196, deals with "Detention of unlawful non-citizens" – those without visas. Division 8 of Pt 2, which contains s 198, deals with "Removal of unlawful non-citizens".

6 Section 198 provides:

> "(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.
>
> ...
>
> (6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
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> (a) the non-citizen is a detainee; and
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> (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
>
> (c) ...
>
> (i) the grant of the visa has been refused and the application has been finally determined;
>
> ... and
>
> (d) the non-citizen has not made another valid application ..."

7 Both sub-ss (1) and (6) apply in the case of the appellant. Removal is not necessarily limited to removal to an unlawful non-citizen's country of nationality. However, it does not include simply ejecting a person physically from Australian territory, and therefore, in a given case, may require international co-operation as mentioned above.

8 Section 189 provides that, if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

9 Section 196, dealing with the period of detention, provides:

> "(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
>
> (a) removed from Australia under section 198 or 199; or
>
> (b) deported under section 200; or

(c) granted a visa.

(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa."

10 The word "detention" in sub-s (3) means "lawful detention". If it were otherwise, the provision would constitute an unconstitutional interference with judicial power[9]. Parliament cannot deprive the courts of the power to order the release of a person from unlawful detention. Consequently, it is the meaning of sub-s (1), understood in its constitutional and statutory context, that is in question.

11 The appellant was taken into detention under s 189, and was to be kept in detention under s 196 until he was removed from Australia under s 198 or granted a visa. He was not granted a visa, and he requested to be removed. Section 198 required that he be removed as soon as reasonably practicable. He wanted to be removed. The authorities wanted to remove him. But removal was not practicable, and was not likely to be practicable in the foreseeable future.

12 One of the features of a system of mandatory, as distinct from discretionary, detention is that circumstances personal to a detainee may be irrelevant to the operation of the system. A person in the position of the appellant might be young or old, dangerous or harmless, likely or unlikely to abscond, recently in detention or someone who has been there for years, healthy or unhealthy, badly affected by incarceration or relatively unaffected. The considerations that might bear upon the reasonableness of a discretionary decision to detain such a person do not operate. The Act is expressed in terms which appear to assume the possibility of compliance with the unqualified statutory obligation imposed by s 198. That assumption is made the basis of the specification of the period of detention required and authorised by s 196. The period is expressed to be finite. In cases where the assumption is valid, the period of mandatory detention may be relatively brief, save to the extent that it is prolonged by a detainee's own action in seeking a visa, with the delays that may involve. And, where the assumption is valid, the detention can always be brought to an end by the detainee's own request for removal. As the facts of the present case illustrate, however, compliance with the unqualified statutory obligation may require the co-operation of others, whose co-operation cannot be

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9 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 50-51 per Toohey J.

compelled. Compliance with an obligation defines the period of detention. The obligation, however, in its nature is subject to the possibility that it cannot be fulfilled for reasons unrelated to any fault on the part of the detainer, or the detainee.

13 The respondents point out that the capacity of a court to investigate, and decide, the practicability of removal in some cases where delicate, and perhaps confidential, matters of international diplomacy are concerned, may be limited. That is true, but if there were an allegation of non-compliance with the obligation imposed by s 198, that would give rise to a justiciable issue, difficult though it may be to resolve. The respondents also point out that international circumstances change, sometimes rapidly and unpredictably, and that it will rarely, if ever, be possible to say that removal will never become practicable. Even so, the provisions of the Act with which we are concerned do not address the possibility of a situation such as has arisen in the present case, and do not expressly provide for it. It should be acknowledged that the same may be said of some statements in past judgments of this Court as to the purpose and character of immigration detention.

14 The Act does not in terms provide for a person to be kept in administrative detention permanently, or indefinitely. A scheme of mandatory detention, operating regardless of the personal characteristics of the detainee, when the detention is for a limited purpose, and of finite duration, is one thing. It may take on a different aspect when the detention is indefinite, and possibly for life. In its application to the appellant, the Act says that he is to be kept in administrative detention until he is removed, and that he is to be removed as soon as reasonably practicable. That could mean that the appellant is to be kept in administrative detention for as long as it takes to remove him, and that, if it never becomes practicable to remove him, he must spend the rest of his life in detention. The appellant contends that it is also capable of another meaning. It may mean that the appellant, who is being kept in detention for the purpose of removal, which must take place as soon as reasonably practicable, is to be detained if, and so long as, removal is a practical possibility, but that if, making due allowance for changes in circumstances, removal is not a practical possibility, then the detention is to come to an end, at least for so long as that situation continues.

15 The respondents dispute that the Act is capable of bearing the second of those two meanings. That issue cannot be divorced from the words of qualification at the end of the preceding paragraph. The qualification also is contestable, and must be addressed.

16 It was submitted on behalf of the respondents that the Minister, and the relevant officers referred to in s 198, may have the purpose of removing a detainee as soon as reasonably practicable, in accordance with their statutory obligations, even though removal is not currently practicable, and is not likely to

become practicable in the foreseeable future. They may have such a purpose for years. They may have it for the whole of a detainee's life.

17 The legislation operates, with reference to the appellant, upon the combined effect of two imperatives. He must be removed from Australia as soon as reasonably practicable. And he must be detained until he is so removed. The first imperative is compound in its nature. It assumes the possibility of removal. It requires, not merely removal, but removal as soon as reasonably practicable. The second imperative, which builds upon the first, is, in terms, unqualified. As a matter of ordinary language, it is open to the construction that, because of its textual relationship to the first imperative, it is subject to a cognate qualification. This is supported by the purposive nature of the power (and duty) of administrative detention. The primary purpose of the appellant's detention, after the completion of the process of examining his application for a visa and after his request that he be removed, was to facilitate his removal. A secondary purpose may well have been to prevent his entry into the Australian community in the meantime. The primary purpose, however, is plain. The purpose is objective. What is in question is the purpose of the detention, not the motives or intention of the Minister, or the officers referred to in s 198.

18 If the second imperative is qualified by its relationship with the first imperative, another question follows as to the precise extent of the qualification. Although the non-citizens referred to in s 196 will possess a variety of personal characteristics, some of which, in a discretionary system, may justify prolonged detention, they all have one thing in common. They are "unlawful". That means they do not have permission to enter, or remain in, Australia. That is their status under the Act, whether in or out of immigration detention. And, in the case of the appellant, a time may come where his removal, by reason of a change in international circumstances, is reasonably practicable. It cannot be said that it will never be reasonably practicable to remove him. The primary purpose of his detention is in suspense, but it has not been made permanently unattainable. The Act makes no express provision for suspension, and possible revival, of the obligation imposed by s 196, according to the practicability of effecting removal under s 198. Similarly, it makes no express provision for indefinite, or permanent, detention in a case where the assumption underlying s 198 (the reasonable practicability of removal) is false. In resolving questions raised by the legislative silence, resort can, and should, be had to a fundamental principle of interpretation.

19 Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of

which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases[10]. It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that "[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness"[11].

20 A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.

21 It is submitted for the respondents that the terms of the statute are general, but tolerably clear, and that if there is a silence on the particular problem raised by the case of the appellant, that is only because it is sufficiently covered by the general words. I am unable to accept that submission. The Act provides that the appellant must be kept in detention until he is removed from Australia under s 198, and s 198 provides that he must be removed as soon as reasonably practicable. The Act does not say what is to happen if, through no fault of his own or of the authorities, he cannot be removed. It does not, in its terms, deal with that possibility. The possibility that a person, regardless of personal circumstances, regardless of whether he or she is a danger to the community, and regardless of whether he or she might abscond, can be subjected to indefinite, and perhaps permanent, administrative detention is not one to be dealt with by implication.

22 In s 196, the period of detention of the appellant is defined by reference to the fulfilment of the purpose of removal under s 198. If that purpose cannot be fulfilled, the choice lies between treating the detention as suspended, or as indefinite. In making that choice I am influenced by the general principle of interpretation stated above. I am also influenced by the consideration that the

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10 *Coco v The Queen* (1994) 179 CLR 427; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].

11 *Potter v Minahan* (1908) 7 CLR 277 at 304. See also *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587-589 per Lord Steyn; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann.

detention in question is mandatory, not discretionary. In a case of uncertainty, I would find it easier to discern a legislative intention to confer a power of indefinite administrative detention if the power were coupled with a discretion enabling its operation to be related to the circumstances of individual cases, including, in particular, danger to the community and likelihood of absconding. The absence of any reference to such considerations, to my mind, reinforces the assumption that the purpose reflected in s 196 (removal) is capable of fulfilment, and supports a conclusion that the mandated detention is tied to the validity of that assumption.

23 If I am correct in saying that, in the case of the appellant, the invalidation of the assumption in s 198 suspends, but does not forever displace, the obligation imposed by s 196, there then arises the question of the nature of the relief to which a person in the position of the appellant is entitled. In the course of argument in this Court, a question was raised as to the practice, adopted by some members of the Federal Court (such as Merkel J[12] and the Full Court in *Al Masri*, and Mansfield J on an interlocutory basis in the present case), of making an order for the release from detention but imposing conditions, such as notification of change of address, and reporting, designed to secure availability for detention and removal if and when removal becomes reasonably practicable.

24 The appellant sought a declaration that he was unlawfully detained and an order in the nature of habeas corpus directing his release from detention. The reference to "an order in the nature of habeas corpus" may reflect a division of opinion in the Full Federal Court in *Ruddock v Vadarlis*[13] as to whether, under s 23 of the *Federal Court of Australia Act* 1976 (Cth), read with s 39B of the *Judiciary Act* 1903 (Cth), the Federal Court has power to issue a writ of habeas corpus or to make an order in the nature of habeas corpus. That question was not argued before this Court, and nothing turns on it in the present appeal. Even if the power is best described as a power to make an order in the nature of habeas corpus, that is what was sought. Furthermore, on the matter of making orders on conditions, s 22 of the *Federal Court of Australia Act* is to be noted.

25 The remedy of habeas corpus, or an order in the nature of habeas corpus, is a basic protection of liberty, and its scope is broad and flexible. "This, the

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12 *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 192 ALR 609.

13 (2001) 110 FCR 491 at 509-514 per Black CJ, 517-518 per Beaumont J, 546-548 per French J.

greatest and oldest of all the prerogative writs, is quite capable of adapting itself to the circumstances of the times."[14]

26 As to the interlocutory orders made by Mansfield J in the present case, it is worth remembering that an order of bail as an interlocutory step in habeas corpus proceedings is not uncommon. Indeed, a proceeding for habeas corpus was once the normal method of applying to the King's Bench for bail[15]. In *R v Secretary of State for the Home Department; Ex parte Turkoglu*[16], Sir John Donaldson MR, with whom Croom-Johnson and Bingham LJJ agreed, said, in an immigration case, "[c]learly we could grant bail ancillary to or as part of proceedings for habeas corpus". The interlocutory orders in this case were made by consent; it is the power of the Federal Court to impose conditions as part of a final order for release from detention that is presently in question.

27 As well as being used to obtain bail, habeas corpus proceedings were commonly brought in disputes relating to the custody of children, or matters concerning the mentally ill. In *R v Greenhill*[17], Lord Denman CJ said:

> "When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody."

Speaking of an order to discharge under habeas corpus a person unlawfully detained as a lunatic, Coleridge J said, in *R v Pinder; In re Greenwood*[18], that:

> "when, on the affidavits, it appears clear that the party confined is in such a state of mind that to set him at large would be dangerous either to the public or himself, it becomes a duty and is within the common law

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14 *R v Secretary of State for the Home Department; Ex parte Muboyayi* [1992] QB 244 at 258 per Lord Donaldson of Lymington MR. As to the procedure in habeas corpus applications, see Clark and McCoy, *Habeas Corpus: Australia, New Zealand, the South Pacific*, (2000) at 200-219, and see also the orders made by this Court in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520, 528.

15 Sharpe, *The Law of Habeas Corpus*, 2nd ed (1989) at 128; *In re Kray* [1965] Ch 736 at 740.

16 [1988] QB 398 at 399.

17 (1836) 4 Ad & E 624 at 640 [111 ER 922 at 927].

18 (1855) 24 LJQB 148 at 152.

> jurisdiction of the Court, or a member of it, to restrain him from his liberty, until the regular and ordinary means can be resorted to of placing him under permanent legal restraint."

It is not antithetical to the nature of habeas corpus for an order to be made upon terms or conditions which relate directly to the circumstances affecting an applicant's right to be released from detention, and reflect temporal or other qualifications upon that right. The author of Antieau, *The Practice of Extraordinary Remedies*[19] says, of the practice in the United States, that "[c]ourts can release petitioners on condition that they post bonds to act in indicated manners". Reference is made to *United States ex rel Chong Mon v Day*[20], where, in 1929, a Federal judge ordered the discharge of a petitioner "on his filing bond in the sum of $500, conditioned that he will depart from the United States as a seaman on a foreign bound vessel within 30 days from the date of his release".

28 The power given by s 22 of the *Federal Court of Australia Act*, to grant remedies on such terms and conditions as the Court thinks just, so that, as far as possible, all matters in contention between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided, extends to the imposition of conditions designed to ensure an unlawful non-citizen's availability for removal if and when that becomes reasonably practicable.

29 A more difficult question, which does not arise in the present case, concerns the power of a court to impose conditions or restraints in the case of a person who is shown to be a danger to the community, or to be likely to abscond. It may be that the reason for difficulty in arranging for the removal of a detainee is that the detainee is regarded by his country of nationality, and other countries, as a dangerous person. Whether that could affect the detainee's right to be released from administrative detention, or the terms and conditions of release, is a matter that could arise for decision in another case.

30 The appeal should be allowed with costs. I agree with the consequential orders proposed by Gummow J.

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19 (1987), vol 1 at 41.

20 36 F 2d 278 at 279 (1929).

31 McHUGH J. The principal issue in this appeal concerns the power of the Parliament to order the detention of an unlawful non-citizen in circumstances where there is no prospect of him being removed from Australia in the reasonably foreseeable future. There is also an important point of statutory construction involved in the case that is anterior to the principal issue. Hence, the appeal raises two issues. First, do ss 189, 196 and 198 of the *Migration Act* 1958 (Cth) ("the Act"), when properly construed, purport to authorise the indefinite detention of an unlawful non-citizen in circumstances where there is no real prospect of removing the non-citizen? Second, if they do purport to authorise such detention, are they invalid because they are beyond the legislative power of the Commonwealth? In my opinion, the first issue should be resolved in the affirmative and the second in the negative. As a result, tragic as the position of the appellant certainly is, his appeal must be dismissed.

32 The material facts of the case are set out in the judgment of Gummow J. I need not repeat them.

First issue

33 For the reasons given by Hayne J, ss 189, 196 and 198 of the Act require Mr Al-Kateb to be kept in immigration detention until he is removed from Australia. The words of ss 196 and 198 are unambiguous. They require the indefinite detention of Mr Al-Kateb, notwithstanding that it is unlikely that any country in the reasonably foreseeable future will give him entry to that country. The words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights.

34 Detention under s 196 for the purpose of removal under s 198 will cease to be detention for that purpose only when the detention extends beyond the time when the removal of the non-citizen has become "reasonably practicable". As long as removal of an unlawful non-citizen is not reasonably practicable, ss 196 and 198 require that person's detention to continue until it is reasonably practicable or that person is given a visa. Minimising the time that an unlawful non-citizen must spend in detention was undoubtedly the reason for providing a time limit for removal or deportation. But that does not mean that the detention of an unlawful non-citizen is limited to a maximum period expiring when it is impracticable to remove or deport the person.

35 The unambiguous language of s 196 – particularly sub-s (3) – indicates that Parliament intends detention to continue until one of the conditions expressly identified therein – removal, deportation or granting of a visa – is satisfied.

Second issue

36 In *Chu Kheng Lim v Minister for Immigration*[21], the Court decided that the power conferred on the Parliament by s 51(xix) of the Constitution extends to authorising the executive government to detain an alien in custody for the purpose of expulsion or deportation. It also decided that detention for that purpose does not infringe the provisions of Ch III of the Constitution. The *ratio decidendi* of the case is expressed in the following passage in the joint judgment of Brennan, Deane and Dawson JJ[22]:

> "It can therefore be said that the legislative power conferred by s 51(xix) of the Constitution encompasses the conferral upon the Executive of authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation. Such authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of that executive power. By analogy, authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers. Such limited authority to detain an alien in custody can be conferred on the Executive without infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates. The reason why that is so is that, to that limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth. When conferred upon the Executive, it takes its character from the executive powers to exclude, admit and deport of which it is an incident."

37 This passage does not mean that the power to detain pending deportation is an incidental constitutional power, that is, a power that is merely incidental to the aliens power.

38 Incidental powers, unlike true heads of s 51 power, operate in a space between the powers expressly granted and those not expressly granted to the Parliament. Incidental powers may only be exercised where they are reasonably necessary to facilitate the making of laws with respect to the head of power of which they are an incident. In a Constitution that grants limited powers to the federal legislature, they are, in a sense, additional to what was granted. Their

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21 (1992) 176 CLR 1.

22 (1992) 176 CLR 1 at 32.

connection with a head of power is closely scrutinised because they involve the acquisition of additional legislative power, not expressly granted to the Commonwealth by the Constitution.

39 In using the term "incident" in the above passage, however, Brennan, Deane and Dawson JJ were describing an event that occurs in the course of the executive government's authority to deport or expel. They were not speaking of a measure of constitutional power. They were not speaking of a true incidental power, that is, a power that stands outside the head of constitutional power but can be justified because it is necessary to protect or give effect to a constitutional power. The power to detain aliens is not an incidental power. It is not the same as a power to detain a person suspected of carrying a weapon on an overseas flight regulated under the trade and commerce power. Detaining such a person is not trade or commerce. If the Parliament confers power to detain such a suspect, it can only be justified as incidental to the trade and commerce power if it is necessary to protect persons, property or transactions involved in overseas commerce. A law authorising detention of an alien stands in a different category. It is a law with respect to the subject of aliens in the same way as a law requiring aliens to register with a government official is a law with respect to aliens. Such laws are not incidental to the aliens power. They deal with the very subject of aliens. They are at the centre of the power, not at its circumference or outside the power but directly operating on the subject matter of the power.

40 Significantly in *Lim*, the joint judgment of Brennan, Deane and Dawson JJ said of the laws in question in that case[23]:

> "Their object and operation are, in the words of s 54J, to ensure that 'each non-citizen who is a designated person should be kept in custody until he or she' leaves Australia or is given an entry permit. They constitute, in their entirety, a law or laws with respect to the detention in custody, pending departure or the grant of an entry permit, of the class of 'designated' aliens to which they refer. As a matter of bare characterization, they are, in our view, a law or laws with respect to that class of aliens. *As such, they prima facie fall within the scope of the legislative power with respect to 'aliens' conferred by s 51(xix).* The question arises whether, nonetheless, their enactment was not authorized by that grant of legislative power by reason of some express or implied restriction or limitation to be found in the Constitution when read as a whole. For the plaintiffs, it is argued that such a restriction or limitation is implicit in Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates." (emphasis added)

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23 (1992) 176 CLR 1 at 26.

41 In *Lim*, I said[24] that the power conferred on the Parliament by s 51(xix) is "limited only by the description of the subject matter". In *Re Patterson; Ex parte Taylor*, I said that "as long as a person falls within the description of 'aliens', the power of the Parliament to make laws affecting that person is unlimited unless the Constitution otherwise prohibits the making of the law"[25]. In *Lim*, I also said that a law requiring detention of aliens for the purpose of deportation or processing of applications would not cease to be one with respect to aliens even if the detention went beyond what was necessary to effect those objects[26]. That is because any law that has aliens as its subject is a law with respect to aliens.

42 If the power to detain aliens for the purpose of deportation was merely an incidental power, it would be impossible to justify the detention of an alien once it appeared that deportation could not be effected or could not be effected in the foreseeable future. But, as I have pointed out, the power to detain aliens is not a power incidental to the s 51(xix) head of power. It is a law with respect to the subject matter of that power.

43 The principles expressed in the above passage in the joint judgment of Brennan, Deane and Dawson JJ in *Lim* do not become inapplicable, therefore, when the alien cannot be deported immediately. The detention of the alien remains a law with respect to the s 51(xix) power.

44 Nor does the continued detention of a person who cannot be deported immediately infringe Ch III of the Constitution. Chapter III is always infringed where the detention of a person other than by a curial order – whatever the purpose of the detention – is authorised by a law of the Commonwealth *and* imposes punishment. However, a law authorising detention will not be characterised as imposing punishment if its object is purely protective. *Ex hypothesi*, a law whose object is purely protective will not have a punitive purpose. That does not mean, however, that a law authorising detention in the absence of a curial order, but whose object is purely protective, cannot infringe Ch III of the Constitution. Even a law whose object is purely protective will infringe Ch III if it prevents the Ch III courts from determining some matter that is a condition precedent to authorising detention.

45 A law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or

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24 (1992) 176 CLR 1 at 64.

25 (2001) 207 CLR 391 at 424.

26 (1992) 176 CLR 1 at 65-66.

the Australian community, the detention is non-punitive. The Parliament of the Commonwealth is entitled, in accordance with the power conferred by s 51(xix) and without infringing Ch III of the Constitution, to take such steps as are likely to ensure that unlawful non-citizens do not enter Australia or become part of the Australian community and that they are available for deportation when that becomes practicable. As Latham CJ pointed out in *O'Keefe v Calwell*[27]:

> "Deportation is not necessarily punishment for an offence. The Government of a country may prevent aliens entering, or may deport aliens ... Exclusion in such a case is not a punishment for any offence. Neither is deportation ... The deportation of an unwanted immigrant (who could have been excluded altogether without any infringement of right) is an act of the same character: it is a *measure of protection of the community* from undesired infiltration and *is not punishment for any offence*." (emphasis added)

46 It is open to the Parliament, therefore, to enact legislation that requires unlawful non-citizens to be detained so as to ensure that they do not enter Australia or the Australian community and can be deported when, and if, it is practicable to do so. To hold that Parliament cannot do so would mean that any person who unlawfully entered Australia and could not be deported to another country could thwart the operation of the *Migration Act*. It would mean that such persons, by their illegal and unwanted entry, could become *de facto* Australian citizens unless the Parliament made it a criminal offence with a mandatory sentence for a person to be in Australia as a prohibited immigrant. However, passing such a law is not the only way that the Parliament can achieve the object of keeping unlawful non-citizens from entering the Australian community. If Parliament were forced to achieve its object of preventing entry by enacting such laws, form would triumph over substance. The unlawful non-citizen would still be detained in custody. The only difference between detention under such a law and the present legislation would be that the detention would be the result of a judicial order upon a finding that the person was a prohibited immigrant. In substance, the position under that hypothesis would be no different in terms of liberty from what it is under ss 189, 196 and 198. Under the hypothesis, the only issue for the court would be whether the person was a prohibited immigrant. Under the present legislation, the issue for the courts is whether the person is an unlawful non-citizen. A finding of being a prohibited immigrant or an unlawful non-citizen produces the same result – detention. The only difference is that in one case the detention flows by the court applying the legislation and making an order and in the other it flows from the direct operation of the Act.

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27 (1949) 77 CLR 261 at 278.

