HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

PLAINTIFF M76/2013 PLAINTIFF

AND

MINISTER FOR IMMIGRATION,
MULTICULTURAL AFFAIRS AND CITIZENSHIP
& ORS DEFENDANTS

Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship
[2013] HCA 53
12 December 2013
M76/2013

ORDER

The questions asked by the parties in the amended Special Case dated 13 August 2013 and referred for consideration by the Full Court be answered as follows:

Question 1

Do ss 189, 196 and 198 of the Migration Act *1958 (Cth) authorise the detention of the Plaintiff?*

Answer

The plaintiff's present detention is authorised by ss 189 and 196 of the Act.

Question 2

If the answer to question 1 is "yes", are these provisions beyond the legislative power of the Commonwealth insofar as they apply to the Plaintiff?

Answer

Save that the plaintiff's present detention is validly authorised by ss 189 and 196 of the Act, it is not necessary to answer this question.

Question 3

Does the fact that the Plaintiff's case was not referred to the Minister for him to consider whether to exercise his power under s 46A(2) reveal an error of law?

Answer

Yes.

Question 4

What relief, if any, should issue?

Answer

It should be declared that the exercise of the Minister's power was affected by an error of law in that, in deciding whether to refer the plaintiff's application to the Minister, an officer of the Commonwealth acted upon PIC 4002 as a consideration relevant to the decision.

Question 5

Who should pay the costs of and incidental to this Special Case?

Answer

The defendants.

Representation

R M Niall SC with K L Walker, C L Lenehan and A Rao for the plaintiff (instructed by Allens)

J T Gleeson SC, Solicitor-General of the Commonwealth and S P Donaghue SC with N M Wood for the defendants (instructed by Australian Government Solicitor)

CATCHWORDS

Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship

Migration – Refugees – Protection visas – Offshore entry persons – Power of Minister to permit valid application for protection visa – Plaintiff assessed to be refugee – Plaintiff subject of adverse security assessment by Australian Security Intelligence Organisation – Minister's department did not refer plaintiff's case for Minister's consideration – Minister's department acted upon invalid regulation – Whether Minister's exercise of power attended by error of law.

Migration – Unlawful non-citizens – Immigration detention pending removal from Australia – Minister's consideration of whether to permit plaintiff to make valid application for visa not completed – Not established that no realistic prospect of removal from Australia in reasonably foreseeable future – Whether appropriate to re-open *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37 – Whether plaintiff's detention authorised.

Administrative law – Non-compellable power – Remedies – Declaration – Plaintiff has real interest in raising question of error – Whether declaration appropriate remedy.

Words and phrases – "adverse security assessment", "declaration", "error of law", "executive detention", "harmless error", "lift the bar", "real interest".

Migration Act 1958 (Cth), ss 46A(2), 189, 196, 198.
Migration Regulations 1994 (Cth), Sched 2, cl 866.225(a), Sched 4, cl 4002.

FRENCH CJ.

Introduction

1 In 2008, the Minister for Immigration and Citizenship established a Refugee Status Assessment ("RSA") process for the assessment of claims for protection under the Refugees Convention as amended by the Refugees Protocol[1] ("the Refugees Convention") by persons known as "offshore entry persons" who had arrived by boat in Australia without a visa. As this Court held in *Plaintiff M61/2010E v The Commonwealth* (*Offshore Processing Case*)[2], the detention of such persons while their claims were being assessed was lawful because the assessment in legal effect informed a statutory process under which the Minister considered whether or not to decide to allow such persons to make applications for protection visas. Applications for such visas by offshore entry persons were otherwise barred by s 46A(1) of the *Migration Act* 1958 (Cth) ("the Act").

2 This Special Case concerns a plaintiff who was found to be a refugee under the RSA process, but was the subject of an adverse security assessment by the Australian Security Intelligence Organisation ("ASIO"). That assessment was made on the assumption that, if the plaintiff were permitted to apply for a protection visa, it would be a necessary condition of the grant of such a visa, pursuant to public interest criterion 4002 ("PIC 4002"), set out in the Migration Regulations 1994, that she not be the subject of an adverse security assessment. That public interest criterion was subsequently found by this Court in *Plaintiff M47/2012 v Director-General of Security*[3] to be invalid.