47 I cannot accept that the words "[t]he judicial power of the Commonwealth shall be vested in ... the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction" in s 71 of the Constitution prohibit the Parliament from legislating to require that unlawful non-citizens be detained until they can be deported. By implication, s 71, when read with ss 1 and 61 of the Constitution, prohibits the Parliament of the Commonwealth from exercising the judicial power of the Commonwealth. But to enact legislation that requires the detention of a person who unlawfully enters Australia until he or she is deported from Australia is not an exercise by the Parliament of the judicial power of the Commonwealth. It is no more an exercise of judicial power than is a law requiring enemy prisoners-of-war to be detained in custody until they are deported from Australia[28].

48 Nothing in ss 189, 196 or 198 purports to prevent courts, exercising federal jurisdiction, from examining any condition precedent to the detention of unlawful non-citizens. Nor is it possible to hold that detention of unlawful non-citizens – even where their deportation is not achievable – cannot be reasonably regarded as effectuating the purpose of preventing them from entering Australia or entering or remaining in the Australian community. Indeed, detention is the surest way of achieving that object. If the Parliament of the Commonwealth enacts laws that direct the executive government to detain unlawful non-citizens in circumstances that prevent them from having contact with members of or removing them from the Australian community, nothing in the Constitution – including Ch III – prevents the Parliament doing so. For such laws, the Parliament and those who introduce them must answer to the electors, to the international bodies who supervise human rights treaties to which Australia is a party and to history. Whatever criticism some – maybe a great many – Australians make of such laws, their constitutionality is not open to doubt.

49 Nothing in the reasoning or the decision in *Lim* assists Mr Al-Kateb. In their joint judgment, Brennan, Deane and Dawson JJ said that laws detaining unlawful non-citizens pending deportation "will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered"[29]. Their Honours went on to say that, "if the detention which [the impugned laws] require and authorize is not so limited ... they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates"[30]. In *Lim*, I said that, if "a law

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28 See later in these reasons at [55]-[61].

29 (1992) 176 CLR 1 at 33.

30 (1992) 176 CLR 1 at 33.

authorizing the detention of an alien went beyond what was reasonably necessary to effect the deportation of that person, the law might be invalid because it infringed the provisions of Ch III"[31]. Neither of these passages was directed to a case like the present where the detention prevents the unlawful non-citizen from entering the Australian community although deportation is not feasible in the reasonably foreseeable future. Neither passage was directed to a case where indefinite detention is necessary to prevent a person from entering Australia or the Australian community.

50 Nor does the *Communist Party Case*[32], to which Kirby J refers, assist Mr Al-Kateb. In that case, this Court held that the law in question was not supported by s 51(xxxix) ("the incidental power") in conjunction with s 61 ("the executive power") of the Constitution or s 51(vi) ("the defence power") of the Constitution. The *Communist Party Case* had nothing to do with aliens, and no Justice found that the law infringed Ch III of the Constitution. Latham CJ, who dissented and upheld the validity of the law, expressly held that it did not contravene Ch III of the Constitution[33].

51 Nor does it assist Mr Al-Kateb's case to assert that this Court "should be no less defensive of personal liberty in Australia than the courts of the United States[34], the United Kingdom[35] and the Privy Council for Hong Kong[36] have been, all of which have withheld from the Executive a power of unlimited detention"[37]. None of those cases was concerned with the question whether, by enacting laws similar to ss 189, 196 and 198, the legislature was exercising "the judicial power of the Commonwealth" or for that matter "judicial power".

52 *Zadvydas v Davis*[38], to which Kirby J refers, was not concerned with the exercise of judicial power. In *Zadvydas*, the Supreme Court of the United States

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31 (1992) 176 CLR 1 at 65.

32 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

33 (1951) 83 CLR 1 at 170-173.

34 *Zadvydas v Davis* 533 US 678 (2001).

35 *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704; [1984] 1 All ER 983.

36 *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

37 Reasons of Kirby J at [149].

38 533 US 678 (2001).

held that, as a matter of construction, the statute in question did not provide for the indefinite detention of an alien who had entered the country unlawfully. The Supreme Court said that a law "permitting indefinite detention of an alien would raise a serious constitutional problem"[39]. That was because under the United States Constitution, "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"[40]. Consequently, in accordance with United States doctrine, the Court had to "ascertain whether a construction of the statute is fairly possible by which the question [of constitutionality] may be avoided"[41]. The Court found that the statute in question could be fairly construed as not requiring indefinite detention of an alien. Although *Zadvydas* was not concerned with judicial power, it is significant that the Court said: "we assume that [the proceedings to deport] are nonpunitive in purpose and effect"[42].

53 *R v Governor of Durham Prison; Ex parte Hardial Singh*[43], to which Kirby J refers, was also concerned with an issue of statutory construction, and not the exercise of judicial power. Woolf J held in that case that the power of detention given by a paragraph in a schedule to the relevant Act was limited to such period of time as was reasonably necessary to carry out the process of deportation. His Lordship also held that the Secretary of State should not exercise the power of detention unless the person involved could be deported within a reasonable time.

54 *Tan Te Lam v Superintendent of Tai A Chau Detention Centre*[44], to which Kirby J refers, also concerned a question of statutory construction. The Privy Council held that, where a statute had given the executive government power to detain persons pending their removal from the country, it was implied, *unless the statute provided otherwise*, that the power could only be exercised during such period as was reasonably necessary to effect removal. If removal was not possible within a reasonable time, further detention was not authorised. The case was not concerned with a constitutional issue or whether legislation authorising the executive government to detain an alien involved the exercise of judicial power.

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39 533 US 678 at 690 (2001).

40 533 US 678 at 693 (2001).

41 533 US 678 at 689 (2001).

42 533 US 678 at 690 (2001).

43 [1984] 1 WLR 704; [1984] 1 All ER 983.

44 [1997] AC 97.

55 It is not true, as Kirby J asserts, that "indefinite detention at the will of the Executive, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements"[45]. During the First and Second World Wars, the National Security Regulations authorised the detention of persons who, in the opinion of the executive government, were disloyal or a threat to the security of the country. Many persons born in Germany were detained under these Regulations in both wars, while many persons born in Italy were detained under the relevant regulation during the Second World War. However, detention was not confined to those born in the countries with which Australia was at war. As the detention of members of the Australia First Movement demonstrates, foreign birth was not a necessary condition of detention. P R Stephensen, one of the leaders of that Movement, was detained for almost three and a half years[46].

56 During the First World War, reg 55(1) of the War Precautions Regulations 1915 (Cth) provided that where the Minister for Defence

> "has reason to believe that any naturalized person is disaffected or disloyal, he may, by warrant under his hand, order him to be detained in military custody in such place as he thinks fit during the continuance of the present state of war".

57 The validity of that regulation was upheld by this Court in *Lloyd v Wallach*[47]. The Court unanimously held that the regulation was validly made under the *War Precautions Act* 1914 (Cth) which was enacted under the defence power. No member of the Court suggested that the regulation infringed Ch III of the Constitution.

58 During the Second World War, reg 26 of the National Security (General) Regulations 1939 (Cth) provided:

> "The Minister may if satisfied with respect to any particular person that with a view to prevent that person acting in any manner prejudicial to the public safety or the defence of the Commonwealth it is necessary to do so make an order ... directing that he be detained in such place and under such conditions as the Minister from time to time determines ..."

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45 Reasons of Kirby J at [146].

46 Crockett, *Evatt: A Life*, (1993) at 121-125.

47 (1915) 20 CLR 299.

59 This Court unanimously upheld the validity of the regulation in *Ex parte Walsh*[48]. Starke J said that the application for *habeas corpus* was "hopeless"[49]. In *Little v The Commonwealth*[50], Dixon J held that an order of the Minister under this regulation was not examinable upon any ground other than bad faith.

60 During the greater part of the period when reg 26 was in force, the relevant Minister was Dr H V Evatt, who had been a Justice of this Court and was later to become President of the United Nations General Assembly. According to a speech he gave in Parliament on 19 July 1944, 6174 persons were detained under this regulation at the time when he became the Minister and 1180 persons were still detained under the regulation in July 1944[51]. He does not appear to have thought that, in making orders under reg 26, he was acting in breach of Ch III of the Constitution.

61 Nor am I aware of anybody else suggesting that detention under these Regulations infringed Ch III of the Constitution. The purpose of the detention was not punitive but protective. I see no reason to think that this Court would strike down similar regulations if Australia was again at war in circumstances similar to those of 1914-1918 and 1939-1945.

62 Finally, contrary to the view of Kirby J, courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw some light on the meaning of a constitutional provision. Interpretation of the term "aliens" by reference to the *jus soli* or *jus sanguinis* is an example. But rules of international law that have come into existence since 1900 are in a different category.

63 The claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of this Court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical. In *Polites v The Commonwealth*, the Court accepted that, so far as the language of a statute permits, it should be interpreted and applied in conformity with the established rules of international law[52]. That is a rule of construction of long standing. The rationale for the rule is that the legislature is taken not to

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48 [1942] ALR 359.

49 [1942] ALR 359 at 360.

50 (1947) 75 CLR 94.

51 Crockett, *Evatt: A Life*, (1993) at 126.

52 (1945) 70 CLR 60 at 68-69, 77, 80-81.

have intended to legislate in violation of the rules of international law *existing* when the legislation was enacted[53]. Accordingly, the law is construed as containing an implication to that effect. But, as *Polites* decided, the implication must give way where the words of the statute are inconsistent with the implication. No doubt the rule of construction had some validity when the rules of international law were few and well-known. Under modern conditions, however, this rule of construction is based on a fiction. Gone are the days when the rules of international law were to be found in the writings of a few well-known jurists.

64 Under Art 38 of the Statute of the International Court of Justice[54], international law includes: (1) international conventions establishing rules recognised by contesting states, (2) international custom, as evidence of a general practice accepted as law and (3) the general principles of law recognised by civilised nations. International custom may be based on

> "diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions ... executive decisions and practices, orders to naval forces etc, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly."[55]

65 Given the widespread nature of the sources of international law under modern conditions, it is impossible to believe that, when the Parliament now legislates, it has in mind or is even aware of all the rules of international law. Legislators intend their enactments to be given effect according to their natural and ordinary meaning. Most of them would be surprised to find that an enactment had a meaning inconsistent with the meaning they thought it had because of a rule of international law which they did not know and could not find without the assistance of a lawyer specialising in international law or, in the case of a treaty, by reference to the proceedings of the Joint Standing Committee on Treaties. In *Minister for Immigration and Ethnic Affairs v Teoh*, counsel for the Minister told this Court that Australia was "a party to *about* 900 treaties"[56].

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53 *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 at 771; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

54 Statute of the International Court of Justice, done at San Francisco, 26 June 1945.

55 Brownlie, *Principles of Public International Law*, 6th ed (2003) at 6.

56 (1995) 183 CLR 273 at 316 (emphasis added).

When one adds to the rules contained in those treaties, the general principles of law recognised by civilised nations and the rules derived from international custom, it becomes obvious that the rationale for the rule that a statute contains an implication that it should be construed to conform with international law bears no relationship to the reality of the modern legislative process. Be that as it may, the rule of construction recognised in *Polites* was reaffirmed by this Court in *Teoh*[57] and by Gummow and Hayne JJ in *Kartinyeri v The Commonwealth*[58]. It is too well established to be repealed now by judicial decision.

66 However, this Court has never accepted that the Constitution contains an implication to the effect that it should be construed to conform with the rules of international law. The rationale for the rule and its operation is inapplicable to a Constitution – which is a source of, not an exercise of, legislative power. The rule, where applicable, operates as a statutory implication. But the legislature is not bound by the implication. It may legislate in disregard of it. If the rule *were* applicable to a Constitution, it would operate as a restraint on the grants of power conferred. The Parliament would not be able to legislate in disregard of the implication. In *Polites*, Dixon J, after accepting that the implication applied in relation to statutes, said[59]:

> "The contention that s 51(vi) of the Constitution should be read as subject to the same implication, in my opinion, ought not to be countenanced. The purpose of Pt V of Ch I of the Constitution is to confer upon an autonomous government plenary legislative power over the assigned subjects. Within the matters placed under its authority, the power of the Parliament was intended to be supreme and to construe it down by reference to the presumption is to apply to the establishment of legislative power a rule for the construction of legislation passed in its exercise. It is nothing to the point that the Constitution derives its force from an Imperial enactment. It is none the less a constitution."

67 In *Kartinyeri*, Gummow and Hayne JJ cited that passage with approval[60]. Their Honours went on to point out that in *Horta v The Commonwealth*[61] the "judgment of the whole Court affirmed that no provision of the Constitution

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57 (1995) 183 CLR 273 at 287.

58 (1998) 195 CLR 337 at 384 [97].

59 (1945) 70 CLR 60 at 78. See also at 69 per Latham CJ, 74 per Rich J, 75 per Starke J, 79 per McTiernan J, 82-83 per Williams J.

60 (1998) 195 CLR 337 at 385 [98].

61 (1994) 181 CLR 183 at 195.

confines the legislative power with respect to 'External affairs' to the enactment of laws which are consistent with, or which relate to treaties or matters which are consistent with, the requirements of international law"[62]. In *Kartinyeri*, Gummow and Hayne JJ rejected a submission that in essence "sought to apply a rule for the construction of legislation passed in the exercise of the legislative power to limit the content of the legislative power itself"[63].

68 Most of the rules[64] now recognised as rules of international law are of recent origin. If Australian courts interpreted the Constitution by reference to the rules of international law now in force, they would be *amending* the Constitution in disregard of the direction in s 128 of the Constitution. Section 128 declares that the Constitution is to be amended only by legislation that is approved by a majority of the States and "a majority of all the electors voting". Attempts to suggest that a rule of international law is merely a factor that can be taken into account in interpreting the Constitution cannot hide the fact that, if that is done, the meaning of the Constitution is changed whenever that rule changes what would otherwise be the result of the case. The point is so obvious that it hardly needs demonstration. But a simple example will suffice to show the true character of what is done if courts take a post-1900 rule of international law into account. Immediately before the rule was recognised, our Constitution had meanings that did not depend on that rule. Either the rule of international law has effect on one or more of those meanings or it has no effect. If it has an effect, its invocation has altered the meaning of the Constitution overnight. As a result, a court that took the rule into account has amended the Constitution without the authority of the people acting under s 128 of the Constitution. It has inserted a new rule into the Constitution. Take this case. The issues are whether ss 189, 196 and 198 are laws with respect to aliens or are exercises by the Parliament and not the federal courts of the judicial power of the

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62 (1998) 195 CLR 337 at 385 [99].

63 (1998) 195 CLR 337 at 386 [101].

64 The main – perhaps the only – difference between rules and principles is that principles are expressed at a higher level of generality than rules. In the present context, the difference between rules and principles seems a distinction without a difference. The international law provisions most frequently invoked to interpret statutes and Constitutions are Articles in international Conventions, which are more like rules than principles. Does "rule" or "principle" most accurately describe a provision such as Art 26 of the International Covenant on Civil and Political Rights ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law ...")? Whether described as a rule – which I prefer – or a principle, the effect of such provisions on statutory or constitutional interpretation is the same.

Commonwealth. If this Court had to take a rule of international law into account in interpreting those powers, the rule would either confirm what was already inherent in the powers or add to or reduce them. If the international rule is already inherent in the power it is *irrelevant*. If it is not, its invocation alters the constitutional meaning of "aliens" or "judicial power of the Commonwealth" or both.

69 Many constitutional lawyers – probably the great majority of them – now accept that developments inside and outside Australia since 1900 may result in insights concerning the meaning of the Constitution that were not present to earlier generations. Because of those insights, the Constitution may have different meanings from those perceived in earlier times. As Professor Ronald Dworkin has often pointed out, the words of a Constitution consist of more than letters and spaces. They contain propositions. And, because of political, social or economic developments inside and outside Australia, later generations may deduce propositions from the words of the Constitution that earlier generations did not perceive. Windeyer J made that point persuasively in *Victoria v The Commonwealth*[65]. But that is a very different process from asserting that the Constitution must be read to conform to or so far as possible with the *rules* of international law. As I earlier pointed out, reading the Constitution up or down to conform to the *rules* of international law is to make those rules part of the Constitution, contrary to the direction in s 128 that the Constitution is to be amended only in accordance with the referendum process.

70 The issue in *Polites*[66] shows what would be the effect of reading the Constitution to conform with the *rules* of international law. It was arguably a rule of international law in 1945 that aliens could not be compelled to serve in the military forces of a foreign state in which they happened to be. Whether or not such a rule existed[67], this Court refused to read the constitutional powers with

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65 (1971) 122 CLR 353 at 395-397.

66 (1945) 70 CLR 60.

67 See *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 (n 199) per Gummow and Hayne JJ:

> "The accuracy, at the time, of that perception of customary international law has been disputed, at least as regards aliens who were permanent residents of the conscripting state: Shearer, 'The Relationship Between International Law and Domestic Law' in Opeskin and Rothwell (eds), *International Law and Australian Federalism* (1997) at 48-49, n 60; O'Connell, *International Law*, 2nd ed (1970), vol 2 at 703-705."

respect to "defence"[68] and "aliens"[69] as subject to such a rule. If the Court had accepted the argument of the plaintiff in *Polites*, the international law rule would have become a constitutional rule contrary to s 128 of the Constitution.

71 Failure to see the difference between taking into account political, social and economic developments since 1900 and taking into account the *rules* of international law is the error in the approach of those who assert that the Constitution must be read in conformity with or in so far as it can be read conformably with the rules of international law. Rules are specific. If they are taken into account as *rules*, they amend the Constitution. That conclusion cannot be avoided by asserting that they are simply "context" or elucidating factors. Rules are too specific to do no more than provide insights into the meanings of the constitutional provisions. Either the rule is already inherent in the meaning of the provision or taking it into account alters the meaning of the provision. No doubt from time to time the making or existence of (say) a Convention or its consequences may constitute a general political, social or economic development that helps to elucidate the meaning of a constitutional head of power. But that is different from using the *rules* in that Convention to control the meaning of a constitutional head of power. Suppose the imposition of tariffs is banned under a World Trade Agreement. If that ban were taken into account – whether as context or otherwise – in interpreting the trade and commerce power[70], it would add a new rule to the Constitution. It would require reading the power to make laws with respect to trade and commerce as subject to the rule that it did not extend to laws that imposed tariffs. Such an approach, in the words of Dixon J, cannot be "countenanced"[71].

72 It is also erroneous to think that, in *Lawrence v Texas*[72], the United States Supreme Court adopted the position that Kirby J advocates. All that Kennedy J (delivering the majority decision) did in *Lawrence* was to rely on a decision of the European Court of Human Rights to rebut the claim made in the earlier United States case of *Bowers v Hardwick* that private homosexual acts had "been subject to state intervention throughout the history of Western civilization"[73]. Kennedy J said that "the decision is at odds with the premise in *Bowers* that the

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68 The Constitution, s 51(vi).

69 The Constitution, s 51(xix).

70 The Constitution, s 51(i).

71 *Polites v The Commonwealth* (1945) 70 CLR 60 at 78.

72 539 US 558 (2003).

73 478 US 186 at 196 (1986).

claim put forward was insubstantial in our Western civilization"[74]. The Supreme Court did not apply any *rule* of international law. It used European case law to reject the major premise of *Bowers* that the Due Process Clause of the US Constitution did not protect private homosexual conduct because such conduct had been condemned "throughout the history of Western civilization". Moreover, reliance on the European decision played only a minor part in the Court's decision.

73 Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments[75]. It is an enduring – and many would say a just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights. But, desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country. It would be absurd to suggest that the meaning of a grant of power in s 51 of the Constitution can be elucidated by the enactments of the Parliament. Yet those who propose that the Constitution should be read so as to conform with the rules of international law are forced to argue that rules contained in treaties made by the executive government are relevant in interpreting the Constitution. It is hard to accept, for example, that the meaning of the trade and commerce power can be affected by the Australian government entering into multilateral trade agreements. It is even more difficult to accept that the Constitution's meaning is affected by rules created by the agreements and practices of other countries. If that were the case, judges would have to have a "loose-leaf" copy of the Constitution. If Australia is to have a Bill of Rights, it must be done in the constitutional way – hard though its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill.

Conclusion

74 Under the aliens power, the Parliament is entitled to protect the nation against unwanted entrants by detaining them in custody. As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within

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74 539 US 558 at 573 (2003).

75 See, eg, Williams, *The Case for an Australian Bill of Rights*, (2004).

the powers conferred on it by the Constitution. The doctrine of separation of powers does more than prohibit the Parliament and the Executive from exercising the judicial power of the Commonwealth. It prohibits the Ch III courts from amending the Constitution under the guise of interpretation.

Order

75 The appeal should be dismissed. I agree with the orders proposed by Hayne J.

76 GUMMOW J. The first and second respondents are officers of the Department administered by the third respondent, the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister"). On the application of the Attorney-General of the Commonwealth under s 40 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), this Court ordered the removal of the whole of the cause constituted by the appeal by Mr Al-Kateb then pending in the Federal Court of Australia.

77 It is that appeal pending in the Federal Court which has been heard in this Court and is the subject of these reasons. This Court is not exercising the appellate jurisdiction conferred by s 73 of the Constitution. The jurisdiction is that of the Federal Court conferred by Pt III Div 2 (ss 24-30) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"); Div 2 is headed "Appellate and related Jurisdiction".

78 The appeal is brought against a decision of the Federal Court (von Doussa J) delivered on 3 April 2003 and dismissing an application by Mr Al-Kateb brought under s 39B of the Judiciary Act. The principal relief sought on the appeal is a declaration that the appellant is "unlawfully detained" and an order in the nature of habeas corpus directing the Minister to cause the appellant forthwith to be released from immigration detention.

The facts

79 There is no dispute between the appellant on one side and the Minister and the Attorney-General on the other respecting the relevant facts. The facts may be stated as follows. The appellant arrived in Australia in mid-December 2000, by vessel, without a passport or Australian visa. He was born in Kuwait on 29 July 1976 and is a Palestinian. He has lived for most of his life in Kuwait, save for a brief period when he resided in Jordan, it would seem illegally. The appellant submitted, and it was not contested, that he is a "stateless person". That term is defined in Art 1 of the Convention relating to the Status of Stateless Persons ("the Stateless Persons Convention")[76] as meaning one "who is not considered as a national by any State under the operation of its law"[77]. Long term residency in Kuwait or birth there did not guarantee to Palestinians citizenship or the right to permanent residence[78].

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76 Done at New York on 28 September 1954, which entered into force for Australia on 13 March 1974: [1974] *Australian Treaty Series* No 20.

77 cf *Australian Citizenship Act* 1948 (Cth), s 23D.

78 Takkenberg, *The Status of Palestinian Refugees in International Law*, (1998) at 158-162.

Statelessness

80 At the time of the adoption of the Constitution, the phenomenon of "double nationality" was well understood[79], but that of the "stateless person" achieved significance only in the course of the twentieth century[80]. As late as 1916, the House of Lords reserved the question whether "this country will recognize a man as having no nationality" so as to guard "against appearing to assent to such a proposition"[81]. Later developments respecting statelessness are significant for the interpretation of the constitutional term "alien".