3 Officers of the Department of Immigration and Citizenship, acting on ministerial guidelines, and having regard to the adverse security assessment, did not refer the plaintiff's case to the Minister for a decision on whether to allow her to apply for a protection visa. Acknowledging that the plaintiff could not be returned to her country of origin — where, as had been found, she would face persecution on Convention grounds — the Department approached a number of other countries to accept her for resettlement. Those approaches were unsuccessful. The plaintiff asserts error in the Department's reliance upon the adverse security assessment and challenges the lawfulness of her continuing detention.

---

1 The "Refugees Convention" means the Convention Relating to the Status of Refugees (1951); the "Refugees Protocol" means the Protocol Relating to the Status of Refugees (1967).

2 (2010) 243 CLR 319; [2010] HCA 41.

3 (2012) 86 ALJR 1372; 292 ALR 243; [2012] HCA 46.

4 For the reasons that follow, the decision by the Department not to refer to the Minister the plaintiff's request to be allowed to apply for a protection visa was informed by error. Nevertheless, her continuing detention is lawful. The Minister has not yet made a determination whether or not to allow the plaintiff to apply for a visa. If a decision is made not to allow her to apply, the question whether she can be detained indefinitely thereafter, where there is no other country to which she can be sent, may arise. It has not arisen yet. The occasion is not one which warrants consideration of the correctness of the decision of this Court in *Al-Kateb v Godwin*[4]. The questions raised in the Special Case should be answered accordingly and a declaration made as proposed in the joint reasons of Crennan, Bell and Gageler JJ[5].

Factual and procedural background

5 On 8 May 2010, the plaintiff, a national of Sri Lanka, entered Australia without a visa at Christmas Island, which was designated under the Act as an "excised offshore place"[6]. Having entered without a visa she was an "unlawful non-citizen" within the meaning of the Act[7]. Being an unlawful non-citizen who had entered Australia at an excised offshore place, she was also an "offshore entry person"[8]. Because she was an unlawful non-citizen, the plaintiff was taken into immigration detention pursuant to s 189 of the Act.

6 The plaintiff claimed at all times to have had a well-founded fear of persecution in Sri Lanka by reason of her race or political opinion. However, because she was an offshore entry person who was in Australia and was an unlawful non-citizen, s 46A(1) of the Act had the effect that an application by her for a visa would not be a valid application. On 27 July 2010, the plaintiff claimed protection as a refugee. She was interviewed by an officer of the Department on 30 July 2010. That interview commenced the RSA process conducted under ministerial guidelines. The nature of the RSA process was described in the *Offshore Processing Case*. Its purpose was to enable the Minister to consider whether to determine, pursuant to s 46A(2) of the Act, if he thought it in the public interest to do so, that the barring provision in s 46A(1) would not apply to an application by the plaintiff for a visa. Section 46A(7) provided that the Minister was not under a duty to consider whether to exercise

---

4 (2004) 219 CLR 562; [2004] HCA 37.

5 Reasons of Crennan, Bell and Gageler JJ at [150].

6 Act, s 5(1), definition of "excised offshore place".

7 Act, s 14.

8 Act, s 5(1), definition of "offshore entry person".

his power under s 46A(2)[9]. However, as this Court held in the *Offshore Processing Case*, the establishment and conduct of the RSA process reflected a ministerial decision to consider exercising the power under s 46A(2) in every case in which an offshore entry person claimed to be a person to whom Australia owed protection obligations[10].

7 On or about 12 September 2011, the plaintiff was found by a delegate of the Minister to be a person to whom Australia owed protection obligations under the Refugees Convention within the meaning of s 36(2)(a) of the Act.

8 In a response dated 10 March 2009 to a departmental submission concerning the application of s 46A(2) to a group of offshore entry persons, the Minister had directed that health, identity and security checks of an offshore entry person should "be completed prior to release from detention." The Minister added:

> "Unless there are extenuating or special circumstances those requirements should be applied before seek bar to be lifted under Sect 46A(2)."

The term "release from detention" was not apposite. "Release from detention" was not a legal consequence of a referral to the Minister of a request that he exercise his power under s 46A(2). It may be that its use was an elliptical reference to the stage at which a person lodged a valid application for a protection visa following a decision by the Minister to allow such an application to be made. Once a visa was issued, release from immigration detention would ordinarily follow.

9 On 12 September 2011, the Department completed its inquiries as to whether the plaintiff was a refugee and concluded that she was a person to whom Australia owed protection obligations under the Refugees Convention. The plaintiff was interviewed by ASIO on 8 December 2011 for the purpose of conducting a security assessment.

10 On 24 March 2012, the Minister issued further guidelines on ministerial interventions under s 46A(2). In s 10 of the guidelines under the heading "CASES NOT TO BE REFERRED FOR MY CONSIDERATION", the Minister, referring to offshore entry persons as "OEPs", stated:

---

9 Section 46A(7) was in a form found in a number of provisions of the Act providing for non-compellable dispensing powers and considered in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636; [2012] HCA 31.

10 (2010) 243 CLR 319 at 350–351 [70]–[71].

> "For OEPs who have undertaken a Refugee Status Assessment (RSA) or POE interview prior to the transition to a single PV process on 24 March 2012 ... and in relation to whom the following circumstances apply, their case should not be referred for my consideration:
>
> ...
>
> • where my department has conducted an assessment or has accepted an assessment made by an independent merits reviewer, which has found that an OEP engages Australia's protection as provided for under s36(2) of the Act and the OEP does not appear to satisfy or is awaiting to satisfy the relevant Public Interest Criteria for the grant of a PV.
>
> For all OEPs (regardless of their date of arrival) to whom the following circumstances apply, their case should not be referred for my consideration:
>
> ...
>
> • where an OEP has been found to engage Australia's protection as provided for in s36(2) of the Act but has received an adverse security assessment".

PIC 4002, which was among the public interest criteria referred to in the ministerial guidelines, was specified in the Migration Regulations as a primary criterion which must be satisfied for the grant of a protection visa[11]. It required that:

> "The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*."

That criterion was subsequently held by this Court in *Plaintiff M47* to be an invalid exercise of the regulation-making power. Judgment in *Plaintiff M47* was delivered on 5 October 2012.

11 In April 2012, the plaintiff was advised by the Department that ASIO had assessed her to be directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act* 1979 (Cth). On that basis it was said that she did not satisfy PIC 4002. For that reason her case was not referred to the Minister for consideration of a determination under s 46A(2)

---

11 Migration Regulations, Sched 2, cl 866.225.

on whether she should be permitted to make a valid application for a protection visa. As a result of the adverse security assessment, no consideration is presently being given to the making of a determination under s 46A(2) or otherwise granting a visa to the plaintiff.

12 The plaintiff had been taken into immigration detention upon her arrival on Christmas Island in May 2010. She had her then two young sons with her. In March 2011, the Minister made a residence determination pursuant to s 197AB of the Act permitting her and her sons to reside in so-called "community detention". Under that determination they could move freely in the community. However, the plaintiff was required to report to the Department regularly and to accept visits at her residence, scheduled and unscheduled, from departmental staff. She moved into the specified residence on or about 8 April 2011. On 23 March 2012, she and her then two sons were transferred to the address of her then de facto spouse, who is now her husband, in Melbourne. He is a national of Sri Lanka who was granted a protection visa on 3 July 2012 and became an Australian permanent resident. The plaintiff and her husband married under Australian law on 18 October 2012. Their son, who is now the plaintiff's youngest child, was born on 15 January 2013 and is an Australian citizen.

13 In May 2012, the Minister revoked the plaintiff's residence determination and she and her then two sons were transferred to Sydney Immigration Residential Housing at Villawood, where she is presently detained. Her placement in that residential housing facility is a species of "immigration detention" as placement in "another place approved by the Minister in writing" for the purposes of par (b)(v) of the definition of "immigration detention" in s 5(1) of the Act. Subsequently, the Minister exercised his power under s 46A(2) so that the plaintiff's two eldest children could lodge valid applications for protection visas, which they were granted on 20 June 2013. The plaintiff's three children live as "visitors" at the residential facility. There is no dispute that the plaintiff is in continuing immigration detention.