81 Part 2 of the *Migration Act* 1958 (Cth) ("the Act") (ss 13-274) is headed "Control of arrival and presence of non-citizens". This appeal is concerned principally with provisions in Div 7 (ss 188-197) headed "Detention of unlawful non-citizens", and Div 8 (ss 198-199) headed "Removal of unlawful non-citizens".

82 The appellant answers the statutory description in s 14 of "unlawful non-citizen"; he is in the migration zone, is not an Australian citizen, and does not hold a visa.

83 Of s 51(xix), Quick and Garran wrote[82]:

> "In English law an alien may be variously defined as a person who owes allegiance to a foreign State, who is born out of the jurisdiction of the Queen, or who is not a British subject."

Later experience, and the appearance of the class of stateless persons, has shown that these various definitions are not interchangeable. The appellant's status as a stateless person takes him outside the meaning given to the term "alien" in the joint judgment of six members of the Court in *Nolan v Minister for Immigration and Ethnic Affairs*[83]. Their Honours said[84]:

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79 Cockburn, *Nationality or the Law Relating to Subjects and Aliens*, (1869) at 183-187.

80 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 278-279.

81 *Ex parte Weber* [1916] 1 AC 421 at 424 per Lord Buckmaster LC.

82 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 599.

83 (1988) 165 CLR 178.

84 (1988) 165 CLR 178 at 183.

> "As a matter of etymology, 'alien', from the Latin alienus through old French, means belonging to another person or place. Used as a descriptive word to describe a person's lack of relationship with a country, the word means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state'[85]."

84 On the other hand, in her dissenting judgment in *Nolan*[86], Gaudron J said that "[f]or most purposes" an alien is to be identified by reference to the absence of that criterion, such as citizenship, which determines membership of the community constituting the body politic of the nation state "from whose perspective the question of alien status is to be determined". That appears to assume a relevant logical universe comprising citizens and aliens, and no others, so that all non-Australian citizens are aliens in the constitutional sense of the term.

85 In many cases, the distinctions, express or implicit, in previous authorities will be immaterial to the result reached. For example, the applicants in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[87] and the applicant in *Shaw v Minister for Immigration and Multicultural Affairs*[88] were born outside Australia, with Cambodian or Vietnamese, and British nationality respectively, and to parents who were not Australian citizens. But the appellant here is destitute of any nationality. Does that condition deny him the character of a constitutional "alien"? It is unnecessary to decide that question now, particularly in the absence of full argument. That is because, at all events, and as the respondents submitted, the appellant is within the reach of the immigration power in s 51(xxvii) and laws supported by that power[89].

The history of the legislation

86 From 1901 to 1994, federal law contained offence provisions respecting unlawful entry and presence in Australia, which was punishable by imprisonment as well as by liability to deportation. The legislation gave rise to various

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85 *Milne v Huber* 17 Fed Cas 403 at 406 (1843) (US).

86 (1988) 165 CLR 178 at 189.

87 (2002) 212 CLR 162.

88 (2003) 78 ALJR 203; 203 ALR 143.

89 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 44-45.

questions of construction which reached this Court[90]. The first of these provisions was made by the *Immigration Restriction Act* 1901 (Cth) ("the 1901 Act")[91]. Section 7 thereof stated:

> "Every prohibited immigrant entering or found within the Commonwealth in contravention or evasion of this Act shall be guilty of an offence against this Act, and shall be liable upon summary conviction to imprisonment for not more than six months, and in addition to or substitution for such imprisonment shall be liable pursuant to any order of the Minister to be deported from the Commonwealth.
>
> Provided that the imprisonment shall cease for the purpose of deportation, or if the offender finds two approved sureties each in the sum of Fifty pounds for his leaving the Commonwealth within one month."

As enacted in 1958, s 27 of the Act continued this pattern. That provision eventually became s 77 of the Act, but this was repealed by s 17 of the *Migration Reform Act* 1992 (Cth) ("the 1992 Act"). It has not been replaced[92].

87 The legislation has also provided for detention by the executive branch of government and without adjudication of criminal guilt pending deportation and pending determination of status. For example, s 8C of the 1901 Act[93] authorised the keeping in custody, "pending deportation and until he is placed on board a vessel for deportation from Australia", of any person ordered by the Minister to be deported. Similar provisions were construed by this Court in *Koon Wing Lau v Calwell*[94]. The Court rejected the submission recorded by Latham CJ that they were invalid for permitting "unlimited imprisonment"[95]. The legislation escaped invalidity because it "[did] not create or purport to create a power to keep a deportee in custody for an unlimited period"[96] and, rather, implied a purpose such

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90 See *Griffin v Wilson* (1935) 52 CLR 260; *Chu Shao Hung v The Queen* (1953) 87 CLR 575.

91 The title of the 1901 Act was changed by s 1 of the *Immigration Act* 1912 (Cth) to the *Immigration Act* 1901 (Cth). It continued to have that title until its repeal by s 4 of the *Migration Act* 1958 (Cth).

92 Section 17 commenced on 1 September 1994.

93 Inserted by s 8 of the *Immigration Act* 1925 (Cth).

94 (1949) 80 CLR 533.

95 (1949) 80 CLR 533 at 555.

96 (1949) 80 CLR 533 at 556 per Latham CJ.

that "unless within a reasonable time [the deportee] is placed on board a vessel he would be entitled to his discharge on habeas"[97]. These statements are important for the construction of the provisions of the Act relied on to continue the detention of the appellant.

88 In saying in *Calwell* that in the statute "the words 'pending deportation' imply purpose"[98], Dixon J was not reading the statute as imposing legal consequences purely on a legislative or executive opinion as to the attainability of that purpose. Such a construction would have invited an attack on validity of a similar nature to that which shortly after *Calwell* was to succeed in *Australian Communist Party v The Commonwealth*[99]. (That case is authority for the basic proposition that the validity of a law or of an act of the executive branch done under a law cannot depend upon the view of the legislature or executive officer that the conditions requisite for validity have been satisfied.) Rather, Dixon J went on in *Calwell* to describe the purpose as one to be attained within "a reasonable time", to be assessed, if need be, by a court on an application for habeas corpus[100]. Consistently with that reasoning, the Court in the present case should be slow to construe the Act as if all that were requisite is an executive opinion as to the continued viability of a purpose of deportation.

89 Since 1994, the present system found in Divs 7 and 8 of Pt 2 of the Act has provided for mandatory detention by the Executive of unlawful non-citizens in the manner with which this appeal is concerned and for the discretionary detention by the Executive of persons the subject of deportation orders. The present system contains no offence provision such as found before 1994 and the appellant, as a result, was not liable to punishment by the exercise by a court of the judicial power of the Commonwealth.

90 The appellant's status under the Act was and remains that of an "unlawful non-citizen". Section 189 of the Act requires the detention of unlawful non-citizens and, after the appellant's arrival in Australia, he was placed in "immigration detention" within the meaning of that term in s 5(1) of the Act. The Act also contains in Div 10 of Pt 2 (ss 207-224) a system imposing liability on detainees, their spouses and, in some cases, their carriers for the costs of their detention and removal. It is an offence to escape from immigration detention (s 197A), but, as explained above, it was not the adjudication of guilt of any

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97 (1949) 80 CLR 533 at 581 per Dixon J. See also at 586-587 per Williams J.

98 (1949) 80 CLR 533 at 581.

99 (1951) 83 CLR 1. See also *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [102].

100 (1949) 80 CLR 533 at 581.

offence which led to the imposition by the Act upon the appellant of a requirement to suffer that detention.

The Australian community

91 In *R v Forbes; Ex parte Kwok Kwan Lee*, Barwick CJ said[101]:

> "It scarce needs saying that a prohibited immigrant may not by any means become a member of the Australian community whilst he is a prohibited immigrant. By the very description he is not a person having any title to remain in the country."

92 It is hardly to be supposed that, in speaking of the denial to prohibited immigrants of acquisition of "membership" of "the Australian community", Barwick CJ was giving support to the notion that the legislative powers with respect to such persons would support a system of segregation by incarceration without trial for any offence and with no limit of time or a limit fixed only by an executive opinion as to the ultimate possibility of their removal from Australia.

93 Rather, the use of the term "Australian community" in such statements reflects the rejection in vigorous terms in *Robtelmes v Brenan*[102] of the submission that the legislative power with respect to aliens was one of exclusion from entry only and did not extend to expulsion after entry[103]. At issue in *Robtelmes* was the validity of the *Pacific Island Labourers Act* 1901 (Cth) and of orders for deportation made by magistrates exercising federal jurisdiction.

94 Nevertheless, it does not gainsay the power of expulsion that the appellant is within the Queen's peace as that notion applies in Australia. Australian domestic law is consistent with the requirement in Art 16.1 of the Stateless Persons Convention that such persons have "free access to the Courts of Law on the territory of all Contracting States". *Chu Kheng Lim v Minister for Immigration*[104] indicates that the appellant has the standing or capacity, among other things, to invoke the intervention of a domestic court of competent jurisdiction to determine whether he is unlawfully detained by the

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101 (1971) 124 CLR 168 at 173. See also the remarks of Latham CJ in *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 561 and of Mason J in *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461 at 478.

102 (1906) 4 CLR (Pt 1) 395 at 404, 415, 419.

103 See (1906) 4 CLR (Pt 1) 395 at 396-398.

104 (1992) 176 CLR 1 at 19-20. See also *Abebe v The Commonwealth* (1999) 197 CLR 510 at 560 [137].

Commonwealth and that valid statutory provision is required to authorise or enforce his detention in custody.

95 The issue here is not the amenability of the appellant to removal; indeed, he has sought, unsuccessfully, his removal by the Minister. It is the construction of the laws under which his detention may continue.

96 Reference was made by the respondents to the decision, by majority, of the Supreme Court of the United States in *Shaughnessy v Mezei*[105]. An appreciation of the issue in *Robtelmes* assists an understanding of the point on which the United States case turned. The statute applied in *Shaughnessy* had permitted the removal of the alien Mr Mezei from the *Île de France* on its arrival in New York and his detention on Ellis Island, but specified that his presence there "shall not be considered a landing", so that he was to be treated "as if stopped at the border"[106]. This deemed state of affairs was critical, for the majority distinguished between the denial of entry and the expulsion of aliens "who have once passed through our gates, even illegally"; to the latter class of case there applied "traditional standards of fairness encompassed in due process of law"[107]. Later, in *Zadvydas v Davis*[108], the majority of the Supreme Court, with reference to *Shaughnessy*, said that there runs throughout immigration law "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered".

97 The Australian legislation in force at the time of *Shaughnessy*[109] also deemed certain prohibited immigrants not to have entered Australia. But the distinction upon which *Shaughnessy* depended does not apply in the legislation which governs the present case.

The appellant's case

98 Undoubtedly, the continuing absence for persons in the position of the appellant of any right or title to remain in Australia complements and gives further effect to the well-established constitutional power to legislate for

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105 345 US 206 (1953).

106 345 US 206 at 215 (1953).

107 345 US 206 at 212 (1953).

108 533 US 678 at 693 (2001).

109 The 1901 Act, s 13C(3); see also s 36A of the Act considered in *Heshmati v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 123 at 126-127.

exclusion or denial of entry[110]. But these considerations are not determinative of the issues in this case. In or out of detention the appellant lacks any right or title to remain in Australia. However, the point on which the appellant's case turns is his susceptibility under federal law to continued detention, outside any operation of the criminal law requiring that detention, and where the prospects of removal to another country are so remote that continued detention cannot be for the purpose of removal. The appellant submits that his situation answers that case. He contends that, on the proper construction of the Act indicated by authorities such as *Calwell* and consistently with the Constitution, his further detention was not authorised by the time of the proceeding before von Doussa J. Those submissions should be accepted.

The litigation

99 On 6 January 2001, the appellant lodged an application for a protection visa within the meaning of s 36 of the Act. At the relevant time, a criterion for such a visa was that the applicant for the visa was a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention[111]. It should be noted that the definition of the term "refugee" in Art 1 of the Refugees Convention includes one "who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it". The reference by the phrase "such fear" is to the "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". Indeed, one of the objectives of the Refugees Convention was to deal with the particular difficulties encountered by the stateless refugee[112]. However, the Preamble to the Stateless Persons Convention makes the point that there are many stateless persons who are not covered by the Refugees Convention. The appellant has been shown to be one of those persons.

100 A delegate of the Minister refused the application for a protection visa and that refusal was upheld by the Refugee Review Tribunal. Proceedings in the Federal Court for administrative review were unsuccessful, culminating in the dismissal of an appeal on 21 May 2002. In those circumstances, s 198(6) of the Act operated to require "[a]n officer [to] remove as soon as reasonably

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110 *Robtelmes v Brenan* (1906) 4 CLR (Pt 1) 395 at 400, 415, 418-419.

111 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

112 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 278-279.

practicable an unlawful non-citizen". The term "officer" is widely defined in s 5(1) so as to include not only officers of the Department and Customs officers, but members of the federal, State and Territory police forces.

101 It should be noted that s 198 first appeared as s 54ZF and was introduced by s 13 of the 1992 Act. The analogous provision considered in *Lim* (but the validity of which was unchallenged) was s 54P(1). This did not use the word "reasonably" which now appears in s 198(6) and other sub-sections of s 198. Rather, the obligation placed by the previous section upon an officer to remove from Australia was to do so "as soon as practicable".

102 On 19 June 2002, the appellant himself indicated to the Department that he wished to leave Australia and to return to "Kuwait, and if you cannot please send me to Gaza". He later, on 30 August 2002, signed a form addressed to the Minister stating "I wish voluntarily to depart Australia, and ask the Minister to remove me from Australia as soon as reasonably practicable". Section 198(1) of the Act requires removal of such unlawful non-citizens "as soon as reasonably practicable".

103 The second respondent was an officer entrusted with that task. She considered that the appellant might be eligible for the provision of a visa or travel authority to enable his removal from Australia to Egypt, Kuwait or the Palestinian territories and that his repatriation to Syria might be possible. It appears that any return to Gaza, a preferred destination by the appellant, would require the co-operation of the authorities of the State of Israel. Inquiries also were undertaken with the Jordanian authorities but, like approaches to other States, were unsuccessful. Von Doussa J considered that these efforts made by the second respondent were reasonable steps to comply with s 198(1) and that there were no grounds for relief in the nature of mandamus.

104 At the time of the hearing before von Doussa J in March 2003, the second respondent remained unable to identify another country to which the appellant might be removed. The result is that the appellant is a stateless person unable either to obtain residency in a third country or to exercise any "right of return" to live in Gaza.

105 In his reasons delivered on 3 April 2003, von Doussa J expressed his conclusions on this aspect of the matter as follows:

> "However, the possibility of removal in the future remained, and officers of [the Department] and the Minister were continuing to make enquiries. In this case ... I am not satisfied that [Department] officers, including the second respondent, are not taking all reasonable steps to secure the removal from Australia of the [appellant]. *However, I consider the evidence does establish that removal from Australia is not reasonably*

practicable at the present time as there is no real likelihood or prospect of removal in the reasonably foreseeable future." (emphasis added)

106 The evidence before von Doussa J of the efforts made by officers of the Department to bring about the removal of the appellant from Australia is to be understood against the background of customary international law. It is said that the State of nationality is under a duty towards other States to receive its nationals back onto its territory[113]. That position does not apply to the appellant. Nor is the Stateless Persons Convention of any immediate assistance to him. Article 31 obliges the Contracting States not to "expel a stateless person *lawfully* in their territory save on grounds of national security or public order" (emphasis added).

107 It should be added that the appellant is presently not in immigration detention. By consent order of the Federal Court (Mansfield J) made on 17 April 2003[114], and subject to further order and pending the hearing of this appeal, the appellant was released from detention forthwith. Various conditions were attached to that order and these were variable by agreement between the solicitors for the parties. By such an arrangement, which includes reporting conditions, the appellant moved to live in Sydney. Thus, there is no present occasion for the making of an order in the nature of habeas corpus. The substance of the relief which the appellant seeks appears to be a final injunctive order without the conditions attached to the interlocutory order of Mansfield J, or declaratory relief to similar effect.

108 The key to the resolution of the appellant's case lies in the construction of ss 189, 196 and 198 of the Act. That construction should allow for what was said in *Calwell* concerning the duration of purposive powers such as those involved here. It also should allow for what was decided in *Lim*. To that I now turn.

The decision in *Lim*

109 Considerable attention was given in argument to *Lim* and the reasoning which supported the outcome in that case. In looking at that reasoning, it should be kept in mind that the Court construed the removal provisions of the Act upon a particular footing as to the conduct of international relations. The case concerned Cambodian nationals, not stateless persons. It appears to have been assumed in *Lim*, as it had been in *Calwell*, that, once the status of an illegal

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113 Weis, *Nationality and Statelessness in International Law*, 2nd ed (1979) at 46.

114 After the decision of the Full Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, delivered on 15 April 2003.

immigrant was established, then expulsion or deportation would be a practicable course and that the country of nationality could be expected to discharge its international responsibilities. The evidence in this case demonstrates that, at least as far as stateless persons are concerned, such assumptions cannot be made. That strand in the reasoning in *Lim*, which assumed that the detainees, by requesting their removal, had it in their own power to bring their detention to an end, can play no part in this case.

110 For the purposes of the present case, it is sufficient to treat *Lim* as authority for the following: (i) valid statutory provision is required to authorise and enforce the custodial detention by the State of aliens[115]; (ii) such an exercise of legislative power is subject to such operation as Ch III has upon the subject-matter; (iii) but legislatively conferred authority to detain aliens in custody for the purposes of receiving, investigating and determining applications for entry permits and, upon rejection and exhaustion of review processes, to detain aliens pending their removal from Australia, is not essentially and exclusively judicial in character; (iv) when conferred by statute law upon the Executive rather than a court the authority identified in (iii) "takes its character" from the legislative powers to exclude, admit and deport of which it is an incident[116]; and (v) otherwise a law to authorise and enforce the detention of aliens in custody will be invalid; this may be because the detention for which it provides is but an incident of the essential judicial function of adjudging and punishing criminal guilt[117] or, for the reasons developed by Gaudron J in *Kruger v The Commonwealth*[118], the law is not on a topic with respect to which s 51 of the Constitution confers legislative power.

111 The reasoning supporting the two bases outlined in (v) may be reserved for consideration later in these reasons. The immediate issues are of construction of the Act against the background of the constitutional propositions drawn from *Lim* and stated above in (i)-(iv). The references in those propositions to "aliens" should be understood as also applying to stateless persons in the position of the appellant. The contrary has not been suggested.

The legislative text

112 Section 189(1) provides:

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115 (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ.

116 (1992) 176 CLR 1 at 32 per Brennan, Deane and Dawson JJ.

117 (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

118 (1997) 190 CLR 1 at 109-111.

> "If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person."

However, that detention is not without limit of time or with an absence of purpose. These are supplied by s 196.

> "(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
>
> (a) removed from Australia under section 198 or 199; or
>
> (b) deported under section 200; or
>
> (c) granted a visa.
>
> (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
>
> (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa."

113 Section 196(3), consistently with the reasoning in *Lim* of Mason CJ[119], with whom Toohey J agreed[120], and of McHugh J[121], should be construed as applying only to those who are held in lawful detention pursuant to the Act. Habeas corpus will secure the release from detention of a person no longer in such lawful detention.

114 Reference should also be made to the balance of s 196, being sub-ss (4)-(7):

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

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119 (1992) 176 CLR 1 at 13-14.

120 (1992) 176 CLR 1 at 50-51.

121 (1992) 176 CLR 1 at 67-69.

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

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

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

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

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

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

(7) In this section:

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

115 Sub-sections (4)-(7) of s 196 were added by the *Migration Amendment (Duration of Detention) Act* 2003 (Cth). Those amendments commenced on 24 September 2003, that is to say, before the hearing of this appeal. Given the nature of the appeal provided by the Federal Court Act, which differs from that provided by s 73 of the Constitution[122], the amendments, if otherwise applicable in their terms, would require consideration. However, the appellant is neither detained as a result of a visa cancellation under s 501, nor is he being detained pending deportation under s 200. For this reason, sub-ss (4) and (4A) of s 196 do not apply to the appellant, and the qualifications in sub-ss (5) and (5A) also do not apply. As a result, this case does not require the Court to consider the construction or constitutional validity of those sub-sections. In particular, it should be noted that the Court need not decide whether a provision providing for continued detention where there is no "real likelihood of the person detained being removed from Australia under section 198 or 199, or deported under section 200, in the reasonably foreseeable future" would be valid.

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122 See *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109; *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111]; *Western Australia v Ward* (2002) 213 CLR 1 at 87 [70].

116 Two sub-sections of s 198 are material, sub-ss (1) and (6). These state:

> "(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.
>
> ...
>
> (6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
>
> (a) the non-citizen is a detainee; and
>
> (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
>
> (c) one of the following applies:
>
> (i) the grant of the visa has been refused and the application has been finally determined;
>
> (iii) the visa cannot be granted; and
>
> (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone."

117 In considering these provisions, it is important to eschew, if a construction doing so is reasonably open, a reading of the legislation which recognises a power to keep a detainee in custody for an unlimited time. That reluctance is evident in the construction given the legislation in *Calwell*. Rather, temporal limits are linked to the purposive nature of the detention requirement in the legislation.

Conclusions as to legislative construction

118 This appeal is to be determined upon the construction of the legislation. In the somewhat similar situation that was presented in *Zadvydas*[123] the Supreme Court of the United States also took that course.

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123 533 US 678 at 689 (2001).

119 It will be apparent that, in the circumstances of the present case, the legislation placed upon an officer two obligations of removal of the appellant. The first (s 198(6)) arose upon exhaustion of the steps leading to the refusal of the protection visa application and the failure on 21 May 2002 of the Federal Court litigation respecting that refusal. Had the visa application succeeded, then par (c) of s 196(1) would have discharged the requirement of further detention of the appellant. The second obligation of removal arose later, from the written request for his removal made by the appellant in his letter of 30 August 2002 to the Minister.

120 The requirement imposed upon the appellant by s 196 was to suffer immigration detention for the purposes of facilitating discharge of the various obligations placed upon an officer to remove the appellant from Australia under s 198. Section 196 speaks also of removal under s 199 and deportation under s 200. However, the terms of s 199 and s 200 are not applicable to the appellant[124].

121 There are several temporal elements in the provisions under consideration. There is the requirement in s 196(1) to keep the appellant in detention "*until* he or she is ... *removed* from Australia *under* section 198" (emphasis added). There is also an element of process or outcome which is attainable or achieved *under* s 198. What then is the significance for a removal under s 198 of a failure to do so "*as soon as* reasonably practicable"? (emphasis added) Here, too, there is a temporal element, supplied by the phrase "as soon as". The term "practicable" identifies that which is able to be put into practice and which can be effected or accomplished. The qualification "reasonably" introduces an assessment or judgment of a period which is appropriate or suitable to the purpose of the legislative scheme. The term "purpose" identifies "the object for the advancement or attainment of which [the] law was enacted"[125]. This involves the detention of the appellant to facilitate his availability to removal from Australia but not with such delay that his detention has the appearance of being for an unlimited time.