14 Following the decision of this Court in *Plaintiff M47*, the Commonwealth appointed a retired Federal Court judge as an "Independent Reviewer" to review adverse security assessments made by ASIO in relation to persons who had been found by the Department to be owed protection obligations and who remained in immigration detention. Her terms of reference required the Independent Reviewer to provide an opinion to the Director-General of Security on whether the challenged adverse security assessment was an appropriate outcome based on the material relied upon by ASIO, including any new material which had been referred to ASIO, and to make recommendations for the Director-General's consideration. The Director-General was not obliged by law to consider or otherwise take any steps in response to any such recommendation.

15 The plaintiff applied on 14 December 2012 for a review of the adverse security assessment against her. Having received detailed written submissions

from the plaintiff, followed by an interview and the receipt of supplementary submissions, the Independent Reviewer wrote to the plaintiff on or about 11 June 2013 informing her that, in the Independent Reviewer's opinion, the adverse security assessment was an appropriate outcome. The Independent Reviewer recommended that the assessment be reviewed again in 12 months' time. The Independent Reviewer's decision was not linked to any statutory process. It had no legal consequence or effect. The plaintiff's request to be allowed to apply for a protection visa was not referred to the Minister, so the security assessment was not relied upon for any ministerial decision.

16 The plaintiff has no right to enter and remain in any country other than Sri Lanka. Approaches have been made by the Department, without success, to a number of other countries seeking their assistance to resettle persons from the adverse security assessment cohort, of which the plaintiff is one. The Department considers that in the absence of a change in circumstances, further approaches to the countries already approached or other countries are unlikely to result in them accepting the plaintiff for resettlement. The Department intends to keep the plaintiff's case under review with a view to approaching resettlement countries should there be a change in circumstances that would make such an approach appropriate.

17 In July 2013, a departmental officer sent a letter to the plaintiff's legal advisers requesting that she provide details of relatives which she had said were living in India and another country so the Department could explore the option of third country resettlement with them. Her legal representatives informed the Department on 25 July 2013 that her mother and two brothers are living as refugees in India, do not have permanent residency and have no right to sponsor a family member to join them. Her father had moved back to Sri Lanka. Moreover, the legal advisers informed the Department that India will not accept a refugee who has received an adverse security assessment.

18 The plaintiff commenced proceedings in this Court on 5 July 2013 with an application, which was amended and further amended. In the further amended application, which was filed on 14 August 2013, the plaintiff sought a writ of habeas corpus requiring her release on such conditions as the Court sees fit. She also sought declarations, including a declaration that her detention at Sydney Immigration Residential Housing is unlawful and further declaratory relief.

19 The plaintiff filed a Special Case on 1 August 2013. Hayne J made an order on 2 August 2013 referring the Special Case to a Full Court[12]. The Special Case was subsequently amended to reflect the further amended application. It refers five questions for determination by the Court.

---

12 [2013] HCATrans 162.

The questions for determination

20 The questions in the Special Case are:

(1) Do ss 189, 196 and 198 of the *Migration Act 1958* (Cth) authorise the detention of the Plaintiff?

(2) If the answer to question 1 is "yes", are these provisions beyond the legislative power of the Commonwealth insofar as they apply to the Plaintiff?

(3) Does the fact that the Plaintiff's case was not referred to the Minister for him to consider whether to exercise his power under s 46A(2) reveal an error of law?

(4) What relief, if any, should issue?

(5) Who should pay the costs of and incidental to this Special Case?

Question 3 — the s 46A question

21 It is convenient to consider question 3 first as, for the reasons that follow, the answer to that question effectively determines this Special Case. The legal nature and effect of the RSA process and the ASIO assessment must be identified in determining whether the non-referral of the plaintiff's request to the Minister to consider exercising his power under s 46A(2) was infected by legal error.

22 The first is shortly stated. The RSA process involved a decision by the Minister to consider the exercise of his power under s 46A(2). That process in its application to the plaintiff provided a lawful basis for her continuing detention[13]. The legal nature and effect of the ASIO assessment requires close consideration of the RSA process and the ministerial guidelines.

23 The plaintiff had, in effect, requested the opportunity to apply for a protection visa under s 36 of the Act. The relevant ministerial guidelines were directed to requests for ministerial consideration of the exercise of his power under s 46A(2) of the Act. The question to which the RSA process was directed was whether the criterion stated in s 36(2)(a) as a criterion for the grant of a protection visa was met[14]. That was the question whether the plaintiff was:

---

13 *Offshore Processing Case* (2010) 243 CLR 319 at 348–351 [62]–[71].

14 (2010) 243 CLR 319 at 356 [89].

> "a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol".

The RSA process involved a proleptic application of that criterion to the plaintiff's request as though she had made an application for a protection visa. There were other criteria referred to in the Minister's direction of 10 March 2009, under the general description of health and security checks, which the Minister wanted dealt with before having the matter referred to him for consideration.

24 The defendants, in submissions to this Court, characterised the power conferred on the Minister by s 46A(2) of the Act as involving two distinct steps. The first was a decision whether to consider making a determination. The second was the decision to make or not make a determination. That much is not controversial[15]. The defendants submitted that by reason of s 46A(7) the Minister could terminate the process of consideration at any time. That proposition should not be accepted. Once the Minister has decided to consider whether or not to exercise his power under s 46A(2), he must decide to exercise it or not to exercise it. The defendants also argued that, except for a bad faith limitation, a decision to lift the bar imposed by s 46A(1) was conditioned only upon the Minister's view that it was in the public interest to do so. They submitted that it was open to the Minister to direct the Department to refer a case to him for a possible decision under s 46A(2) only if the person met certain criteria, which need not match the criteria for a visa. That can be done. It was not done in this case. The defendants also submitted that the Department's non-referral of the plaintiff's case accorded with the guidelines issued in 2012. So much may be accepted, but the directions were informed by legal error.

25 That result flows from the decision of this Court in *Plaintiff M47* that PIC 4002 was invalid. The application of the RSA process and the ministerial guidelines, designed as they were to provide a proleptic assessment of the plaintiff's satisfaction of PIC 4002, among other criteria, wrongly assumed its validity.

26 It is not the case that, in considering whether to exercise his power under s 46A(2) in relation to a possible application for a protection visa, the Minister is always required to apply processes of assessment which precisely foreshadow those that would be followed in an application for a protection visa. The determination which the Minister makes under s 46A(2) is made "[i]f the Minister thinks that it is in the public interest to do so". The public interest may allow the Minister to have regard to a range of considerations, consistent with the

---

15 *Offshore Processing Case* (2010) 243 CLR 319 at 350 [70] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

subject matter, scope and purpose of the Act[16]. Those considerations are not limited to the criteria for the grant of the type of visa being sought. However, the Minister has committed himself to a process which foreshadows the process to be followed and the criteria to be applied in determining an application for a protection visa. The plaintiff's continued detention was based upon the need to make relevant inquiries in aid of that process.

27 The Solicitor-General submitted, on behalf of the defendants, that the reference in the March 2012 guidelines to an adverse security assessment indicated both a proleptic application of PIC 4002 and reliance upon an adverse security assessment as a matter informing the public interest, which the Minister would have to consider under s 46A(2). That construction of the guidelines had the character of a reconstruction undertaken in the light of the decision of this Court in *Plaintiff M47*. The Solicitor-General conceded that if the correct construction of the guidelines was that the fact of an adverse security assessment of itself was not a barrier to referral, then there had been an error and what the Department should have done was to refer the matter to the Minister. Nevertheless, it was submitted that the Minister would remain free under s 46A(2) to determine that the existence of the adverse security assessment was a reason against making a determination to allow the plaintiff to apply for a protection visa.

28 The legal consequences for the Minister and for the plaintiff arising out of the application to her of the RSA process, as governed by the ministerial directions and guidelines and the statutory context, may be summarised as follows:

(i) Upon the plaintiff's arrival in Australia as an offshore entry person and an unlawful non-citizen, officers of the Department were required, by s 189 of the Act, to take her into immigration detention.

(ii) Section 198(2) of the Act required officers to remove the plaintiff from Australia as soon as reasonably practicable if she had not made a valid application for a substantive visa or had made a valid application that had finally been adversely determined.