122 If the stage has been reached that the appellant cannot be removed from Australia and as a matter of reasonable practicability is unlikely to be removed, there is a significant constraint for the continued operation of s 198. In such a case s 198 no longer retains a present purpose of facilitating removal from

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124 Section 199 is concerned with the dependants of removed non-citizens and s 200 with the deportation of certain non-citizens who have been convicted of crimes and with deportation on security grounds.

125 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 487.

Australia which is reasonably in prospect and to that extent the operation of s 198 is spent. If that be the situation respecting s 198, then the temporal imperative imposed by the word "until" in s 196(1) loses a necessary assumption for its continued operation. That assumption is that s 198 still operates to provide for removal *under* that section.

123 In the present case, the findings of von Doussa J, which have been set out earlier in these reasons, that there was no real likelihood or prospect of removal of the appellant in the reasonably foreseeable future, despite the taking to date by the officers of the Department of reasonable steps to secure the reception of the appellant by another country, are of critical importance. They indicate that his Honour should have gone on to hold that, on their proper construction, ss 198 and 196 no longer mandated the continuing detention of the appellant.

124 The appellant remains liable to removal (in the absence of his consent to that course). Nor, it may be, does the appellant escape further liability to renewed detention to facilitate that removal if the prospects of removal arrangements revive as a matter of real likelihood. It also should be emphasised that nothing in these reasons qualifies in any way the requirement that the appellant be detained whilst his protection visa application was pending and review proceedings had not been pursued to finality.

125 The point of present importance for the appellant is that the continued detention of this stateless person is not mandated by the hope of the Minister, triumphing over present experience, that at some future time some other State may be prepared to receive the appellant.

The scope of legislative power

126 The question appears to have been raised in several of the other judgments in this case whether administrative detention of aliens and their segregation thereby from the Australian community for a purpose unconnected with the regulation of their entry, investigation, admission or deportation might be authorised by a law which was compatible with Ch III of the Constitution. The position also appears to be adopted that legislation may validly authorise the indefinite detention of an unlawful non-citizen, even where that person has requested removal under a provision such as s 198(1) of the Act, provided that, in the view of the executive government, which may be contrary to the fact, such removal remains a matter of reasonable practicability.

127 Lest silence be taken as any assent to these propositions, I should state my disagreement with them. To do so, it is necessary to return to what earlier in these reasons was marked as proposition (v) to be derived from *Lim*[126].

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126 (1992) 176 CLR 1.

128 A majority of the Court in *Lim* accepted the proposition that the power of the Parliament to authorise, and that of the Executive to implement, the detention of aliens is limited by reference to the purpose of that detention. In their joint judgment, Brennan, Deane and Dawson JJ held that laws authorising the administrative detention of aliens will only be valid[127]:

> "if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered".

Their Honours went on to explain that, were laws authorising immigration detention not so limited, the authority of the Executive to detain could not properly be characterised as being an incident of the power to exclude, admit and deport[128]. In these circumstances, the detention would properly be characterised as punitive and would thereby offend against the principle that the judicial power of the Commonwealth can only be vested in Ch III courts[129].

129 In a separate judgment in *Lim*, McHugh J expressed a similar view, and one which likewise focused on the purpose of detention as the criterion upon which the constitutional validity of the detention was to be assessed. His Honour said[130]:

> "If a law authorizing the detention of an alien went beyond what was reasonably necessary to effect the deportation of that person, the law might be invalid because it infringed the provisions of Ch III of the Constitution. Similarly, if a law, authorizing the detention of an alien while that person's application for entry was being considered, went beyond what was necessary to effect that purpose, it might be invalid because it infringed Ch III."

McHugh J later added[131]:

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127 (1992) 176 CLR 1 at 33.

128 (1992) 176 CLR 1 at 33.

129 (1992) 176 CLR 1 at 33.

130 (1992) 176 CLR 1 at 65-66.

131 (1992) 176 CLR 1 at 71.

> "Although detention under a law of the Parliament is ordinarily characterized as punitive in character, it cannot be so characterized if the purpose of the imprisonment is to achieve some legitimate non-punitive object. … But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character."

130 Gaudron J analysed the issue not in terms of the limitations on legislative power imposed by Ch III, but rather as an issue of characterisation and the scope of that legislative power. In her Honour's view, which was further developed in *Kruger*[132], a law that was not appropriate and adapted to regulating the entry of aliens or facilitating their departure could not be characterised as a valid law with respect to naturalisation and aliens under s 51(xix)[133].

131 Although it proceeds on a different basis, the result of Gaudron J's analysis is consistent with the view expressed by Brennan, Deane, Dawson and McHugh JJ that the power of the Parliament to authorise the administrative detention of aliens is not at large and that the power does not extend to authorise detention for any purpose selected by the Parliament.

132 There may be situations in which a law authorising the detention of aliens is "so insubstantial, tenuous or distant" in its connection with aliens that "it ought not to be regarded as enacted with respect to the specified matter falling within the Commonwealth power"[134]. However, between the reasons dictating invalidity in *Lim*, those advanced by Brennan, Deane, Dawson and McHugh JJ are to be preferred.

133 Consistently with McHugh J's analysis in *Lim*[135], it could not seriously be doubted that a law providing for the administrative detention of bankrupts in order to protect the community would be a law with respect to bankruptcy and insolvency (s 51(xvii)), or that a law providing for the involuntary detention of all persons within their homes on census night would be a law with respect to census and statistics (s 51(xi)). If such laws lack validity, it is not by reason of any limitation in the text of pars (xvii) and (xi) but by the limitation in the opening words of s 51, "subject to this Constitution", which attract any limitation required by Ch III.

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132 (1997) 190 CLR 1 at 109-111.

133 (1992) 176 CLR 1 at 57.

134 The words are those of Dixon J in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79.

135 (1992) 176 CLR 1 at 64.

134 In considering any limitation required by Ch III, it is not to the point that if no such limitation applies persons may be deprived of their liberty and detained without commission of and conviction for any offence, so that to require of the Parliament that it attain its objective of detention by means of the criminal law is to allow form to triumph over substance. That which the Constitution may require is an expression of supreme authority in the Australian system of government.

The nature of the Ch III limitation

135 The respective submissions in the present case fixed upon the question whether the detention authorised by the Act was punitive or non-punitive in character. This reflects the general discussion in *Lim* and *Kruger* of the Commonwealth's power to impose administrative detention. However, there is often no clear line between purely punitive and purely non-punitive detention. So much is clear from this Court's decision in *Chu Shao Hung v The Queen*[136]. That case concerned s 5(6) of the 1901 Act as it then stood, which provided that any person deemed to be a prohibited migrant by virtue of s 5 was guilty of a criminal offence. The last sentence of the sub-section read:

> "Penalty: Imprisonment for six months, and, in addition to or substitution for such imprisonment, deportation from the Commonwealth pursuant to an order made in that behalf by the Minister."

Kitto J, with whom Fullagar J agreed[137], noted that, although an offence under s 5 was criminal in nature[138],

> "there may be no purpose to be served by the imprisonment except that of keeping the 'offender' available for immediate deportation in the event of the Minister's deciding upon that course, and it is quite right, therefore, to say that the provision for imprisonment is ancillary to the provision with respect to deportation".

Accepting this, it is clear that imprisonment under s 5(6) had both punitive and non-punitive aspects. The imprisonment provided for by the sub-section was imposed as a "penalty"; in that sense, it was penal or punitive in character. Yet,

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136 (1953) 87 CLR 575.

137 (1953) 87 CLR 575 at 585.

138 (1953) 87 CLR 575 at 589; see also *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 96; *O'Keefe v Calwell* (1949) 77 CLR 261 at 278; *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555.

as Kitto J noted, the purpose of the imprisonment also included a non-punitive element; namely, the facilitation of deportation.

136 This coincidence of punitive and non-punitive purposes is not uncommon. In *Veen v The Queen [No 2]*[139], this Court recognised that among the purposes which inform a criminal sentence are not only the punitive purposes of deterrence, retribution and reform, but also what may be seen as the non-punitive purpose of protection of society. Once it is accepted that many forms of detention involve some non-punitive purpose, it follows that a punitive/non-punitive distinction cannot be the basis upon which the Ch III limitations respecting administrative detention are enlivened.

137 Accordingly, the focusing of attention on whether detention is "penal or punitive in character" is apt to mislead. As Blackstone noted, in a passage quoted by Brennan, Deane and Dawson JJ in *Lim*[140], "[t]he confinement of the person, in any wise, is an imprisonment" and one which, subject to certain exceptions, is usually only permissible if consequent upon some form of judicial process. It is primarily with the deprivation of liberty that the law is concerned, not with whether that deprivation is for a punitive purpose. The point is encapsulated in the statement in *Hamdi v Rumsfeld* by Scalia J (with the concurrence of Stevens J), made with reference to Blackstone and Alexander Hamilton[141], that[142]:

> "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."

138 In *Witham v Holloway*, Brennan, Deane, Toohey and Gaudron JJ observed[143]:

> "[N]othing is achieved by describing some proceedings as 'punitive' and others as 'remedial or coercive'. Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there

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139 (1988) 164 CLR 465 at 476.

140 *Commentaries*, 17th ed (1830), Bk 1, pars 136-137 cited in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28.

141 *The Federalist*, No 84, reproduced in Wright (ed), *The Federalist*, (1996) at 533.

142 72 USLW 4607 at 4621 (2004).

143 (1995) 183 CLR 525 at 534.

can be no doubt that imprisonment and the imposition of fines, the usual sanctions for contempt, constitute punishment."

139 It is convenient here to return to the joint judgment in *Lim*. Having established that the involuntary detention of a citizen can generally only exist as an incident of the exclusively judicial power of adjudging and punishing criminal guilt, Brennan, Deane and Dawson JJ noted that the protection afforded by Ch III to aliens was not so far reaching[144]. The principal reason for this is that, absent some authority conferred by statute, aliens have no right to enter or reside in Australia[145]. The aliens power (s 51(xix)) and the immigration power (s 51(xxvii)) empower the Parliament to establish the conditions upon which aliens enter, reside in and leave Australia[146]. It has long been recognised that this includes the power to deport aliens on such terms as the legislature thinks fit[147]. As a consequence of this, the Parliament has the power to authorise the Executive to detain aliens for the purposes of "deportation or expulsion", and as an incident to the executive powers to "receive, investigate and determine an application by that alien for an entry permit"[148].

140 However, the purposes are not at large. The continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government. The reason is that it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III. The location of that boundary line itself is a question arising under the Constitution or involving its interpretation, hence the present

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144 (1992) 176 CLR 1 at 27, 29.

145 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 81-82.

146 *Robtelmes v Brenan* (1906) 4 CLR (Pt 1) 395 at 415; *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 533; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 81, 83, 137; *O'Keefe v Calwell* (1949) 77 CLR 261 at 277-278, 288; *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555-556, 558-559.

147 *Robtelmes v Brenan* (1906) 4 CLR (Pt 1) 395 at 403, 415, 422; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 117, 132-133; *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555-556, 558-559; *Pochi v Macphee* (1982) 151 CLR 101 at 106.

148 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 32; see also *Koon Wing Lau v Calwell* (1949) 80 CLR 533; *Chu Shao Hung v The Queen* (1953) 87 CLR 575.

significance of the *Communist Party Case*[149]. Nor can there be sustained laws for the segregation by incarceration of aliens without their commission of any offence requiring adjudication, and for a purpose unconnected with the entry, investigation, admission or deportation of aliens. To that latter proposition there should be entered the caveat expressed by Brennan, Deane and Dawson JJ in *Lim* as follows[150]:

> "It is unnecessary to consider whether the defence power in times of war will support an executive power to make detention orders such as that considered in *Little v The Commonwealth*[151]."

Orders

141 The appeal should be allowed with costs and the orders of von Doussa J set aside. The interlocutory regime established by the consent order of Mansfield J depended upon the outcome of the appeal and will be spent. As it now stands, the Act itself does not authorise the imposition upon the appellant of restraints, whether by reporting arrangements or otherwise, upon his freedom of movement and action whilst he is not detained under the legislation.

142 However, with respect to the exercise of jurisdiction by the Federal Court in every "matter" before it, s 22 of the Federal Court Act enjoins the Court to grant the appropriate remedies "either absolutely or on such terms and conditions as the Court thinks just". This provision is in the well-known Judicature form and does not operate at large[152]. However, I agree that the section supports orders of the type described by the Chief Justice in his reasons in this case. I agree also with the observations in the penultimate paragraph of those reasons.

143 In place of the orders made by von Doussa J, it should be declared that the appellant presently is not liable to detention under the provisions of Pt 2, Div 7 of the *Migration Act* 1958 (Cth). In addition, (a) there should be liberty to any party to apply to a judge of the Federal Court on two days notice for any further or

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149 See, most recently, *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 116 [66]; 202 ALR 233 at 248.

150 (1992) 176 CLR 1 at 28, fn 66. See also *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 194-195, 227-228, 239, 258-259, 261, 282.

151 (1947) 75 CLR 94.

152 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 231 [59], 239-240 [86]-[88]; see also *Reid v Howard* (1995) 184 CLR 1 at 16-17.

other relief (including injunctive relief[153]) as may be appropriate to give effect to the reasons of this Court and (b) the respondents should pay the costs of the appellant of the application determined by von Doussa J.

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153 See the judgment of Isaacs J in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 537-551.

144 KIRBY J. I agree, for the reasons given by Gummow J[154], that this case, referred into the Court under the *Judiciary Act* 1903 (Cth)[155], is to be decided primarily on the basis of the construction of the applicable legislation. Relevantly, this is the *Migration Act* 1958 (Cth) ("the Act"), ss 196 and 198. Most of the larger questions of law raised in argument, including possible constitutional questions concerning the status of stateless persons as "aliens" within s 51(xix) of the Constitution and the operation of Ch III, do not need to be decided. However, of necessity, in giving meaning to the Act, certain constitutional fundamentals must be kept in mind.

Construing the Act to accord with basic rights

145 On the uncontested facts of this case, Mr Ahmed Ali Al-Kateb (the appellant) is a stateless person. By definition, he therefore cannot be removed from Australia to a country of nationality. Despite the very long interval involved in this litigation, no other country has been found by Australia willing to accept him. As a matter of reasonable practicality, therefore, it is proper to infer that he will be unlikely to be removed in the foreseeable future. In these circumstances, I agree in the reasons of Gummow J[156] that ss 196 and 198 of the Act do not apply, in terms, to the appellant's case as it now stands. It follows that these sections do not sustain his continuing detention[157].

146 As Gummow J points out[158], the law-making power with respect to aliens, upon which McHugh J relies for his contrary opinion[159], is granted to the Federal Parliament subject to the Constitution[160]. That includes, relevantly, subject to Ch III of the Constitution. Indefinite detention at the will of the Executive, and

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154 Reasons of Gummow J at [118].

155 s 40. See reasons of Gummow J at [76]-[77].

156 Reasons of Gummow J at [122]-[123].

157 See *Zadvydas v Davis* 533 US 678 at 699 (2001), where Breyer J, for the Court, cites 1 Coke *Institutes* 70b for the Latin maxim *cessante ratione legis cessat ipse lex* ("the rationale of a legal rule no longer being applicable, that rule itself no longer applies"). See also *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 at 706; [1984] 1 All ER 983 at 985; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111.

158 Reasons of Gummow J at [110].

159 Reasons of McHugh J at [42]-[44].

160 Constitution, s 51 (opening words).

according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements.

147 This Court should be no less vigilant in defending those arrangements – and their consequences for the meaning of legislation and the ambit of the judicial power – than the United States Supreme Court has lately been in responding to similar Executive assertions in that country[161]. The constitutional norms are not the same in each country. We have no equivalent to the Fifth Amendment in our Constitution. The United States Constitution contains no express subjection of the legislative power to Art III. Its notions of the judicial power have developed somewhat differently. But the result of each Constitution is similar in this respect.

148 I dissent from the majority view in this case. Potentially, that view has grave implications for the liberty of the individual in this country which this Court should not endorse.

149 "Tragic"[162] outcomes are best repaired before they become a settled rule of the Constitution. As McHugh J observed in recent extracurial remarks[163]:

> "[I]t is difficult to believe that Australia would have been as politically free a country as it is today if the High Court had upheld the validity of the legislation challenged in the *Communist Party Case*[164]. If that legislation had survived, its legacy must have influenced the way that we give effect to political rights and freedoms."

We should be no less vigilant than our predecessors were. As they did in the *Communist Party Case*[165], we also should reject Executive assertions of self-defining and self-fulfilling powers. We should deny such interpretations to

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161 *Hamdi v Rumsfeld* 72 USLW 4607 (2004). See reasons of Gummow J at [137]. See also *Rasul v Bush* 72 USLW 4596 (2004).

162 Reasons of McHugh J at [31]. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38 at [4] per McHugh J.

163 McHugh, "The Strengths of the Weakest Arm", paper delivered at the Australian Bar Association Conference, Florence, 2 July 2004.

164 *Australian Communist Party v The Commonwealth* ("the *Communist Party Case*") (1951) 83 CLR 1.

165 (1951) 83 CLR 1 at 193 per Dixon J, 205 per McTiernan J, 222 per Williams J, 263 per Fullagar J. See *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 116 [66]; 202 ALR 233 at 248.

federal law, including the Act. Unlike Callinan J[166], I would not have this Court surrender the power of unlimited executive detention to a Minister's "intention" any more than to an open-ended interpretation of the Parliament's command that removal from Australia be "as soon as reasonably practicable". This Court should be no less defensive of personal liberty in Australia than the courts of the United States[167], the United Kingdom[168] and the Privy Council for Hong Kong[169] have been, all of which have withheld from the Executive a power of unlimited detention.

150 Gummow J's conclusion is further supported, in my view, by considerations of international law and the common law presumption in favour of personal liberty. In my opinion, the Constitution and the Act are to be read in the light of these abiding values. The conclusion of Gummow J is one defensive of individual liberty. It is also in conformity with the obligations binding upon Australia under international law[170]. The common law has a strong presumption in favour of liberty, and against indefinite detention[171]. That presumption informs the way provisions of an Australian statute, such as ss 196 and 198 of the Act, are to be construed by an Australian court. It also informs this Court's approach to elucidating the meaning of the Constitution necessary to support the validity of such provisions[172].

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166 Reasons of Callinan J at [298]-[299].

167 See *Zadvydas* 533 US 678 (2001).

168 See *Hardial Singh* [1984] 1 WLR 704; [1984] 1 All ER 983.

169 See *Tan Te Lam* [1997] AC 97.

170 International Covenant on Civil and Political Rights, done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23, Arts 7, 9, 10; cf reasons of Callinan J at [297]-[298]. See also Convention relating to the Status of Stateless Persons, done at New York on 28 September 1954, [1974] *Australian Treaty Series* No 20, Art 31; reasons of Gummow J at [79], [94], [99]. See further: Universal Declaration of Human Rights, General Assembly Resolution 217(III)(A) of 10 December 1948, Art 9; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on 10 December 1984, [1989] *Australian Treaty Series* No 21.

171 See, for example, *Whittaker v The King* (1928) 41 CLR 230 at 248; *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Watson v Marshall and Cade* (1971) 124 CLR 621 at 632; *Williams v The Queen* (1986) 161 CLR 278 at 292; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 532; *McGarry v The Queen* (2001) 207 CLR 121 at 140-142 [59]-[61].

172 cf *Lawrence v Texas* 539 US 558 at 562, 567 (2003) per Kennedy J.

151 I agree with Gummow J[173] that this conclusion, of itself, does not cast doubt on the lawfulness of the appellant's earlier detention while his application for a protection visa was viable and was being determined according to law. But it does entitle the appellant to relief in these proceedings at the stage that they have now reached.

Construing Australian law to accord with international law

152 *Response to the criticism*: I cannot agree with much of what McHugh J has written in his reasons[174], including that part responding to the foregoing reasons of my own. There will be other occasions where I will have written a more substantial exposition of the contested issues than in this case and where it will therefore be more appropriate to enter debate over such matters. However, it is necessary to respond to McHugh J's specific criticisms. Otherwise, it might be thought that they are unanswerable; and that is far from the case.

153 *Detention under the Constitution*: The express subjection of the legislative power to the judicial power in the Australian Constitution is not a mere formality. The existence and predominance of the judicial power necessarily implies constitutional limitations on the use of the heads of legislative power in Ch I (or the powers of the Executive under Ch II) of the Constitution in providing for unlimited detention without the authority of the judiciary. This is because such a power of detention can turn into punishment in a comparatively short time. And punishment, under the Constitution, is the responsibility of the judiciary; not of the other branches of government[175].

154 In another extracurial paper, with which I respectfully agree, McHugh J has pointed to the implications that may exist in Ch III in order that the judiciary, as there provided, should be effective[176]. Many of these implications remain to be elaborated. His Honour suggested that there would be a "[g]radual acceptance that Ch III protects due process rights"[177]. In my opinion, impeccable and

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173 Reasons of Gummow J at [124].

174 Reasons of McHugh J at [49]-[73].

175 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 33.

176 McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?", (2001) 21 *Australian Bar Review* 235. See *Muir v The Queen* (2004) 78 ALJR 780; 206 ALR 189. Contrast *Milat v The Queen* (2004) 78 ALJR 672 at 676 [26]; 205 ALR 338 at 343.

177 McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?", (2001) 21 *Australian Bar Review* 235 at 238.

persuasive views such as this should be given effect within the Court in legal and constitutional exposition. They should not be confined to papers for the academy and the profession. If the opinion is sound, it applies to judicial decisions, unless binding authority coerces a judge to a different conclusion.

155 *The Communist Party Case*: Contrary to the suggestion of McHugh J[178], the *Communist Party Case*[179] is of substantial assistance to Mr Al-Kateb. This is so for the reasons that Gummow J has identified[180]. It is inconsistent with a basic proposition of Australian constitutional doctrine, at least since 1951, that the validity of a law or of an act of the Executive should depend on the conclusive assertion or opinion of the Parliament (eg expressed in recitals to an Act[181]) or the assertion or opinion of an officer of the Executive (eg that the preconditions for the exercise of power have been satisfied). This is why the *Communist Party Case* is such an important statement of the rule of law as it operates in Australia[182]. It remains for the judiciary in each contested case to interpret the applicable law. As in the *Communist Party Case*, this requirement has proved an important, even vital, protection for individual liberty, as McHugh J has himself acknowledged[183].

156 *Foreign decisions and analogies*: Self-evidently, the overseas decisions to which I have referred were not concerned with an elaboration of the language or structure of the Australian Constitution or the meaning of an Australian statute, such as the Act, ss 196 and 198[184]. How could it be otherwise? But this does not render the cited authority irrelevant to the performance of this Court's duty in the present case.

157 The three cases that I have mentioned[185] illustrate singly, and even more forcefully in combination, the resistance of the judges of the common law, since

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178 Reasons of McHugh J at [49]-[50].

179 (1951) 83 CLR 1.

180 Reasons of Gummow J at [109]-[111], [127]-[134].

181 *Communist Party Case* (1951) 83 CLR 1 at 193, 206, 222, 263.

182 *Communist Party Case* (1951) 83 CLR 1 at 175 per Dixon J.

183 See McHugh, "The Strengths of the Weakest Arm", paper delivered at the Australian Bar Association Conference, Florence, 2 July 2004 (extracted above at [149]).