(iii) By virtue of s 46A(1), the plaintiff was unable to make a valid application for a substantive visa. Absent any claim to engage protection obligations under the Refugees Convention, the plaintiff would have been liable to removal back to Sri Lanka as soon as reasonably practicable after her initial detention.

---

16 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 496 per Latham CJ, 505 per Dixon J; [1947] HCA 21.

(iv) The plaintiff having made a claim to have a well-founded fear of persecution on Convention grounds if returned to Sri Lanka, she was not removed to that country but continued to be detained so that her claim could be assessed under the RSA process.

(v) Section 198(2) of the Act, as construed by this Court in the *Offshore Processing Case*, accommodates "the taking of steps for the purpose of informing the Minister of matters relevant to the possible exercise of power under either s 46A or s 195A."[17] Assuming that such inquiries were undertaken reasonably promptly, detention while they were undertaken would be lawful[18].

(vi) By operation of s 46A(7), the Minister does not have a duty to consider exercising his power under s 46A(2).

(vii) The establishment and implementation of the RSA process constituted a decision by the Minister to do that which he was under no duty to do — namely, to consider whether to exercise his power under s 46A(2) in respect of offshore entry persons, including the plaintiff[19].

(viii) The assessment of the plaintiff's claims under the RSA process as a means of informing the Minister's decision whether or not to exercise his power under s 46A(2) provided the legal underpinning for the plaintiff's continuing detention[20].

(ix) The Minister's decision, effected by the establishment and implementation of the RSA process, to consider exercising his power under s 46A(2) was not made pursuant to s 46A(7). That subsection confers no power. It merely declares that there is no duty to consider exercising the power under s 46A(2)[21].

---

17 (2010) 243 CLR 319 at 341–342 [35].

18 (2010) 243 CLR 319 at 341–342 [35].

19 (2010) 243 CLR 319 at 349 [66].

20 (2010) 243 CLR 319 at 351 [71].

21 (2010) 243 CLR 319 at 347 [59].

(x) The RSA process and subsequent checks constituted, in respect of the plaintiff, the steps taken to inform the exercise of the Minister's power under s 46A(2)[22].

(xi) The steps taken under the RSA process and subsequently to inform ministerial consideration of whether to exercise his power under s 46A(2) must be in accordance with law, including compliance with the requirements of procedural fairness and by reference to correct legal principles correctly applied[23].

29 In this case the post-RSA process was informed by error of law in relation to PIC 4002. On the basis of that error, the plaintiff's case was not referred to the Minister. There was no separate consideration, and none was provided for in the guidelines, of whether some public interest criterion derived from the "public interest" condition referred to in s 46A(2) would be unable to be met. As a consequence, the third question in the Special Case should be answered "Yes". Declaratory relief to give effect to that answer should be granted in the terms proposed in the joint reasons of Crennan, Bell and Gageler JJ[24].

The continuing detention of the plaintiff

30 Absent her claim on Australia for protection under the Refugees Convention and the process of assessment that followed it, the plaintiff's continuing detention would only have been lawful while steps were being taken to arrange for her removal as soon as reasonably practicable from Australia to Sri Lanka. The process of assessment provided a distinct legal underpinning for her detention pending its completion and the ministerial decision. The legal proceedings which the plaintiff has instigated in this Court to test that process for legal error must, like the process itself, be accommodated by the provisions of s 198(2). In short, subject to reasonable promptness on the part of the Minister and his officers in responding to the declaration of this Court, the plaintiff's continuing detention is authorised.

31 In the event that the Minister makes a decision under s 46A(2) adverse to the plaintiff, the question may arise whether her detention thereafter is authorised if she is unable to be removed to another country. On the construction of ss 189, 196 and 198 of the Act adopted by the majority in *Al-Kateb*, it appears that her continuing detention would be authorised until she was able to be removed from Australia. However, question 1 in the Special Case speaks to the present, rather

---

22 (2010) 243 CLR 319 at 349–350 [67], 353–354 [78].

23 (2010) 243 CLR 319 at 354 [78].

24 Reasons of Crennan, Bell and Gageler JJ at [150].

than to the position which may arise after the Minister has made a decision under s 46A(2). In my opinion, question 1 can only be answered by reference to the present circumstances. In the circumstances, this is not a case in which this Court should consider reopening the decision in *Al-Kateb*, either as to the construction of ss 189, 196 and 198 of the Act or as to the constitutional validity of those provisions. Nor is it necessary to confirm its correctness. The reopening and re-examination of a decision of this Court should only be considered in a case the outcome of which depends upon its application. And in such a case well-established criteria governing the circumstances in which a previous decision of this Court will be reopened would apply[25].

Conclusion

32 I would answer the questions in the Special Case as proposed in the joint judgment of Crennan, Bell and Gageler JJ[26].

---

25 See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438–439; [1989] HCA 5; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70] per French CJ; [2009] HCA 2.

26 Reasons of Crennan, Bell and Gageler JJ at [150].

33 HAYNE J. The *Migration Act* 1958 (Cth) ("the Act") provides[27] that a non-citizen in the "migration zone"[28] is either a "lawful non-citizen" or an "unlawful non-citizen" according to whether he or she holds a visa that is in effect. An officer who knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen must detain that person under s 189(1) or (3). An unlawful non-citizen detained under s 189 must be kept[29] in immigration detention until the occurrence of one of four terminating events: removal[30] from Australia, deportation[31], grant[32] of a visa, or an officer beginning to deal[33] with the non-citizen for the purpose of taking that person to a regional processing country[34]. An officer must remove from Australia an unlawful non-citizen detained under s 189(3) "as soon as reasonably practicable"[35].

34 Once again, this Court must decide whether these provisions of the Act mean what they say and, if they do, whether they are valid.

35 This Court decided both the construction and the constitutional question in *Al-Kateb v Godwin*[36], deciding that ss 189, 196 and 198 had to be construed as meaning what they say, and that those provisions were not beyond the legislative

---

27 ss 13(1) and 14(1).

28 Defined in s 5(1).

29 s 196(1).

30 Under s 198.

31 Under s 200.

32 Under s 65 or s 195A.

33 Under s 198AD(3).

34 This last terminating event was added to the Act in 2012, after the plaintiff's initial detention, by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012 (Cth), s 3, Sched 1, item 18. Nothing turns on this amendment.

35 s 198(2).

36 (2004) 219 CLR 562; [2004] HCA 37.

powers of the Parliament. As I said[37] in *Al-Kateb*, by reference to the words of Judge Learned Hand[38]:

> "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."

36 No good reason was proffered for revisiting the conclusions reached in *Al-Kateb* about the construction of the relevant provisions and their validity. Despite making numerous amendments to the Act in the intervening years, the Parliament has taken no step to amend these provisions in any relevant way. The provisions are valid laws of the Parliament. No matter what one may think of the provisions, this Court has no warrant for refusing to enforce them.

37 Behind the issues of construction and validity that have been mentioned, there lies a third issue in this case: whether the Minister must decide whether to make a determination under s 46A(2) which would permit the plaintiff to make a valid application for a visa. These reasons will show that, having decided to consider whether to exercise this power, the Minister must decide whether to make a determination under s 46A(2). And the Minister must decide whether to make the determination only by reference to the one consideration which the Minister decided was relevant to the exercise of the power, namely whether Australia owes the plaintiff protection obligations under the Refugees Convention[39] as amended by the Refugees Protocol[40] ("the Convention").

38 Consideration of this third issue requires brief reference to the facts.

The facts

39 The plaintiff is a Sri Lankan national. She arrived by boat in Australia in May 2010. She then held, and now holds, no visa permitting her to travel to and enter Australia or permitting her to remain in Australia. She is, therefore, an unlawful non-citizen[41]. Having first arrived in Australia in the Territory of

---

37 (2004) 219 CLR 562 at 652 [269].

38 *United States v Shaughnessy* 195 F 2d 964 at 971 (1952).

39 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951.

40 The Protocol relating to the Status of Refugees done at New York on 31 January 1967.

41 ss 5(1) and 14(1).

Christmas Island (an "excised offshore place") she is an "offshore entry person"[42].