184 See reasons of McHugh J at [51]-[54].

185 Above at [149].

early times and until the present age, to the notion of unlimited executive power to deprive individuals of liberty. In another important and recent case which can now be added to those that I have cited, *Rumsfeld v Padilla*[186], Stevens J (Souter, Ginsburg and Breyer JJ joining) explained[187]:

> "At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive *by the rule of law*. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.[188]"

158 Although Stevens J and his colleagues were in dissent in *Padilla*, on a technical point concerning the availability of *habeas corpus* in the circumstances, their substantive opinion was adopted by the Supreme Court of the United States on the same day in *Rasul v Bush*[189]. There the claim of the United States Executive to a power to detain persons accused "of terrorist connections without access to lawyers or the outside world and without any possibility of significant review by courts or other judicial bodies"[190] was decisively rejected. The resistance of the judiciary to such notions was reaffirmed. These are not, therefore, rare and atypical cases. They are legion. And, in recent times, they have been largely consistent.

159 *Approach to statutory construction*: The holding in *Zadvydas v Davis*[191], that the statute there in question could be construed so as to avoid an interpretation authorising or requiring indefinite detention of an alien, grew out of the same judicial resistance to the notion of unlimited powers of executive detention. The assumption that the proceedings were "nonpunitive"[192] arose

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186 72 USLW 4584 (2004).

187 72 USLW 4584 at 4595 (2004) (emphasis added).

188 See *Watts v Indiana* 338 US 49 at 54 (1949) (opinion of Frankfurter J). "There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men": 338 US 49 at 52 (1949).

189 72 USLW 4596 (2004).

190 Dworkin, "What the Court Really Said", (2004) 51:13 *New York Review of Books* 26 at 26.

191 533 US 678 at 690 (2001). See reasons of McHugh J at [52].

192 *Zadvydas* 533 US 678 at 690 (2001).

specifically because, had it been otherwise, "a serious constitutional problem" would have arisen[193]. The reasoning therefore follows the approach that Gummow J has adopted in this case, with which I agree. Thus, *Zadvydas* is highly relevant to the decision in this case. Although the applicable statutory and constitutional provisions are different, the approach that we should take is precisely the same.

160 The same can be said of *R v Governor of Durham Prison; Ex parte Hardial Singh*[194]. An arguably open-ended legislative provision was read down to avoid affront to notions that lie deep in the common law which it was assumed Parliament would wish to observe in the absence of clear law demonstrating the contrary. That this is done in England, without the support of a constitutionally stated and entrenched judicial power, makes the force of the judicial resistance to an untrammelled executive power of detention all the more striking.

161 Likewise, in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre*[195] the approach to the judicial function of statutory interpretation adopted by the Privy Council in a Hong Kong appeal can only be explained by reference to the same judicial resistance to unlimited executive detention. In different courts the resistance leads to different techniques of decision-making and to different powers and outcomes. But the common thread that runs through all these cases is that judges of our tradition incline to treat unlimited executive detention as incompatible with contemporary notions of the rule of law. Hence, judges regard such unlimited detention with vigilance and suspicion. They do what they can within their constitutional functions to limit it and to subject it to express or implied restrictions defensive of individual liberty.

162 *Wartime cases and actions*: In his reasons, McHugh J cites Australian cases and official conduct during the two World Wars to establish the proposition that arbitrary and unrestricted detention by the Executive or under legislation is possible, even usual, in Australia in time of war[196].

163 I accept that cases exist that lend support to the conclusion that such detention has occurred and that such powers have been upheld by this Court[197].

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193 *Zadvydas* 533 US 678 at 690 (2001).

194 [1984] 1 WLR 704; [1984] 1 All ER 983. See reasons of McHugh J at [53].

195 [1997] AC 97. See reasons of McHugh J at [54].

196 See reasons of McHugh J at [55]-[61].

197 eg *Ex parte Walsh* [1942] ALR 359 and *Little v The Commonwealth* (1947) 75 CLR 94, cited by McHugh J at [59].

However, these cases are the Australian equivalent to the decision of the Supreme Court of the United States in *Korematsu v United States*[198]. There the Supreme Court, by majority, upheld the detention of an American-born citizen of Japanese ancestry (and hence many of a like background). Such cases are now viewed with embarrassment in the United States and generally regarded as incorrect[199]. We should be no less embarrassed by the local equivalents. Certainly, the necessities of war require adaptation of the Constitution and specifically of the power to make laws with regard to defence. However, such necessities cannot support the elimination of constitutional requirements, including those appearing in Ch III. This is because, by the opening words of s 51, the legislative power with respect to defence is subjected to the Constitution, including Ch III.

164 This point was well made by Barak P for the Supreme Court of Israel, sitting as the High Court of Justice in *Beit Sourik Village Council v The Government of Israel*[200]. That case concerned a challenge by Palestinian villagers to the "security fence" or wall being constructed on their land. In the course of reasons that upheld some of the petitions, Barak P cited an earlier decision of the Court in *The Public Committee against Torture in Israel v The Government of Israel*[201] in which, after referring to the implications of the decision for national security, he had said:

> "This is the destiny of a democracy – she does not see all means as acceptable, and the ways of her enemies are not always open before her. A democracy must sometimes fight with one arm tied behind her back. Even so, a democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit and this strength allows her to overcome her difficulties."

165 I do not doubt that if Australia were faced with challenges of war today, this Court, strengthened by the post-War decision in the *Communist Party*

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198 323 US 214 (1944). See also *Hirabayashi v United States* 320 US 81 (1943).

199 See, for example, Rostow, "The Japanese American Cases – A Disaster", (1945) 54 *Yale Law Journal* 489; Tushnet, "Defending Korematsu?: Reflections on Civil Liberties in Wartime", (2003) *Wisconsin Law Review* 273 at 273 ("Rostow's criticism of [*Korematsu*] has become the common wisdom"). Also see *Stenberg v Carhart* 530 US 914 at 953 (2000) per Scalia J (diss).

200 HCJ 2056/04 at [86].

201 HCJ 5100/94 at 845.

Case[202] and other cases since, would approach the matter differently than it did in the decisions which McHugh J has cited with apparent approval. Respectfully, I regard them as of doubtful authority in the light of legal developments that occurred after they were written.

166 The actions of Attorney-General Evatt, referred to by McHugh J[203], have been described by a biographer as a "cancer" which greatly damaged his reputation[204]. According to the biographer, the initial arrests of wartime detainees were authorised by the Minister of the Army, on a military submission, not by Dr Evatt, who sought to have most of the detainees freed[205]. However that may be, the instances hardly amount to a proud moment in Australian law. Nor are they ones that should be propounded as a precedent and statement of contemporary legal authority.

167 *Subjective versus purposive interpretation*: In his reasons, McHugh J appears to adopt an interpretation of detention legislation that implies that the subjective intentions of the legislators must prevail (eg their knowledge and views at the time of enactment about international law[206]). I would reject such an approach. Today, legislation is construed by this Court to give effect, so far as its language permits, to its purpose[207]. This is an objective construct. The meaning is declared by the courts after the application of relevant interpretive principles. It is an approach that has been greatly influenced by McHugh J's own decisions[208].

168 The purposive approach accommodates itself readily to an interpretive principle upholding compliance with international law, specifically the international law of human rights. This is because, as Professor Ian Brownlie has explained, municipal or domestic courts when deciding cases to which

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202 (1951) 83 CLR 1.

203 Reasons of McHugh J at [60].

204 Tennant, *Evatt – Politics and Justice*, (1970, rev 1972) at 147.

205 Tennant, *Evatt – Politics and Justice*, (1970, rev 1972) at 146-147.

206 Reasons of McHugh J at [65].

207 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].

208 See *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 per McHugh JA (diss).

international law is relevant, are exercising a form of international jurisdiction[209]. In exercising municipal or domestic jurisdiction, such courts give effect to interpretive principles defensive of basic rights as recognised in local law. In exercising international jurisdiction, they likewise give effect to interpretive principles defensive of basic rights upheld by international law.

169 *The evolution of constitutional law*: A majority of this Court may not yet have accepted the interpretive principle that I favour. However, in 1904, a majority did not accept the principle later upheld in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[210] as a fundamental interpretive principle of the Constitution. It has been applied ever since. In 1921, a majority of this Court did not accept the interpretation of the structure of the Constitution (and of the requirements of Ch III) adopted in 1956 in *R v Kirby; Ex parte Boilermakers' Society of Australia*[211]. In *Gould v Brown*[212] a majority could not be found to strike down part of the State cross-vesting legislation. Following changes to the membership of the Court, a majority was assembled little more than one year later in *Re Wakim; Ex parte McNally*[213]. There are many similar cases.

170 The understanding of the Constitution in this Court is constantly evolving[214]. The interpretive principle that I have expressed is but another step in the process of evolution.

171 With great respect to the opinion of Dixon J in *Polites v The Commonwealth*[215] (and to those who have later embraced that view[216]) his

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209 Brownlie, *Principles of Public International Law*, 5th ed (1998) at 584. See *Reference re Secession of Québec* [1998] 2 SCR 217 at 234-235 [20]-[22]; Turp and van Ert, "International Recognition in the Supreme Court of Canada's *Québec Reference*", (1998) *The Canadian Yearbook of International Law* 335; van Ert, *Using International Law in Canadian Courts*, (2002) at 44-45.

210 (1920) 28 CLR 129; (1921) 29 CLR 406.

211 (1956) 94 CLR 254.

212 (1998) 193 CLR 346.

213 (1999) 198 CLR 511.

214 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 522-525 [111]-[118].

215 (1945) 70 CLR 60 at 78.

216 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384-385 [98]-[99] per Gummow and Hayne JJ.

Honour's notion of the influence of international law on the interpretation of the Australian Constitution can scarcely be treated as the last word. In 1945, when *Polites* was decided, the Australian Constitution was commonly regarded as little more than a statute of the United Kingdom Parliament, binding in Australia for that reason. In most cases – including many constitutional cases – the decisions of this Court were subject to appeal to the Privy Council. Notions of national independence and distinctive legal thinking in Australia were tamed by these realities. Because of entirely new realities today our thinking is necessarily different.

172 In 1945, the international community was quite different. The Crown of the United Kingdom was still sovereign over a fifth of humanity. Many colonial empires survived. Government by representative democracy and the rule of law were the exception. The global economy was primitive when compared with today. Integrating technology was quite limited. The United Nations had not yet been formed when the decision in *Polites* was handed down in April 1945. The institutions of the world community had not yet been created. The legal instruments that have declared the human rights and fundamental freedoms of humanity had not yet been adopted. In these circumstances, to have expected even so great a judge as Dixon J to foresee the legal expressions of human rights and fundamental freedoms, founded in the notions of human dignity and the principle of justice recognised in the Charter of the United Nations[217] and to appreciate their impact on our Constitution, is to expect too much. He, and our other predecessors, are excused for not foreseeing these developments. Contemporary judges are not excused for ignoring them.

173 McHugh J objects to the use of the "rules" of international law to inform the interpretive principle that I favour[218]. "Rules" is a word I have not used, preferring as I do "principles" or "basic principles". McHugh J accepts that phenomena other than international law can "result in insights concerning the meaning of the Constitution that were not present to earlier generations"[219]. Once this concession is made, the difference between McHugh J and myself is narrowed. International law, including as it declares universal human rights and fundamental freedoms, exists in the form of "rules" and discourse. This is the tangible manifestation. "[P]olitical, social or economic developments"[220], which McHugh J accepts *can* throw light on the meaning of the Constitution, generally appear in other forms. But if they can have their influence in the form in which

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217 Charter of the United Nations, signed at San Francisco on 26 June 1945, Preamble.

218 Reasons of McHugh J at [62]-[71].

219 Reasons of McHugh J at [69].

220 Reasons of McHugh J at [69].

they exist, so can the "rules" of international law in the form in which they manifest themselves. They do not *bind* as other "rules" do. But the principles they express can *influence* legal understanding.

174 Lord Steyn recently observed that in the law, "context is everything"[221]. There is much truth in his Lordship's *dictum*. Constitutional law is part of our law and its meaning is thus subject to contextual considerations. The Australian Constitution was understood and applied in 1945 in a completely different international context from that prevailing today. Now, the Constitution speaks not only "to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community."[222] Inevitably, its meaning is influenced by the legal context in which it must now operate.

175 Whatever may have been possible in the world of 1945, the complete isolation of constitutional law from the dynamic impact of international law is neither possible nor desirable today. That is why national courts, and especially national constitutional courts such as this, have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms[223].

176 In practice, this development presents no significant difficulty for a legal system such as Australia's. In part, this is because of the profound influence on the most basic statements of international law (and specifically of the law of human rights and fundamental freedoms) of Anglo-American lawyers and the concepts that they derived from the common law. In part, it is because such rights and freedoms express the common rights of all humanity. They pre-existed their formal expression.

177 *Consistency with s 128 of the Constitution*: Nor, contrary to the opinion of McHugh J[224], is the interpretive principle that I favour inconsistent with the provisions of s 128 of the Constitution governing its formal amendment. If this argument were valid, it would apply equally to other decisions of this Court in

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221 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 548 [28].

222 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 658.

223 Bangalore Principles (1988), reproduced in Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms", (1988) 62 *Australian Law Journal* 514 at 531-532.

224 Reasons of McHugh J at [68]-[69].

which the Court has given new meaning to the constitutional text and expounded new rights and duties.

178 The Constitution provides both for formal amendment and judicial reinterpretation. From the earliest days of federation both means of adjustment and change have been followed, to the advantage of the Commonwealth and its people. It is idle to suggest otherwise. This Court has played its role in adapting the Constitution to changing times where that was proper and compatible with the constitutional text and legal principle. The developments of international law since 1945 represent no more than another change requiring adaptation.

179 *Courts declaring new rights*: It is true that, consistently with the Constitution, it is not part of the judicial function to insert a comprehensive Bill of Rights into the Constitution[225]. Nor may the judiciary "by the back door" incorporate an international treaty (even one ratified by Australia) as part of Australian law where the Parliament has not done so by legislation[226]. Whether a Bill of Rights should be adopted in Australia by legislation, constitutional amendment or at all, is a political question. The limits inherent in the interpretive principle favouring consistency with the principles of international law, specifically the international law of human rights and fundamental freedoms, must be observed by the courts. Where the Constitution or a valid national law are clear, the duty of a court, which derives its power and authority from the Constitution, is to give effect to the law's requirements[227]. As such, international law is not part of, nor superior to, our constitutional or statute law. Unless incorporated, it is not part of our municipal law.

180 Nevertheless it is incorrect, with respect, to say that Australian courts, including this Court, have no function in finding "rights" in the text of the Constitution. Some of this Court's decisions, declaring what are in effect "rights", would have been regarded by the founders as astonishing. In deriving a number of them, McHugh J has played a notable part[228]. Thus, the courts in Australia are also law-makers; but in a confined and restricted way acting in accordance with the Constitution and established legal principle.

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225 Reasons of McHugh J at [73].

226 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288.

227 See eg *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737 at 768-769 [169]-[173]; 206 ALR 130 at 172-173.

228 Notably in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Austin v The Commonwealth* (2003) 77 ALJR 491; 195 ALR 321. A non-constitutional case of the same character is *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 15-16.

181 I do not agree with McHugh J[229] that the content of the trade and commerce power, expressed in the Constitution[230], is unaffected by the great changes that have occurred in global trade since 1901; nor influenced by multilateral, regional and bilateral agreements in which Australia has participated. With respect, to suggest that, were it otherwise, judges would need a "loose-leaf" copy of the Constitution trivialises a serious question[231].

182 If the defence power expands and contracts, as it does, by reference to the needs of war and a state of profound peace[232], so it is with the trade and commerce power and every other federal head of power in the Australian constitutional list. In the case of most powers, the differences may not always be so noticeable or profound as in cases concerning the defence power. However, in terms of constitutional principle, the concept must be the same.

183 In any event, constitutional lawyers do indeed have "loose-leaf" copies of the Constitution in which the text is elaborated by the decisions of this and other courts, and which refer to contextual, historical and other materials essential to the evolving understanding of what the Constitution means and how it operates. I have simply indicated the need, in the present age, to add a reference to one of the most important legal developments that is occurring and to which national constitutions must adapt, namely the growing role of international law, including the law relating to human rights and fundamental freedoms.

184 *The approach of other countries*: The constitutional courts of many other countries now adopt the interpretive approach that I favour[233]. They reject the

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229 Reasons of McHugh J at [71].

230 Constitution, s 51(i). See also s 92.

231 Reasons of McHugh J at [73].

232 Constitution, s 51(vi). See, for example, *Farey v Burvett* (1916) 21 CLR 433 at 441; *R v Foster; Ex parte Rural Bank of NSW* (1949) 79 CLR 43 at 81.

233 See, for example, "The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation", (2001) 114 *Harvard Law Review* 2049; LeBel and Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law", (2002) 16 *Supreme Court Law Review* (2d) 23; Spiro, "Treaties, International Law, and Constitutional Rights", (2003) 55 *Stanford Law Review* 1999 at 2026-2027; Bodansky, "The Use of International Sources in Constitutional Opinion", (2004) 32 *Georgia Journal of International and Comparative Law* 421; Neuman, "The Uses of International Law in Constitutional Interpretation", (2004) 98 *American Journal of International Law* 82.

approach that McHugh J supports in this case. It is true that in some cases, the new process of reasoning has been stimulated by express constitutional provisions requiring that regard be had to the provisions of international law[234]. This is so, for example, under the new Constitution of the Republic of South Africa[235]. However, the Constitutional Court of South Africa has said that, even if such an express provision did not exist in the text, international law would necessarily have been considered where it was relevant[236].

185 It is also true that in some cases, the references to the developing jurisprudence of international and regional courts and other bodies have been stimulated by the existence of human rights provisions in the national constitution expressed in terms similar to the international and regional statements of human rights and fundamental freedoms. This is not a significant consideration in the Australian context. However, the willingness of national constitutional courts to look outside their own domestic legal traditions to the elaboration of international, regional and other bodies represents a paradigm shift that has happened in municipal law in recent years. There are many illustrations in the decisions of the courts of, for example, Canada[237], Germany[238], India[239], New Zealand[240], the United Kingdom[241] and the United States[242].

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234 eg The Constitution of India (1950), s 51(c).

235 The Constitution of the Republic of South Africa (1996), ss 39(1)(b), 233.

236 *S v Makwanyane* 1995 (3) SA 391 at 413-414 [34]-[35] (referring to s 35(1) of the now superseded transitional constitution: Interim Constitution (1993)).

237 eg *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313 at 348; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at 31-32 [46], 38 [60] ("in seeking the meaning of the Canadian Constitution, the courts may be informed by international law").

238 eg *Presumption of Innocence and the European Convention on Human Rights* (1987) BverfGE 74, 358, translated into English in *Decisions of the* Bundesverfassungsgericht – *Federal Constitutional Court – Federal Republic of Germany*, vol 1/II (1992).

239 eg *Vishaka v State of Rajasthan* 1997 AIR SC 3011 at 3015.

240 eg *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.

241 eg *Pratt v Attorney-General for Jamaica* [1994] 2 AC 1 (PC).

242 See the extracurial remarks of Ginsburg J in Ginsburg and Merritt, "Fifty-First Cardozo Memorial Lecture – Affirmative Action: An International Human Rights Dialogue", (1999) 21 *Cardozo Law Review* 253 at 282, and of O'Connor J in

(Footnote continues on next page)

186 The developments in the Supreme Court of the United States are most pertinent to the criticisms that McHugh J has expressed in this case. Until recently, the approach of that Court concerning the elaboration of the United States Constitution commonly reflected the propositions that McHugh J has stated. However, lately, in *Atkins v Virginia*[243] and *Lawrence v Texas*[244] there is evidence of a new willingness on the part of that Court to pay regard to international and regional law where such considerations may help to throw light on the contemporary meaning of provisions of the United States Constitution.

187 In *Lawrence*, in words somewhat similar to views that I have expressed in this Court[245], Kennedy J, for the Supreme Court, after references to international human rights law[246], concluded[247]:

> "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."

O'Connor, "Keynote Address", (2002) 96 *American Society of International Law Proceedings* 348 at 350-351.

243 536 US 304 at 316 n 21 (2002).

244 539 US 558 at 576-577 (2003). See also *Grutter v Bollinger* 539 US 306 at 344 (2003) per Ginsburg J.

245 *Re Wakim* (1999) 198 CLR 511 at 599-600 [186].

246 *Lawrence* 539 US 558 at 576-577 (2003). Most especially, decisions of the European Court of Human Rights in *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1988) 13 EHRR 186 and *Modinos v Cyprus* (1993) 16 EHRR 485.

247 *Lawrence* 539 US 558 at 578-579 (2003).

188 This shift in approach to deriving the meaning of a national constitution has attracted both support[248] and criticism[249] in the United States. In the Supreme Court itself, in *Atkins*[250] and in *Lawrence*[251], Scalia J voiced for the dissenters opinions not dissimilar to those expressed by McHugh J in this case. However, the majority view in the United States now appears to favour the interpretive principle that I have accepted. When such a court, in a legal culture traditionally less open to outside legal ideas than ours has been, accepts the relevance for its reasoning of the jurisprudence emerging from a "wider civilization"[252], it is time for this Court to do likewise.

189 It is incorrect to say, as McHugh J does[253], that *Lawrence* merely used "European case law" to reject a premise in an earlier decision. That is only half the story[254]. The opinion of Kennedy J in *Lawrence* expressly refers to an *amicus* brief filed by Professor Mary Robinson, past United Nations High Commissioner for Human Rights. As Professor Koh has pointed out[255], that brief referred to a wide range of materials in international law – including a decision of the United Nations Human Rights Committee in *Toonen v Australia*[256]. In any event, the "European case law" itself relies upon rules expressed in the European Convention on Human Rights that have exact equivalents in the international law of human rights and fundamental freedoms. If *Lawrence* involved such an inconsequential step in reasoning, as McHugh J appears to think, it has obviously

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248 eg Koh, "International Law as Part of Our Law", (2004) 98 *American Journal of International Law* 43; Neuman, "The Uses of International Law in Constitutional Interpretation", (2004) 98 *American Journal of International Law* 82.

249 eg Alford, "Misusing International Sources to Interpret the Constitution", (2004) 98 *American Journal of International Law* 57.

250 536 US 304 at 347-348 (2002).

251 539 US 558 at 586 (2003).

252 539 US 558 at 576 (2003) per Kennedy J for the Court.

253 Reasons of McHugh J at [72].

254 See, for example, Jackson, "Could I Interest You in Some Foreign Law? Yes Please, I'd Love to Talk With You", (2004) August *Legal Affairs* 43 at 45.

255 Koh, "International Law as Part of Our Law", (2004) 98 *American Journal of International Law* 43 at 50.

256 Human Rights Committee Communication No 488/1992 (1994).

deceived Scalia J[257] and many commentators[258] who have thought, and said, otherwise.

190 Therefore, with every respect to those of a contrary view, opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail[259]. They will be seen in the future much as the reasoning of Taney CJ in *Dred Scott v Sandford*[260], Black J in *Korematsu*[261] and Starke J in *Ex parte Walsh*[262] are now viewed: with a mixture of curiosity and embarrassment. The dissents of McLean J[263] and Curtis J[264] in *Dred Scott*[265] strongly invoked international law to support the proposition that the appellant was not a slave but a free man. Had the interpretive principle prevailed at that time, the United States Supreme Court might have been saved a serious error of constitutional reasoning; and much injustice, indifference to human indignity and later suffering might have been avoided. The fact is that it is often helpful for national judges to check their own constitutional thinking against principles expressing the rules of a "wider civilization".

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257 *Lawrence* 539 US 558 at 586 (2003).

258 See above at [188], n 248, 249. See also Posner, "Could I Interest You in Some Foreign Law? No Thanks, We Already Have Our Own Laws", (2004) August *Legal Affairs* 40. Compare Jackson, "Could I Interest You in Some Foreign Law? Yes Please, I'd Love to Talk With You", (2004) August *Legal Affairs* 43; Alford, "Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v Texas", (2004) 44 *Virginia Journal of International Law* 913 at 915.

259 Eskridge, "United States: *Lawrence v Texas* and the imperative of comparative constitutionalism", (2004) 2 *International Journal of Constitutional Law* 555 at 556.

260 60 US 393 (1856) (holding that Mr Scott was still a slave in the United States).

261 323 US 214 (1944).

262 [1942] ALR 359 at 360, cited by McHugh J at [59].

263 60 US 393 at 534, 556-557 (1856).

264 60 US 393 at 594-597, 601 (1856).

265 60 US 393 (1856).

191 My conclusion is no more a judicial attempt to "amend[] the Constitution under the guise of interpretation"[266] than were the many decisions of this Court, in which McHugh J participated, where the process of interpretation produced a significant change to earlier understandings of that document[267]. If one new interpretation is forbidden, so are others. We should not declare interpretations impermissible just because we do not agree with them. As McHugh J has written elsewhere[268]:

> "Questions of construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong."

These words apply equally to constitutional construction.

192 It is for these reasons, and others that must await later exposition, that I disagree with what McHugh J has written.

193 *Conclusion: interpretive principle*: In my view, this Court should read ss 196 and 198 of the Act in a way that restricts any assertion that a purely literal construction might otherwise sustain, that unlimited executive detention was there enacted. It should do so because that construction is available in the language of the Act and the assumptions disclosed by that language. It should do so because, in that way, a "serious constitutional problem"[269] that would otherwise be raised is avoided. And it should do so because that interpretation is consistent with the principles of the international law of human rights and fundamental freedoms that illuminate our understanding both of the provisions of the Act and of the Constitution applicable to this case.

Orders

194 I agree in the orders proposed by Gummow J.

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266 Reasons of McHugh J at [74].

267 eg *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 238; *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561; *Kable* (1996) 189 CLR 51 at 116-119; *Ha v New South Wales* (1997) 189 CLR 465 at 504; *Lange* (1997) 189 CLR 520; *Nicholas v The Queen* (1998) 193 CLR 173 at 226 [126]-[127]; cf *Mabo [No 2]* (1992) 175 CLR 1 at 15-16; *Dietrich v The Queen* (1992) 177 CLR 292 at 302-306.

268 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1524 [42]; 200 ALR 157 at 168.

269 *Zadvydas* 533 US 678 at 690 (2001). See above at [159].

195 HAYNE J. The appellant, born of Palestinian parents in Kuwait, is stateless. In December 2000 he arrived, by boat, in Australia. He had no visa permitting him to enter or remain here. He was taken into immigration detention and applied for a protection visa. His application was refused and his applications for review of that refusal failed. In August 2002, he wrote to the Minister asking to be removed from Australia as soon as reasonably practicable. He has not been removed.

196 In 2003, he commenced two proceedings in the Federal Court of Australia. Attention need be given only to the proceeding commenced on 12 February 2003 in which he sought a declaration that his continued detention was unlawful, habeas corpus and prohibition to achieve his release from that detention, and mandamus directing the Minister, among other things, to remove him from Australia. That application was dismissed and he gave notice of appeal to the Full Court of the Federal Court. That appeal has been removed into this Court by order made under s 40 of the *Judiciary Act* 1903 (Cth). It was heard at the same time as *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*[270] and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*[271].

197 At the trial of the appellant's application to the Federal Court, the primary judge was not satisfied that officers of the Department were "not taking all reasonable steps to secure the removal from Australia" of the appellant. The primary judge did find, however, that "removal from Australia is not reasonably practicable at the present time as there is no real likelihood or prospect of removal in the reasonably foreseeable future". That finding is not challenged.

198 The central issue in the appeal is whether, in those circumstances, the continued detention of the appellant is lawful. These reasons will seek to demonstrate that it is.

Mandatory detention

199 The appellant is detained pursuant to ss 189 and 196 of the *Migration Act* 1958 (Cth). Section 189(1) requires "an officer" who knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen to detain that person. Section 196 provides that an unlawful non-citizen detained under s 189

"*must* be kept in immigration detention until he or she is:

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270 [2004] HCA 36.

271 [2004] HCA 38.

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

(b) deported under section 200; or

(c) granted a visa." (emphasis added)

The appellant is not eligible for deportation under s 200. That provision deals with the deportation of non-citizens who are convicted of certain crimes (ss 201 and 203) and the deportation of non-citizens upon security grounds (s 202). Section 199 deals with the dependants of removed non-citizens. Section 198 provides that in certain circumstances an officer must remove an unlawful non-citizen "as soon as reasonably practicable". One of those circumstances is if the unlawful non-citizen asks the Minister in writing to be removed (s 198(1)). The appellant has done that. He is eligible for removal under s 198.

200 To understand the issues which now arise, it is necessary to examine some of the history of the regulation of immigration to Australia.

Some matters of history

201 Since before federation, control of immigration to Australia has had a prominent place in Australian law and politics. In the first year of federation, the Parliament passed the *Immigration Restriction Act* 1901 (Cth) "to place certain restrictions on Immigration and to provide for the removal from the Commonwealth of prohibited Immigrants". For more than 90 years, legislation prohibited various classes of person from entering the Commonwealth[272] and made it a criminal offence to enter, or to be found within, the Commonwealth as a prohibited immigrant[273]. For many years[274], the dictation test was used to exclude persons, or classes of person, whom the government of the day deemed undesirable immigrants. The operation of that test was considered by this Court many times[275].

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272 *Immigration Restriction Act* 1901 (Cth), s 3.

273 *Immigration Restriction Act*, s 7.

274 Until the *Migration Act* 1958 (Cth).

275 See, for example, *Chia Gee v Martin* (1905) 3 CLR 649; *Potter v Minahan* (1908) 7 CLR 277; *R v Carter; Ex parte Kisch* (1934) 52 CLR 221; *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234; *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248; *R v Davey; Ex parte Freer* (1936) 56 CLR 381; *Gamble v Lau Sang* (1943) 67 CLR 455; *O'Keefe v Calwell* (1949) 77 CLR 261.

202 The statutory provisions, by which it was made an offence to enter or be found within the Commonwealth as a prohibited immigrant, provided for the imprisonment of the offender and for deportation, pursuant to an order of the Minister, during or after the term of imprisonment[276]. Some aspects of the operation of provisions of this kind were considered in *Chu Shao Hung v The Queen*[277], but the validity of such provisions was established much earlier in this Court's history.

203 In one of its earliest decisions[278], the Court held that it is an attribute of sovereignty that every nation state is entitled to decide what aliens shall or shall not become members of its community. It further held that the grant to the federal Parliament of power to make laws with respect to aliens (s 51(xix)) and with respect to immigration (s 51(xxvii)) validly authorised the enactment of a law permitting the deportation of an alien to a place other than the state from which the alien came. That power was held to extend to permitting the detention of the alien and, because of Australia's geographical position, it necessarily permitted the imprisonment, beyond the territorial jurisdiction of Australia, of the person deported. Griffith CJ said[279]:

> "The power to make such laws as Parliament may think fit with respect to aliens must surely, if it includes anything, include the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it. I cannot, therefore, doubt that the Commonwealth Parliament has under that delegation of power authority to make any laws that it may think fit for that purpose; and it is not for the judicial branch of the Government to review their actions, or to consider whether the means that they have adopted are wise or unwise."

The *Migration Reform Act* 1992 (Cth)

204 In 1992, a radical change was made to the legislative scheme for dealing with those who entered Australia without entitlement. The *Migration Reform Act* 1992 (Cth) repealed those provisions of the *Migration Act* by which it was made an offence for a prohibited immigrant to enter or be found within the

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276 *Immigration Restriction Act*, s 7.

277 (1953) 87 CLR 575.

278 *Robtelmes v Brenan* (1906) 4 CLR 395.

279 (1906) 4 CLR 395 at 404.

Commonwealth[280]. Instead, the Act, as amended[281], divided non-citizens into two categories: one described as "lawful non-citizens" and the other described as "unlawful non-citizens". The former category was defined as non-citizens in the migration zone who held a visa (s 14). (Certain other kinds of non-citizen and allowed inhabitants were also included in this class.) The latter category, of unlawful non-citizens, was defined as those non-citizens in the migration zone who were not lawful non-citizens.

205 The Act, again as amended[282], obliged "officers" to detain all who were known or suspected of being unlawful non-citizens. An "officer" was then defined, in effect, as an officer of the Department, a person who was an officer for the purposes of the *Customs Act* 1901 (Cth), a federal, State or Territory police officer, or a protective service officer under the *Australian Protective Service Act* 1987 (Cth). The definition of "officer" has since been amended but nothing was said to turn on its details.

206 The Act further required[283] that unlawful non-citizens be kept in detention until they were removed or deported from Australia, or were granted a visa which would entitle them to remain. The Act obliged[284] officers to remove unlawful non-citizens as soon as reasonably practicable after the final determination of any application for a visa, or upon the request of the unlawful non-citizen concerned[285]. The criminal law was engaged only by providing (see now, s 197A) that it was an offence to escape immigration detention.

207 These provisions for the mandatory detention of unlawful non-citizens applied regardless of whether the person concerned was seeking permission to remain in Australia (whether as a refugee or otherwise). They applied even if the person concerned had entered Australia with permission but that permission had later terminated. All who did not have a valid permission to enter and remain in Australia were "unlawful non-citizens" and were to be detained.

208 The use of the terms "lawful" and "unlawful" in the description of immigration status must, therefore, be understood as no more than a reference to

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280 *Migration Reform Act* 1992 (Cth), s 17.

281 *Migration Act*, ss 14, 15.

282 s 54W.

283 s 54ZD.

284 s 54ZF.

285 s 54ZF(1).

whether the non-citizen had that permission. The use of those terms (and in particular the epithet "unlawful") did not refer to any breach of a law which expressly prohibited the conduct of entering or remaining in Australia without permission.

209 Although the provisions introduced by the *Migration Reform Act* have since been amended, and renumbered, the legislative provisions dealing with unlawful non-citizens which now fall for consideration can be seen to follow the same pattern as the 1992 provisions.

The scheme of the current provisions

210 It will be necessary to consider some issues about the proper construction of the particular provisions in question. Before doing that, however, it is convenient to say something further about the scheme which those provisions reveal. It is a scheme having three principal features. First, non-citizens may enter Australia if they have permission (a visa) to do so; they may remain in Australia for so long as they have permission (again in the form of a visa) to do so. Secondly, if a non-citizen has entered Australia without permission, or no longer has permission to remain here, that non-citizen must be detained. Thirdly, the detention of a non-citizen is to end only upon that person's removal or deportation from Australia or upon the person obtaining a visa permitting him or her to remain in the country. Removal or deportation must occur "as soon as reasonably practicable" after the conclusion of any attempts the non-citizen has made to procure a visa, or after that person has made a written request to be removed.

211 The hypothesis for consideration of all of the arguments advanced in this and the other matters heard with it must be that the person whose detention is in question is someone who does not have permission to remain in Australia. Often, but not invariably, those detained will be persons who arrived in Australia without permission to enter the country. (None of the non-citizens in these cases had permission to enter.) But whether or not that is so, each must be a person who has no permission to *remain* in the country.

The underlying questions

212 At the base of the arguments advanced in this matter, and the other two matters heard with it, lie questions about whether, and to what extent, the statutory scheme requiring mandatory detention of unlawful non-citizens is consonant with the long-established principle that "[n]o part of the judicial power [of the Commonwealth] can be conferred in virtue of any other authority or

otherwise than in accordance with the provisions of Chap III"[286]. In particular, given that deprivation of liberty is the harshest form of punishment now exacted for wrongdoing in Australia, is there a point at which detention of an unlawful non-citizen could validly be required only in the exercise of the judicial power? Are the circumstances in which unlawful non-citizens are detained relevant to deciding whether the law permitting or requiring such detention is valid? Are these considerations which shed light on the proper construction of those provisions of the *Migration Act* under which the non-citizens who are parties to these proceedings are or have been held? Can an unlawful non-citizen be detained without a judicial determination of wrongdoing accompanied by imposition of a sentence of imprisonment? Does there come a point when continued detention without judicial determination becomes unlawful?

The application of the criminal law

213 It must be noted that, since the 1992 amendments, the criminal law has been engaged at a later point than was previously the case. Under the legislation which operated between 1901 and the 1992 amendments, the act of entering or being found within Australia without permission was made a criminal offence. In many cases, persons who contravened the relevant legislation would be made available for removal or deportation because they would be imprisoned. But the administrative assumption which lay behind this system was that any question about permission to enter Australia would ordinarily be decided at the point of entry. And if entry was refused it would be for the vessel which brought the applicant to Australia to remove that person. Where the applicant would be taken in such a case was not a matter to which the legislation directed attention. It was treated as a matter for the applicant and the carrier.

214 Where a person was "found within" Australia as a prohibited immigrant, arrangements necessary for that person's deportation or removal could be made during the person's period of imprisonment. And at least in the earlier part of the 20th century, the assumption that such arrangements could readily be made might have been thought to be well founded.

215 Since the 1992 amendments, the criminal law is engaged only to impose a sanction for escaping from detention. Standing alone, that shift in the point at which the criminal law is engaged does not demonstrate that the detention which the Act required raises a Ch III question about the validity of the provisions which required detention. To make it an offence to leave the customs and immigration controlled area at a point of entry to Australia, like an airport, without first having obtained permission to do so would not, standing alone,

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286 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

suggest that the restraint on freedom of movement which is implicitly required could validly be imposed only in the exercise of the judicial power. And it is this reasoning which underpins the Court's decision in *Chu Kheng Lim v Minister for Immigration*[287].

216 In *Chu Kheng Lim*, the Court held that the legislative power given by s 51(xix) of the Constitution with respect to aliens extended to conferring, upon the Executive, authority to detain an alien in custody for the purposes of expulsion or deportation. The terms in which that authority was then conferred on the Executive were held not to contravene Ch III. In considering the various issues that have been raised in this matter it is essential, therefore, to bear steadily in mind that *Chu Kheng Lim* established that the deprivation of liberty of a non-citizen who seeks permission to enter or remain in this country does not, *of itself*, require the conclusion that the legislation permitting the detention is constitutionally infirm. It will be necessary to say more about the decision in *Chu Kheng Lim* but it is desirable to come to that case only after considering a number of other matters. First, what is it about the appellant's detention to which attention was drawn?

The critical features of detention

217 The arguments advanced in this and the other matters against the validity of the provisions for mandatory detention of unlawful non-citizens proceeded from the identification of two critical features of the provisions. First, the detention required is for an indeterminate length of time. Its duration is bounded by the occurrence of events which, *if they happen*, will happen at a time which cannot be identified at the start of the period of detention. Secondly, it is now recognised that there may be cases where the events upon which detention will cease may not happen, or at least will not happen for a very long time. It is this uncertainty, about whether or when detention will cease, that is said to present issues about the proper construction of the provisions, and to engage consideration of Ch III.

218 It is important to examine why there is that uncertainty. Detention comes to an end upon removal or deportation or the granting of a visa. Removal or deportation may occur only when the non-citizen's attempts to obtain permission to remain in Australia have come to an end. To that extent the period of detention is under the control of the non-citizen. He or she will be *available* for removal or deportation as soon as he or she wishes to be available. But what more recent events, concerning some non-citizens who have asked to be removed, have revealed is that removal *to* a country requires the co-operation of the receiving country, and of any countries through which the person concerned

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287 (1992) 176 CLR 1.

must pass to arrive at that destination. That co-operation is not always freely made available. In such a case the period of detention will come to an end only upon the relevant authorities, in one or more countries other than Australia, agreeing to receive the person being removed, or, where it is necessary, agreeing to allow that person to travel through their territory. Australia can seek that co-operation; it cannot demand it. Detention will continue until that co-operation is provided.

219 It is then necessary to notice one further matter about the detention of an unlawful non-citizen. It is not suggested that the alternative to detention is unconditional admission to Australia. The debate assumed that there could be no objection to a legislative scheme that would curtail a non-citizen's freedom of movement within Australia, whether by requiring the non-citizen to report regularly or even, perhaps, by requiring the person to live at a particular place. (How such a provision could fit with s 92 of the Constitution was not explored[288].) And if the non-citizen were to be prevented from working, and were not to be eligible for social security benefits, there would be many cases where the non-citizen would depend upon the charity of others to survive while living subject to restrictions not applicable to citizens or lawful non-citizens. The questions which arise about mandatory detention do not arise as a choice between detention and freedom. The detention to be examined is not the detention of someone who, but for the fact of detention, would have been, and been entitled to be, free in the Australian community.

220 It is convenient to deal at this point with some questions about the construction of the relevant provisions.

Construction of the relevant provisions

221 Division 7 of Pt 2 of the *Migration Act* (ss 188-197) provides for the detention of unlawful non-citizens. Division 7A of that Part (ss 197A and 197B) provides for certain offences relating to immigration detention. Division 8 (ss 198-199) provides for removal of unlawful non-citizens and Div 9 (ss 200-206) provides for deportation of certain non-citizens. The text of relevant provisions has been sufficiently described earlier. Most attention must be directed to the three provisions I identified earlier: s 189 (providing for the detention of unlawful non-citizens), s 196 (dealing with the period of detention) and s 198 (providing for removal from Australia of unlawful non-citizens).

222 It was submitted that, properly construed, these provisions did not authorise the appellant's detention. They do not authorise, so it was submitted,

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288 *AMS v AIF* (1999) 199 CLR 160.

the continued detention of unlawful non-citizens where s 198 could not be complied with.

223 Questions about the construction of these provisions, and about their validity, must be considered having regard to the way in which the provisions interact. That is, these questions must be considered having regard to the three principal features of the scheme identified earlier in these reasons: provision for the grant of permission to enter and remain in Australia; imposition of an obligation to detain those who do not have that permission; and the detention of those who do not have permission to enter and remain in Australia until they either gain that permission or are removed.

224 The provisions requiring detention of unlawful non-citizens do not expressly refer to the purpose of detention. Rather, s 189 requires officers to detain unlawful non-citizens and s 196 identifies the period of detention. In this respect, however, the legislation does not differ in any fundamental respect from the provisions considered in *Koon Wing Lau v Calwell*[289]. The *War-time Refugees Removal Act* 1949 (Cth), considered in that case, provided for the deportation of aliens who had entered Australia during the Second World War. It provided (s 7(1)(a)) that a deportee might "pending his deportation and until he is placed on board a vessel for deportation from Australia" be kept in such custody as the Minister or an officer directed. Of these provisions Dixon J said[290] that they "mean that a deportee may be held in custody *for the purpose* of fulfilling the obligation to deport him until he is placed on board the vessel" (emphasis added) and that "unless within a reasonable time [the person to be deported] is placed on board a vessel he would be entitled to his discharge on habeas".

225 The present legislation, prescribing the period of detention as it does, may therefore be read as providing for detention for the purposes of processing any visa application and removal. But that does *not* decide the point of how long that detention may persist. It does not decide when that purpose (of detention for removal) is spent. It does not decide that the time during which a person may be detained is "a reasonable time". Here the period of detention is governed by the requirement to effect removal "as soon as reasonably practicable".

226 The period of detention is fixed by reference to the occurrence of any of three specified events. Detention must continue "until" one of those events occurs. The event described as being "removed from Australia under section 198" is an event the occurrence of which is affected by the imposition of a duty, by s 198, to bring about that event "as soon as reasonably practicable".

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289 (1949) 80 CLR 533.

290 (1949) 80 CLR 533 at 581.

That compound temporal expression 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"[291]. In particular, the expression recognises that the co-operation of persons, other than the non-citizen and the officer, will often (indeed usually) be necessary before the removal can occur. The duty to remove must be performed within *that* time. And so long as the time for performance of that duty has not expired, s 196 in terms provides that the non-citizen must be detained.

227 It may be accepted that "as soon as reasonably practicable" assumes that the event concerned can happen, and that, if there is any uncertainty, it is about *when* the event will happen, not *whether* it will. Where, as here, the person to be removed is stateless, there is no state to which Australia can look as the first and most likely receiving country. But whether the non-citizen is stateless or has a nationality, *Robtelmes v Brenan* reveals that the removal provisions of the Act are concerned with what was there identified[292] as the corollary to, or complement of, the power of exclusion. *Removal* is the purpose of the provisions, not repatriation or removal *to* a place. It follows, therefore, that stateless or not, absent some other restriction on the power to remove, a non-citizen may be removed to *any place* willing to receive that person. It follows that, unless some other provision of the Act restricts the places to which a non-citizen may be removed (and none was said to be relevant here), the duty imposed by s 198 requires an officer to seek to remove the non-citizen to any place that will receive the non-citizen. And the time for performance of the duty does not pass until it is reasonably practicable to remove the non-citizen in question.

228 In the case of a stateless person, there may be many countries which could properly be approached and asked to receive the person. Whether one of those countries agrees to take the person will ordinarily depend upon matters beyond the power of Australia. Indeed, whether the country of nationality of a non-citizen who is not stateless will receive that person, if expelled from Australia, will ordinarily depend upon matters beyond this country's power to control, perhaps even influence.

229 What follows is that the most that could ever be said in a particular case where it is not now, and has not been, reasonably practicable to effect removal, is that there is *now* no country which will receive a particular non-citizen whom Australia seeks to remove, and it cannot *now* be predicted when that will happen. Nor is it to say that the time for performing the duty imposed by s 198 has come.

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291 *The Oxford English Dictionary*, 2nd ed (1989), vol 12 at 269, "practicable".

292 (1906) 4 CLR 395.

The duty remains unperformed: it has not yet been practicable to effect removal. That is not to say that it will *never* happen.

230 This appellant's case stands as an example of why it cannot be said that removal will never happen. His prospects of being removed to what is now the territory in Gaza under the administration of the Palestinian Authority are, and will continue to be, much affected by political events in several countries in the Middle East. It is not possible to predict how those events will develop. The most that can be decided with any degree of certainty is whether removal can be effected *now* or can be effected in the future pursuant to arrangements that *now* exist. Of course, it must be accepted in the present appeal that, as the primary judge found, "there is no real likelihood or prospect of [the appellant's] removal in the reasonably foreseeable future", but that does not mean it will *never* occur. Whether and when it occurs depends largely, if not entirely, upon not only the course of events in the Middle East (his preferred destination being Gaza) but also upon the willingness of other countries to receive stateless Palestinians.

231 Because there can be no certainty about whether or when the non-citizen will be removed, it cannot be said that the Act proceeds from a premise (that removal will be possible) which can be demonstrated to be false in any particular case. And unless it has been practicable to remove the non-citizen it cannot be said that the time for performance of the duty imposed by s 198 has arrived. All this being so, it cannot be said that the purpose of detention (the purpose of removal) is shown to be spent by showing that efforts made to achieve removal have not so far been successful. And even if, as in this case, it is found that "there is no real likelihood or prospect of [the non-citizen's] removal in the reasonably foreseeable future", that does not mean that continued detention is not for the purpose of subsequent removal. The legislature having authorised detention until the first point at which removal is reasonably practicable, it is not possible to construe the words used as being subject to some narrower limitation such, for example, as what Dixon J referred to in *Koon Wing Lau* as "a reasonable time". The time for removal is fixed by this legislation by reference to reasonable *practicability*.

232 Unaffected by consideration of Ch III, the words of the relevant provisions will not yield, by a process of construction, the meaning asserted by the appellant. There are, however, some additional reasons for rejecting a construction that would limit the power of detention, as the appellant submitted, to such time as removal is reasonably practicable in the sense that there is a real likelihood of removal in the reasonably foreseeable future[293].

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293 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54.

233 This additional set of reasons for rejecting this construction of the provisions turns upon how the criterion for deciding whether there is a real likelihood of removal would be formulated, and upon how the three critical provisions (ss 189, 196 and 198) would then be read together. Formulating the applicable criterion may be thought to be no more than a challenge to legal ingenuity but upon examination the problem will be seen to be more deeply rooted than a question about how to draft the limitation.

Al Masri

234 The consideration of this set of reasons may begin by examining the criterion identified by the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*[294]. There, the Full Court held[295] that the power to detain a person was impliedly limited to detention only in circumstances where "there is a real likelihood or prospect of the removal of the person from Australia in the reasonably foreseeable future".

235 This formulation of the limitation appears to present some substantial difficulties of application. What is meant by "real likelihood or prospect"? In particular, what is to be done in cases where negotiations for receiving particular non-citizens are continuing, but are at a stage where it cannot be said when they will conclude, or how they will conclude? Is the lawfulness of detention to turn only upon whether the detaining authority can point to some request that it has made of another country that it receive the non-citizen concerned and which it can show has not finally been rejected by that other country? All of these are questions which would ultimately find an answer. Other questions are more difficult.

236 If the statutory command in s 196 (that an unlawful non-citizen *must* be kept in immigration detention until he or she is removed) is to be read subject to this or some similar limitation, so too must the statutory command in s 189 (requiring an officer to detain unlawful non-citizens). But presumably the duty imposed by s 198 would remain unaffected. And unless the obligations under both ss 189 and 196 were to be regarded as wholly exhausted upon it being found that there is no real likelihood of removal in the reasonably foreseeable future, upon what event would a duty to detain re-emerge? How would that event be defined? Is it the renewed *possibility* of removal, or is it something more concrete?

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294 (2003) 126 FCR 54.

295 (2003) 126 FCR 54 at 88 [136].

237 The process of construction of the words used in ss 189, 196 and 198 yields no ready answer to these questions. Rather, what the questions reveal is that the limitation on the operation of ss 189 and 196 identified in *Al Masri* is a limitation which depends upon taking the temporal element of the legislative command in s 198 (to remove as soon as reasonably practicable) and converting that into a different temporal limitation on the operation of s 196 and, by inference, on the operation of s 189. The limitation imposed is not simply *transferred* from one section to the others (a process which can readily be justified by the need to read the provisions together). It is *transformed* from "as soon as reasonably practicable" to "soon" or "for so long as it appears likely to be possible of proximate performance". That transformation cannot be effected by any process of construction, at least not by any process divorced from considerations of Ch III.

Limitation by reference to international obligation?

238 In particular the transformation just identified cannot be effected by reference to international instruments, whether the International Covenant on Civil and Political Rights ("the ICCPR"), to which the Full Court referred[296] in *Al Masri*, or other relevant instruments or principles. Let it be assumed that, as was said[297] in *Al Masri*, "s 196 should, *so far as the language permits*, be interpreted and applied in a manner consistent with established rules of international law and in a manner which accords with Australia's treaty obligations" (emphasis added). There must, at least, be doubt about whether the mandatory detention of those who do not have permission to enter and remain in Australia contravenes Art 9 of the ICCPR when the detention is in accordance with a procedure established by law (Art 9(1)) and the lawfulness of that detention can readily be tested in a court (Art 9(4)) (as is the lawfulness of the appellant's detention). There would appear to be circularity of reasoning in asserting that the detention is not lawfully authorised by s 196 because, *if* it were not lawfully authorised by that section, it would breach the obligations undertaken by Australia in Art 9 of the ICCPR that "[n]o one ... be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

239 But be this as it may, the root question is whether the language of s 196 will yield the construction asserted. For the reasons given earlier, it will not. It will not because "as soon as reasonably practicable" does not mean "soon" or "for so long as it appears likely to be possible of proximate performance". It is, therefore, not necessary to examine what weight, if any, should be given to the

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296 (2003) 126 FCR 54 at 88-92 [138]-[155].

297 (2003) 126 FCR 54 at 88 [138].

opinions expressed by the Human Rights Committee established under Art 28 of the ICCPR.

Limitation by reference to decisions of other courts?

240 Nor can the transformation be made by resort to decisions of other courts, even final courts, about the construction of legislation framed in different ways. Particular reference was made in argument to *R v Governor of Durham Prison; Ex parte Hardial Singh*[298] and to what was said, in that case, about the power of detention given by the *Immigration Act* 1971 (UK). Woolf J said[299] that:

> "as the power [of detention] is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose."

But two aspects of what was said in *Hardial Singh* must be noticed. First, what was said concerned a discretionary power to detain, not a mandatory requirement to do so until one of three specified events occurred. Secondly, the construction adopted was described as being reached by a process of implication. It may readily be accepted that to make the implication in that case accorded with applicable principles of statutory construction. But contrary to what was submitted in this and the other two matters heard with it, the resulting implication in that legislation is not itself some principle which finds application beyond the particular legislative context. It is necessary to consider and apply the language of the sections with which we are concerned, *not* other forms of legislation on the same general subject. That is why no useful assistance is gained by considering *Hardial Singh* or the other decisions of overseas courts to which we were taken[300].

Protection of fundamental rights and freedoms

241 There is a relevant general principle to which effect must be given in construing the provisions now in question: legislation is not to be construed as interfering with fundamental rights and freedoms unless the intention to do so is

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298 [1984] 1 WLR 704; [1984] 1 All ER 983.

299 [1984] 1 WLR 704 at 706; [1984] 1 All ER 983 at 985.

300 *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97; *In the matter of Art 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Zadvydas v Davis* 533 US 678 (2001); *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131; [2002] 4 All ER 785.

unmistakably clear[301]. General words will not suffice. Reading the three sections together, however, what is clear is that detention is mandatory and must continue until removal, or deportation, or the grant of a visa. The relevant time limitation introduced to that otherwise temporally unbounded detention is the time limit fixed by s 198 – removal as soon as reasonably practicable after certain events. No other, more stringent, time limit can be implied into the legislation. (That is why the reasoning in *Hardial Singh* finds no application here.) But more than that, the time limit imposed by the Act cannot be transformed by resort to the general principle identified. The words are, as I have said, intractable.

Conditional release?

242 There is one other aspect to notice about the contention that the legislative requirement to detain is limited to detention for so long as there is a real likelihood or prospect of removal of the non-citizen in the reasonably foreseeable future. This limitation of the requirement to detain appears to have been understood as permitting courts to make orders releasing a non-citizen from detention but imposing conditions on the non-citizen such as conditions requiring the non-citizen to report to authorities periodically or to live in a particular place. The final orders made at first instance in Mr Al Masri's case[302] took that form.

243 Presumably these conditions have been imposed on an assumption that the requirement to detain and remove might revive at some time in the future. That assumption is, as I said, open to doubt. But there is a more fundamental difficulty. There is no statutory or other basis for making any such order. If the detention is not lawful, it must end. It is not to be replaced with some other set of limitations on the person's freedom. If the detention is unlawful, the only order which a court may make is an order requiring the person to be discharged from detention.

244 It is because the words of the Act will not yield the construction for which the appellant contended that I earlier described the underlying questions in this and the other two matters as being about the application of Ch III of the Constitution. It is that issue to which I now turn. I will deal with the issue by the following steps. First, it will be necessary to say something further about the ambit of the aliens and the immigration powers. Secondly, it will be convenient

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301 For example, *Coco v The Queen* (1994) 179 CLR 427 at 436-438 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

302 *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 192 ALR 609.

to deal with the decision in *Chu Kheng Lim*. Thirdly, it will be necessary to examine some questions about punishment.

The aliens and the immigration powers

245 A law which permitted or required detention for the purpose of effecting the removal of an unlawful non-citizen from Australia would be a law with respect to aliens and a law with respect to immigration. So much follows from *Koon Wing Lau*. The provisions now in question, however, are not confined to providing for detention for the purpose of removal. An unlawful non-citizen who is seeking the grant of a visa must be detained. Nonetheless, in that operation, too, the provisions can be seen to be laws with respect to aliens and laws with respect to immigration. That is, in so far as the provisions now in question provide for detention both during the period in which a non-citizen's application for a visa remains unresolved, and thereafter for the purpose of removing the non-citizen from Australia, they are laws with respect to aliens and with respect to immigration.

246 If, after final resolution of a non-citizen's application for a visa, it appears either immediately, or after some time has elapsed, that removal cannot be effected promptly, and it cannot be said when removal might be effected, would the provisions requiring detention no longer be laws with respect to aliens or immigration? Would the connection with either of those subject-matters be so tenuous or insubstantial as to deny that characterisation?

247 The conclusion that a law requiring detention for the purpose of processing a visa application and, if that application is unsuccessful, for the purpose of removing the non-citizen from Australia *is* a law with respect to aliens and with respect to immigration, does not necessarily entail that a law requiring detention of aliens in other circumstances, or for other purposes, is beyond power. In particular, a law which requires the exclusion from Australia of non-citizens who do not have permission to enter or remain in Australia would fall within those powers. And a law which, in its operation, provided that those non-citizens who do not have permission to enter and remain in Australia, but manage to find their way here, are to be excluded from the Australian community by their removal from Australia as soon as reasonably practicable and, if removal is not practicable, their segregation from the community by detention, would fall within power. The question would then be whether the legislation requiring detention would be at odds with the constitutional requirement that no part of the judicial power of the Commonwealth be conferred otherwise than in accordance with the provisions of Ch III. The intersection between the aliens power and Ch III was considered in *Chu Kheng Lim*.

Chu Kheng Lim v Minister for Immigration

248 The plaintiffs in *Chu Kheng Lim* (other than an infant born in Australia) arrived in Australia, by boat, on 27 November 1989 or 31 March 1990. None held a valid entry permit. All were detained upon arrival, and remained in custody thereafter. In 1992, Parliament passed the *Migration Amendment Act* 1992 (Cth) which, among other things, provided for the detention of the plaintiffs (who were within the class referred to in that Act as "designated persons"). Section 54R of the *Migration Act* 1958 (as amended by the *Migration Amendment Act* 1992) provided that "[a] court is not to order the release from custody of a designated person". By majority, the Court held[303] s 54R invalid as a direction by the Parliament to the courts as to the manner in which they were to exercise their jurisdiction and thus an impermissible intrusion into judicial power.

249 Sections 54L, 54N and 54P, added to the *Migration Act* 1958 by the *Migration Amendment Act* 1992, made provision for the detention of designated persons in terms which were not substantially different from what now appears in ss 189, 196 and 198. (Section 54P required removal of a designated person "as soon as practicable", if the person asked, in writing, to be removed, but I do not think that the addition of the word "reasonably", in the provisions now found in s 198[304], assists the appellant in any way.) All members of the Court held[305] that s 54L (requiring designated persons to be kept in custody, and to be released if and only if removed from Australia under s 54P or given an entry permit) and s 54N (permitting an officer to detain a designated person without warrant and "take reasonable action to ensure that the person is kept in custody for the purposes of section 54L") were valid in their application to the plaintiffs. That is, all members of the Court agreed that, in their operation in respect of the plaintiffs, the laws did not infringe Ch III.

250 Section 54Q of the Act, also added by the *Migration Amendment Act* 1992, provided for ss 54L and 54P to cease to apply to designated persons seeking entry permits after the designated person had been in custody for 273 days. (That time did not run during periods where the determination of the application for a permit was delayed for reasons beyond the control of the Department.) This time limit played no, or at least no significant, part in the decision in *Chu Kheng Lim*.

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303 (1992) 176 CLR 1 at 36-37 per Brennan, Deane and Dawson JJ, 53 per Gaudron J.

304 See *Migration Reform Act*, s 13, inserting what was then s 54ZF into the Act.

305 (1992) 176 CLR 1 at 10 per Mason CJ, 32-34 per Brennan, Deane and Dawson JJ, 49-50 per Toohey J, 55 per Gaudron J, 73-74 per McHugh J.

251 One of the arguments advanced in *Chu Kheng Lim* against validity was that, being enacted after the plaintiffs had been taken into custody, the provisions requiring their detention were Bills of Attainder or Bills of Pains and Penalties. Those arguments, which then had only recently been considered by the Court in *Polyukhovich v The Commonwealth* (*War Crimes Act Case*)[306], were rejected. But two other important elements are to be seen in the reasoning in *Chu Kheng Lim*. First, Gaudron J, in her separate reasons, pointed out[307] that legislation authorising detention in circumstances involving no breach of the criminal law was not "necessarily and inevitably offensive to Ch III". As her Honour later said in *Kruger v The Commonwealth*[308], the categories of cases in which such detention may validly be authorised may not be closed. But whether or not that is so, legislation permitting detention, without judicial intervention, of an alien who has no permission to enter or remain in Australia, can be valid. In their joint reasons, Brennan, Deane and Dawson JJ said[309] that ss 54L and 54N:

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

In so far as the distinction which was drawn by their Honours depends upon the identification of the *purpose* of detention, what has been said earlier in these reasons about when that purpose is spent would require the conclusion that the sections now in issue would meet the test of validity which they posit. For the reasons given earlier, the purpose of detention for removal would not be spent until it had become reasonably practicable to remove the non-citizen concerned.

252 The line which was drawn in the joint reasons was a line between detention "reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made

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306 (1991) 172 CLR 501.

307 (1992) 176 CLR 1 at 55.

308 (1997) 190 CLR 1 at 110.

309 (1992) 176 CLR 1 at 33.

and considered" and detention not so limited. The former was said not to contravene Ch III; the latter was said to be punitive and contrary to Ch III. Three points may be made about this division.

253 First, to ask whether the law is limited to what is reasonably capable of being seen as necessary for particular purposes may be thought to be a test more apposite to the identification of whether the law is a law with respect to aliens or with respect to immigration. No doubt account must be taken of the fact that the provisions now in question impose the obligation to detain upon the Executive. If the relevant power is identified (as their Honours appear to have identified[310] it) as the *executive* power to deport or exclude, it may readily be accepted that the legislative conferral of authority to detain in custody for the purposes of an executive power identified in that way would be an incident of that power.

254 It is important to notice, however, that the sections now in question (like the provisions under consideration in *Chu Kheng Lim*) require, rather than authorise, detention. True it is that the requirement is made of the Executive: an "officer" must detain. But the provision is mandatory; the legislature requires that persons of the identified class be detained and kept in detention. No discretion must, or even can, be exercised. No judgment is called for. The only disputable question is whether the person is an unlawful non-citizen. And the courts can readily adjudicate any dispute about that. There is, therefore, nothing about the decision making that must precede detention which bespeaks an exercise of the judicial power. Nor is there any legislative judgment made against a person otherwise entitled to be at liberty in the Australian community. The premise for the debate is that the non-citizen does not have permission to be at liberty in the community.

255 Secondly, for my part, I would not identify the relevant power in quite so confined a manner as is implicit in the joint reasons in *Chu Kheng Lim*. The relevant heads of power are "aliens" and "immigration". The power with respect to both heads extends to preventing aliens entering or remaining in Australia except by executive permission. But if the heads of power extend so far, they extend to permitting exclusion from the Australian community – by prevention of entry, by removal from Australia, *and* by segregation from the community by detention in the meantime.

256 That is why I do not consider that the Ch III question which is said now to arise can be answered by asking whether the law in question is "appropriate and adapted" or "reasonably necessary" or "reasonably capable of being seen as necessary" to the purpose of processing and removal of an unlawful non-citizen. Those are questions which it is useful to ask in considering a law's connection

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310 (1992) 176 CLR 1 at 32.

with a particular head of power. For the reasons given earlier, the sections now in question are laws with respect to aliens and with respect to immigration. In part that is because a law to exclude a non-citizen from joining the Australian community is a law with respect to those two heads of power.

257 Thirdly, the line which their Honours drew in the joint reasons in *Chu Kheng Lim* depended upon first concluding[311] that, with certain exceptions, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt". Their Honours described[312] this as "a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth".

258 As Gaudron J demonstrated in *Kruger*[313], the line which their Honours drew in *Chu Kheng Lim* is a line which is difficult to identify with any certainty. It is a line which appears to assume that there is only a limited class of cases in which executive detention can be justified. And that assumption is at least open to doubt. But doubtful or not, it is an assumption which turns upon the connection between such detention and the relevant head of power, not upon the identification of detention as a step that can *never* be taken except in exercise of judicial power. That is why it is important to recognise that once the step is taken, as it was in *Chu Kheng Lim*, of deciding that mandatory detention of unlawful non-citizens can validly be provided without contravention of Ch III, it is plain that unlawful non-citizens have no general immunity from detention otherwise than by judicial process.

259 At least in many cases it will be right to say that a law authorising detention divorced from any breach of the law is not a law with respect to a head of power and for that reason is invalid. As Gaudron J pointed out in *Kruger*[314], the powers with respect to defence, quarantine and the influx of criminals may stand as exceptions to that observation. But so too do the aliens and immigration powers in so far as they empower the making of laws with respect to the exclusion of persons from Australia and the Australian community.

260 In that, exclusionary, operation the laws do not infringe the limitations on power which follow from the separation of judicial power from the executive and

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311 (1992) 176 CLR 1 at 27.

312 (1992) 176 CLR 1 at 28-29.

313 (1997) 190 CLR 1 at 109-110.

314 (1997) 190 CLR 1 at 111.

legislative powers. If the line to be drawn is, as suggested in the joint reasons in *Chu Kheng Lim*, a line that depends upon connection with the relevant heads of power, these laws in their exclusionary operation have that connection.

261 If the line to be drawn attaches importance to the characterisation of the consequences as punitive, it must be recognised that the consequences which befall an unlawful non-citizen whom the Executive cannot quickly remove from Australia are not inflicted on that person as punishment for any actual or assumed wrongdoing. They are consequences which come about as the result of a combination of circumstances. They flow, in part, from the non-citizen entering or remaining in Australia without permission, in part from the unwillingness of the Executive to give the non-citizen that permission, and in part from the unwillingness of other nations to receive the person into their community or their unwillingness to permit that person to travel across their territory. The first of those considerations may be laid at the feet of the unlawful non-citizen concerned. Indeed, there may be other features of individual cases in which the unwillingness of others to receive the unlawful non-citizen can be seen to flow from the non-citizen's own conduct. These would include not only cases where the non-citizen impedes removal (by destroying identity documents or refusing to co-operate in the obtaining of new documents) but also cases of deportation on "character" grounds in which receiving countries are unwilling to accept persons who have committed criminal offences, or criminal offences of particular kinds, while living in Australia.

262 It is no less important to recognise that the consequences befalling an unlawful non-citizen whom the Executive cannot quickly remove from Australia fall on that person because otherwise he or she will gain the entry to the Australian community which the Executive has decided should not be granted.

263 But at its root, the answer made to the contention that the laws now in question contravene Ch III is that they are *not* punitive. It is necessary to explain why that is so.

"Punishment" and judicial power

264 Because Immigration Detention Centres are places of confinement having many, if not all, of the physical features and administrative arrangements commonly found in prisons, it is easy to equate confinement in such a place with punishment. It is necessary, however, to notice some further matters.

265 Punishment exacted in the exercise of judicial power is punishment *for* identified and articulated wrongdoing. H L A Hart identified the standard or central case of punishment in terms of five elements[315]:

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315 Hart, *Punishment and Responsibility*, (1968) at 4-5.

> "(i) It must involve pain or other consequences normally considered unpleasant.
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> (ii) It must be for an offence against legal rules.
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> (iii) It must be of an actual or supposed offender for his offence.
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> (iv) It must be intentionally administered by human beings other than the offender.
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> (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed."

That is not to say, of course, that it may not be appropriate to identify treatment of persons as punitive where those persons are not offenders[316]. But punishment is not to be inflicted in exercise of the judicial power except upon proof of commission of an offence.

266 Two features of the immigration detention for which the *Migration Act* now provides, and which have been identified earlier in these reasons, are then important. First, immigration detention is not detention for an offence. There is now no offence of entering or being found within Australia as a prohibited immigrant. Yet the law permitting detention otherwise than for an offence is a law with respect to a head of power. Secondly, where a non-citizen has entered or attempted to enter Australia without a visa, detention of that person excludes that person from the community which he or she sought to enter. Only in the most general sense would it be said that *preventing* a non-citizen making landfall in Australia is punitive. Segregating those who make landfall, without permission to do so, is not readily seen as bearing a substantially different character. Yet the argument alleging invalidity would suggest that deprivation of freedom will *after a time* or in some circumstances *become* punitive.

267 Only if it is said that there is an immunity from detention does it become right to equate detention with punishment that can validly be exacted only in exercise of the judicial power. Once it is accepted, as it was by all members of the Court in *Chu Kheng Lim*, that there can be detention of unlawful non-citizens for some purposes, the argument from the existence of an immunity must accept that the immunity is not unqualified. The argument must then turn to the identification of those qualifications. That must be done by reference to the purpose of the detention. Neither the bare fact of detention nor the effluxion of some predetermined period of time in detention is said to suffice to engage Ch III. And because the purposes must be gleaned from the content of the heads

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316 Hart, *Punishment and Responsibility*, (1968) at 5.

of power which support the law, it is critical to recognise that those heads of power would support a law directed to excluding a non-citizen from the Australian community, by preventing entry to Australia or, after entry, by segregating that person from the community.

268 It is essential to confront the contention that, because the time at which detention will end cannot be predicted, its indefinite duration (even, so it is said, for the life of the detainee) is or will become punitive. The answer to that is simple but must be made. If that is the result, it comes about because the non-citizen came to or remained in this country without permission. The removal of an unlawful non-citizen from Australia then depends upon the willingness of some other country to receive that person. If the unlawful non-citizen is stateless, as is Mr Al-Kateb, there is no nation state which Australia may ask to receive its citizen. And if Australia is unwilling to extend refuge to those who have no country of nationality to which they may look both for protection and a home, the continued exclusion of such persons from the Australian community in accordance with the regime established by the *Migration Act* does not impinge upon the separation of powers required by the Constitution.

269 As Judge Learned Hand said in his dissenting opinion in *United States v Shaughnessy*[317]:

> "An alien, who comes to our shores and the ship which bears him, take the chance that he may not be allowed to land. If that chance turns against them, both know, or, if they do not, they are charged with knowledge, that, since the alien cannot land, he must find an asylum elsewhere; or, like the Flying Dutchman, forever sail the seas. When at his urgence we do let him go ashore – *pendente lite* so to say – we may give him whatever harborage we choose, until he finds shelter elsewhere if he can."

(The decision of the Second Circuit Court of Appeals, from which Judge Hand dissented, was reversed by the Supreme Court of the United States[318].) To adopt and adapt what Judge Hand said in that case[319]:

> "Think what one may of a statute ... when passed by a society which professes to put its faith in [freedom], a court has no warrant for refusing to enforce it. If that society chooses to flinch when its principles are put to the test, courts are not set up to give it derring-do."

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317 195 F 2d 964 at 971 (2nd Cir 1952).

318 *Shaughnessy v Mezei* 345 US 206 (1953).

319 195 F 2d 964 at 971 (2nd Cir 1952).

270 The appeal should be dismissed. Consistent with the terms on which the matter was removed into this Court, the Commonwealth should pay the appellant's costs in this Court.

271 CALLINAN J. This appeal raises a question as to the legality of the appellant's detention in immigration detention for an indefinite period but for the purpose of his deportation. These reasons should be read with the reasons in *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*[320] and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*[321].

Facts

272 The appellant claims to be a stateless Palestinian born on 29 July 1976 in Kuwait. His parents are Palestinian and he has lived most of his life in Kuwait except for a brief period of residence in Jordan. He arrived in Australia in mid-December 2000. He said that he did not possess a passport. He was placed in immigration detention pursuant to s 189 of the *Migration Act* 1958 (Cth) ("the Migration Act").

273 The appellant made an application for a protection visa to the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") on 6 January 2001. On 22 February 2001, a delegate of the Minister for the Department refused the application. The appellant then applied for a review of the decision of the delegate to the Refugee Review Tribunal ("the Tribunal").

274 The Tribunal affirmed the decision of the delegate. On 6 June 2001, the appellant applied for judicial review of the Tribunal's decision before the Federal Court. The application was dismissed by the Federal Court on 23 October 2001. He then appealed to the Full Court of the Federal Court. That Court dismissed the appeal on 21 May 2002.

275 On 19 June 2002 the appellant told the Department that he wished to leave Australia and return to Kuwait, or if not there, Gaza. On 30 August 2002, he signed a document addressed to the Minister asking to be removed from Australia as soon as reasonably practicable.

276 His next recourse to litigation was by proceedings in the Federal Court for judicial review of the continuation of his detention on 8 January 2003. This matter was, with others, heard by Selway J who dismissed the application[322]. An appeal to the Full Court of the Federal Court has been filed but not heard.

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320 [2004] HCA 36.

321 [2004] HCA 38.

322 *SHDB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 30.

277 The appellant's litigious endeavours were pursued in yet another way. He lodged a further application to the Federal Court on 12 February 2003 seeking a declaration that he was being unlawfully detained, consequential relief by way of habeas corpus, an order in the nature of mandamus directing the first and second respondents, officers of the Department, to remove him from Australia, an order in the nature of mandamus directing the second respondent to make certain inquiries, an order in the nature of prohibition against the third respondent, the Minister, to prohibit the appellant's retention in detention, and an order for costs, on the ground that his detention (from which he has now been released) was unlawful.

278 On 3 April 2003 the Federal Court (von Doussa J) dismissed the application after hearing evidence from the second respondent. His Honour was not satisfied that the Department was not taking all reasonable steps to secure the removal of the appellant from Australia, although he found that the appellant's removal from Australia was:

> "not reasonably practicable at the present time as there is no real likelihood or prospect of removal in the reasonably foreseeable future."

279 His Honour expressly declined to follow the decision of Merkel J in the case of *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs*[323] which subsequently the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*[324] held to be correct.

280 On 17 April 2003 the appellant applied for an interlocutory order for his release from immigration detention on conditions. He was then released from immigration detention pursuant to an interlocutory order of Mansfield J made on that day. The appellant is living in South Australia and is complying with the conditions to which I have referred.

281 On 23 April 2003, he appealed against the decision of von Doussa J. In July 2003 the appellant was served with a notice under s 40 of the *Judiciary Act* 1903 (Cth) to remove the appeal against the decision of von Doussa J into this Court.

282 The matter therefore comes before this Court as an appeal to the Full Court of the Federal Court removed under s 40 of the *Judiciary Act* to be heard

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323 (2002) 192 ALR 609.

324 (2003) 126 FCR 54.

and determined, effectively as an appeal to this Court. It was argued at the same time as *Behrooz* and *Al Khafaji*. The cases raise the same or some related questions, although this appellant submits that he is in a superior position because he has the advantage of the finding of von Doussa J to which I have referred as to the slightness in fact of his currently foreseeable prospects of removal.

283 The appellant pressed this Court to adopt the approach of the United States Supreme Court in *Zadvydas v Davis*[325] in which the majority, Breyer, Stevens, O'Connor, Souter and Ginsburg JJ, applying the Fifth Amendment[326], held the relevant statute there to be subject to a qualification that it did not permit indefinite detention. The conclusion of the majority is stated in this passage[327]:

> "While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. … Consequently, for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."

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325 533 US 678 (2001).

326 "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

327 533 US 678 at 701 (2001).

284 Not only because of the absence of the complication of a constitutional provision in Australia such as the Fifth Amendment, but also because, in my respectful opinion, they were both more orthodox expressions of constitutional principle and practical reality, I would prefer the opinions of the minority Justices. Scalia J (with whom Thomas J joined) said this[328]:

> "Like a criminal alien under final order of removal, an inadmissible alien at the border has no right to be in the United States. … In *Shaughnessy v United States ex rel Mezei*[329], we upheld potentially indefinite detention of such an inadmissible alien whom the Government was unable to return anywhere else. We said that 'we [did] not think that respondent's continued exclusion deprives him of any statutory or constitutional right.'[330] While four Members of the Court thought that Mezei deserved greater procedural protections (the Attorney General had refused to divulge any information as to why Mezei was being detained[331]), no Justice asserted that Mezei had a substantive constitutional right to release into this country. And Justice Jackson's dissent, joined by Justice Frankfurter, affirmatively asserted the opposite, with no contradiction from the Court: 'Due process does not invest any alien with a right to enter the United States, *nor confer on those admitted the right to remain against the national will*. Nothing in the Constitution requires admission *or sufferance* of aliens hostile to our scheme of government.'[332] Insofar as a claimed legal right to release into this country is concerned, an alien under final order of removal stands on an equal footing with an inadmissible alien at the threshold of entry: He has no such right.
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> We are offered no justification why an alien under a valid and final order of removal – which has *totally extinguished* whatever right to presence in this country he possessed – has any greater due process right to be released into the country than an alien at the border seeking entry. Congress undoubtedly thought that both groups of aliens – inadmissible aliens at the threshold and criminal aliens under final order of removal – could be constitutionally detained on the same terms, since it provided the

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328 533 US 678 at 703-705 (2001).

329 345 US 206 (1953).

330 345 US 206 at 215 (1953).

331 345 US 206 at 209 (1953).

332 345 US 206 at 222-223 (1953) (emphasis added by Scalia J).

> authority to detain both groups in the very same statutory provision ... Because I believe *Mezei* controls these cases, and, like the Court, I also see no reason to reconsider *Mezei*, I find no constitutional impediment to the discretion Congress gave to the Attorney General. Justice Kennedy's dissent explains the clarity of the detention provision, and I see no obstacle to following the statute's plain meaning." (original emphasis)

285 Kennedy J, with whom Rehnquist CJ joined, and with whom Scalia J and Thomas J joined as to the second and third of the paragraphs reproduced below, said this[333]:

> "The Court says its duty is to avoid a constitutional question. It deems the duty performed by interpreting a statute in obvious disregard of congressional intent; curing the resulting gap by writing a statutory amendment of its own; committing its own grave constitutional error by arrogating to the Judicial Branch the power to summon high officers of the Executive to assess their progress in conducting some of the Nation's most sensitive negotiations with foreign powers; and then likely releasing into our general population at least hundreds of removable or inadmissible aliens who have been found by fair procedures to be flight risks, dangers to the community, or both. Far from avoiding a constitutional question, the Court's ruling causes systemic dislocation in the balance of powers, thus raising serious constitutional concerns not just for the cases at hand but for the Court's own view of its proper authority. Any supposed respect the Court seeks in not reaching the constitutional question is outweighed by the intrusive and erroneous exercise of its own powers. In the guise of judicial restraint the Court ought not to intrude upon the other branches. The constitutional question the statute presents, it must be acknowledged, may be a significant one in some later case; but it ought not to drive us to an incorrect interpretation of the statute. The Court having reached the wrong result for the wrong reason, this respectful dissent is required.
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> The 6-month period invented by the Court, even when modified by its sliding standard of reasonableness for certain repatriation negotiations … makes the statutory purpose to protect the community ineffective. The risk to the community exists whether or not the repatriation negotiations have some end in sight; in fact, when the negotiations end, the risk may be greater. The authority to detain beyond the removal period is to protect the community, not to negotiate the aliens' return. The risk to the community survives repatriation negotiations. To a more limited, but still

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333 533 US 678 at 705-712 (2001).

> significant, extent, so does the concern with flight. It is a fact of international diplomacy that governments and their policies change; and if repatriation efforts can be revived, the Attorney General has an interest in ensuring the alien can report so the removal process can begin again.
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> ...
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> The majority's interpretation, moreover, defeats the very repatriation goal in which it professes such interest. The Court rushes to substitute a judicial judgment for the Executive's discretion and authority. As the Government represents to us, judicial orders requiring release of removable aliens, even on a temporary basis, have the potential to undermine the obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters. … The result of the Court's rule is that, by refusing to accept repatriation of their own nationals, other countries can effect the release of these individuals back into the American community. … If their own nationals are now at large in the United States, the nation of origin may ignore or disclaim responsibility to accept their return. … The interference with sensitive foreign relations becomes even more acute where hostility or tension characterizes the relationship, for other countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us. One of the more alarming aspects of the Court's new venture into foreign affairs management is the suggestion that the district court can expand or contract the reasonable period of detention based on its own assessment of the course of negotiations with foreign powers. The Court says it will allow the Executive to perform its duties on its own for six months; after that, foreign relations go into judicially supervised receivership."

286 It follows that I would reject the submission of the appellant that this Court should regard the period of 273 days referred to in s 182 of the Migration Act and discussed in *Chu Kheng Lim v Minister for Immigration*[334], or any other arbitrarily fixed period, in the same way as the majority in the Supreme Court of the United States did six months, in *Zadvydas*, as the outer limit of any reasonable period of detention for the purposes of deportation.

287 It was not, and could not be contested that detention for purposes other than punitive ones has been traditionally constitutionally acceptable. *Lim*[335] itself acknowledges that. Examples are arrest and detention pending trial, detention of the mentally ill or infectiously diseased, and for the welfare and protection of

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334 (1992) 176 CLR 1.

335 (1992) 176 CLR 1 at 25-26.

persons endangered for various reasons. Here the appellant accepts that the power to detain exists in respect of him but contends that it cannot be exercised for too long, indefinitely, or indeed unless the respondents can demonstrate that within some relatively brief period, a country which will receive him has been, or will be found. Whatever may be said about its limits, the existence of the power to detain was not and could not be denied[336].

288 *Koon Wing Lau v Calwell*[337] was also referred to by the appellant in argument, especially the passage in which Dixon J, after referring to "purpose [of detention]" said that "unless within a reasonable time [the detainee] is placed on board a vessel he would be entitled to his discharge on habeas."[338] There, his Honour was not discussing the ambit of the constitutional power with respect to aliens but was construing the language of the enactment as it was at that time. The statement was also made in an entirely different situation, in which immediate deportation was feasible.

289 I do not need to decide, but would not necessarily accept that detention for the purpose of deporting an alien is the only purpose which may be effected under the aliens power. It may be the case that detention for the purpose of preventing aliens from entering the general community, working, or otherwise enjoying the benefits that Australian citizens enjoy is constitutionally acceptable. If it were otherwise, aliens having exhausted their rights to seek and obtain protection as non-citizens would be able to become de facto citizens. It is also important to keep in mind the related fact that the appellant, having been shown not to qualify as a refugee, has no particular rights under the United Nations Convention relating to the Status of Refugees except perhaps under Art 32(1)[339], and only then to the extent if any that s 36 of the Act does not provide otherwise, and the relevant person is lawfully present. Another practical consideration is that by their manner of entry[340], repetitive unsuccessful applications and litigation founded on unsubstantiated claims, or, if and when it occurs, escape from immigration detention, some aliens may attract so much notoriety that other countries will hesitate or refuse to receive them. In those ways they may

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336 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162 per Gummow J.

337 (1949) 80 CLR 533.

338 (1949) 80 CLR 533 at 581.

339 "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

340 For example, by using false papers or making false statements, an offence under s 234 of the Migration Act.

personally create the conditions compelling their detention for prolonged periods. And, so far as conditions are concerned, aliens entering this country should be taken to know and accept, to adopt the language of Griffith CJ in *Robtelmes v Brenan*[341], "as a term of … admission to [it]" that restraint to the extent necessary to enable deportation to be effected as and when it can be, may be imposed upon them if they are not qualified for refugee status.

290 Sections 196(1) and 198 of the Act in particular are not expressed in unqualified language. The latter requires the relevant official to remove as soon as reasonably practicable. It does not follow that the presence of Ch III in the Constitution produces the result that a court must or may examine in every case to which those sections apply, what the chances are of the removal of the alien concerned, and if they are not likely to be realized, and realized within some arbitrary period effectively legislatively fixed by the court, the alien cannot be detained. Such a conclusion is not dictated by *Lim*. Even if the purpose of deportation appears unlikely to be achievable within a foreseeable period it does not mean that the purpose of detention is not still being sought to be, and cannot be, implemented at some time. Who knows, as Kennedy J in *Zadvydas* points out[342], what the outcome of sensitive negotiations between governments taking place from time to time may be. So too, conditions and attitudes may change rapidly or unexpectedly in those countries which an alien has left or which may formerly have rejected him or her.

291 Detention of aliens, certainly for the purpose of deportation, clearly falls within the exception traditionally and rightly recognised as being detention otherwise than of a punitive kind[343]. It would only be if the respondents formally and unequivocally abandoned that purpose that the detention could be regarded as being no longer for that purpose. It may be that detention for some other purpose under the aliens or indeed the immigration power would be constitutionally possible, but no question of that arises here[344]. It may be that

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341 (1906) 4 CLR 395 at 406-407.

342 533 US 678 at 708-709 (2001).

343 cf *Kruger v The Commonwealth* (1997) 190 CLR 1 at 110-111 per Gaudron J.

344 In the second reading speech for the Migration Amendment (Duration of Detention) Bill 2003 the responsible Minister referred to the serious risk to the country of some aliens within it. He said:

> "Such orders mean that a person must be released into the community until such time as the court finally determines their application. The court's final determination of the case can take anywhere between several weeks and several months. Where the person is subsequently unsuccessful, that

(Footnote continues on next page)

legislation for detention to deter entry by persons without any valid claims to entry either as a punishment[345] or a deterrent would be permissible, bearing in mind that a penalty imposed as a deterrent or as a disciplinary measure is not always to be regarded as punishment imposable only by a court[346]. Deterrence may be an end in itself unrelated to a criminal sanction or a punishment. Deterrence can, for example, be an end of the law of tort. Another way of viewing the provisions for detention may simply be as "[prescriptions of] the conditions upon which persons may remain ... within [the] Commonwealth" as an aspect of the "power to regulate immigration by Statute."[347]

292 On their proper construction the sections under consideration do not give rise to a kind of implied temporal limitation or qualification, or provide a licence to rewrite the statutory language. What has already been said about the difficulties necessarily attendant upon unlawful entry, changing attitudes in other countries, and international negotiations, shows that accurate predictions as to the period of immigration detention are simply not possible. The fact that the time cannot be stated in days or months does not mean that the word "until" in s 196(1) should be read as extending, for example, to "until removal or the expiry of 12 months, whichever first occurs", and nor does it mean that those words should be substituted for "as soon as reasonably practicable".

293 I return to *Koon Wing Lau* and *Lim*. In the former the statutory language did not contain the words "reasonably practicable", an expression which is directed to, and indicates that the legislature has had regard to contemporary realities, that time, perhaps much, and indefinable time may pass between what is

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> person must be relocated, redetained and arrangements then made for their removal from Australia. This is a time consuming and costly process and can further delay removal from Australia.
>
> I understand that there have now been some 20 persons released from immigration detention on the basis of interlocutory orders. In the case of more than half of these persons removal action had been commenced, as they are of significant character concern, and the government believes their presence is a serious risk to the Australian community."

Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 June 2003 at 16774.

345 See the discussion by Hayne J of earlier punitive provisions relating to unlawful entrants at [201]-[202].

346 cf *R v White; Ex parte Byrnes* (1963) 109 CLR 665 at 670-671.

347 See *Robtelmes v Brenan* (1906) 4 CLR 395 at 415 per Barton J.

intended, and what in practice may happen. That is sufficient to distinguish this case from *Koon Wing Lau*.

294 In their joint judgment in *Lim*, Brennan, Deane and Dawson JJ acknowledged the breadth of the aliens power as well as the lawfulness of detention for purposes other than punitive ones[348]. In particular it was accepted there that the Parliament might make laws reasonably capable of being seen as necessary for the purposes of deportation[349]. The yardstick, and with respect rightly so, was "purpose", the existence, that is the continuing existence of the relevant purpose of deportation. Nothing that was said in relation to the intrusion upon judicial power by the enactment of another provision directed to a different end alters or diminishes that.

295 The finding that the prospects of this appellant's removal are currently slight does not in my opinion place this appellant in any relevantly special position. Von Doussa J did not indicate, indeed as a practical matter it would probably not be possible for him to do so, what could or should be regarded as a reasonable period in respect of which predictions might safely be made. The fact that deportation may not be imminent, or even that no current prediction as to a date and place of it can be made, does not mean that the purpose of the detention, deportation, has been or should be regarded as abandoned. The sensitivity of international relations, the unsettled political situation in many countries, and the role and capacity of the United Nations, all contribute to the inevitable uncertainties attaching to the identification of national refuges for people who have come to this country unlawfully and who have been shown to be people to whom protection obligations are not owed. I would not import into ss 189 and 198 of the Migration Act an implication that the obligation of an officer to detain an illegal entrant ceases, or may cease, and is not to be enforced simply because it is proving, and may well prove, for some indefinite time, to be difficult to find a country that will receive him. The words "as soon as reasonably practicable" in s 198 of the Migration Act are intended to ensure that all reasonable means are employed to remove an illegal entrant, and not to define a period or event beyond which his detention should be deemed to be unlawful.

296 The appellant submits that Parliament could not have intended to legislate for indeterminate detention, and argues that support for this proposition is to be found in cases in the United Kingdom such as *R v Governor of Durham Prison; Ex parte Hardial Singh*[350]. In that case the Court held that there was an implied

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348 (1992) 176 CLR 1 at 25-26, 28-29, 33.

349 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 33.

350 [1984] 1 WLR 704; [1984] 1 All ER 983.

limitation on a statutory provision allowing detention of aliens for the purposes of removal. If it was not possible to remove the person within a reasonable period, continued detention was not authorised by the legislation. The approach in *Hardial Singh* was affirmed by the House of Lords in *R (Saadi) v Secretary of State for the Home Department*[351]. The appellant also cited the decision of the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre*[352] in which it was held that a statutory power to detain aliens pending removal from Hong Kong was subject to an implied limitation that if removal were not possible within a reasonable time, continuing detention would be unlawful. To the extent that these cases might have application in the different Australian context of an explicit written constitution I would not, with respect, be inclined to adopt them here.

297 The appellant also submits that the intent of Parliament should be interpreted by this Court in a manner that is consistent with Australia's "international obligations": that is, Parliament should be assumed to have intended that any provisions for detention in the Migration Act comply with Art 9 of the International Covenant on Civil and Political Rights which admonishes against "arbitrary detention".

298 These submissions cannot be accepted. The statutory language is clear and unambiguous. It leaves no room for any implications of the kind found by the House of Lords and the Privy Council. It requires the detention of aliens until such time as they are granted a visa or removed from Australia. There is certainly no basis, in my view, for an implication to the effect that the ability to detain aliens in accordance with the Migration Act is limited to detention for a "reasonable" period. Nor is a presumption, assuming it should be made, against legislation that is contrary to an international obligation, sufficient to displace the clear and unambiguous words of Parliament. It is a matter for the Australian Parliament to determine the basis on which illegal entrants are to be detained. So long as the purpose of detention has not been abandoned, a statutory purpose it may be observed that is clearly within a constitutional head of power, it is the obligation of the courts to ensure that any detention for that purpose is neither obstructed nor frustrated.

299 The test is not whether the Minister harbours a hope, but whether she continues to have the intention of removing the appellant from the country. General experience may well be, it is not clear whether it is so from the evidence here, that a very great deal of time can elapse before, not only stateless persons, but also others can be removed to another country. But that does not mean that a

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351 [2002] 1 WLR 3131; [2002] 4 All ER 785.

352 [1997] AC 97.

court is entitled to hold that a person who has no right to enter and reside in the community must be released into it. Nor is it open to a court to hold, in respect of a matter of this kind, that because removal is currently unachievable, it should be treated for all practical purposes as permanently unachievable.

300 The decision and reasoning of Merkel J in *Al Masri* should be rejected. Similarly, the reasoning in the other cases in which *Al Masri* has been adopted or affirmed by the Federal Court is also flawed and should be rejected[353].

301 The fact that the appellant is stateless does not alter the position. A consequence of it is, self-evidently, that it will be difficult to find a country to which he can be removed, but that does not mean that attempts, or an intention to do so may be regarded as abandoned. This country has no greater obligation to receive stateless persons who cannot establish their entitlement to the status of refugee, than others who are not stateless. Under the Migration Act there are not two classes of illegal entrants: those who can be readily and promptly removed from this country because another state is willing to receive them, and others, who, on account of statelessness or otherwise, may not so readily be found another country of residence. Whether statelessness calls for a different treatment, as it may well do for practical and humanitarian reasons, is a matter for the legislature and not for the courts. Nor should the appellant be accorded any special advantages because he has managed illegally to penetrate the borders of this country over those who have sought to, but have been stopped before they could do so.

302 The appeal should be dismissed. In accordance with the order of this Court on the application to remove the proceedings pursuant to s 40 of the *Judiciary Act*, the respondents should pay the costs of the appellant in this Court.

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353 See *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249.

303 HEYDON J. Subject to reserving any decision about whether s 196 should be interpreted in a manner consistent with treaties to which Australia is a party but which have not been incorporated into Australian law by statutory enactment, I agree with the reasons stated by Hayne J for his conclusion that the continued detention of the appellant is not unlawful and for the orders he proposes.

304 It is therefore not necessary to decide whether, if the appellant's continued detention were unlawful, any conditions could be imposed on his release.