40 It is not now disputed that the plaintiff has a well-founded fear of persecution for reasons of race and political opinion if she returns to Sri Lanka. She is a "refugee" within the meaning of the Convention, but the Act provides[43] that, because she is an offshore entry person, she cannot make a valid application for any visa. She has been in immigration detention since her arrival in 2010.

41 In April 2012, the Australian Security Intelligence Organisation ("ASIO") gave the Department of Immigration and Citizenship an "adverse security assessment" with respect to the plaintiff. That assessment recorded that ASIO assessed the plaintiff to be directly or indirectly a risk to "security" within the meaning of s 4 of the *Australian Security Intelligence Organisation Act* 1979 (Cth) ("the ASIO Act"). The ASIO Act definition of "security" required[44] reference to "the carrying out of Australia's responsibilities to any foreign country" in relation to certain matters.

42 ASIO later summarised its reasons for making the adverse security assessment in four points. ASIO had concluded that the plaintiff (a) had been a voluntary member of the Liberation Tigers of Tamil Eelam ("LTTE") who had engaged in armed combat, training and administrative support; (b) remained "strongly ideologically supportive of the LTTE and its aim to achieve Tamil Eelam through the use of violence"; (c) was likely to continue to support the LTTE in Australia; and (d) was "likely to engage in acts prejudicial to Australia's security" if she were to be granted a visa. On their face, the first three points relate only to the past conduct and present beliefs of the plaintiff. The real sting of the assessment appears to lie in the last point made but neither its content nor its basis has been revealed, whether in the course of these proceedings or otherwise. It is not a point which necessarily follows from any one or more of the first three points.

---

42 s 5(1). Following the enactment of the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act* 2013 (Cth), the Act no longer uses the term "offshore entry person". Instead, the Act now uses the term "unauthorised maritime arrival", and defines that term in a way which differs in some respects from the definition of "offshore entry person". Nothing turns on this change. It is convenient to use the term "offshore entry person" in these reasons and to refer to the relevant provisions of the Act in the form they took when the Act used that expression.

43 s 46A(1).

44 s 4, definition of "security", par (b).

43 In April 2012, when ASIO gave its adverse security assessment, regulations made under the Act provided[45] that a criterion[46] for the grant of a protection visa ("PIC 4002") was, in effect, that ASIO not have provided an adverse security assessment in respect of the visa applicant. In October 2012, this Court held[47], in *Plaintiff M47/2012 v Director-General of Security*, that PIC 4002 was invalid because its making was inconsistent with the Act. Sections 500(1) and 501(6) prescribed character requirements for the grant of a protection visa and made special provision for the review of decisions refusing to grant a protection visa relying on Art 1F, 32 or 33(2) of the Convention or on the ground (among others) that there is a significant risk that a person would represent a danger to the Australian community or to a segment of that community. None of those grounds permitted consideration of foreign country security obligations of the kind referred to in par (b) of the ASIO Act definition of "security". Hence, PIC 4002 prescribed a criterion which went beyond those expressly provided by the Act, was inconsistent with the Act and was invalid.

44 The plaintiff has no right to enter and remain in any country other than Sri Lanka. The Minister does not propose to remove the plaintiff to Sri Lanka against her will. Despite efforts to resettle the plaintiff in another country, no country has agreed to take the plaintiff and it is agreed that no country appears likely to do so. The defendants ("the Commonwealth parties") accepted that, in the circumstances, it would be open to conclude that there is no real likelihood or prospect that the plaintiff will be removed from Australia in the reasonably foreseeable future.

45 The plaintiff commenced proceedings in the original jurisdiction of this Court alleging that her continued detention was unlawful. The parties agreed in stating questions of law in the form of a special case for the consideration of the Full Court.

46 It is convenient to deal first with whether the Minister decided to consider whether to make a s 46A(2) determination (permitting the plaintiff to make a valid application for a visa).

---

45 Migration Regulations 1994 (Cth), Sched 2, cl 866.225(a).

46 Migration Regulations 1994, Sched 4, cl 4002.

47 (2012) 86 ALJR 1372 at 1396-1397 [71] per French CJ, 1418-1419 [206] per Hayne J, 1455 [399] per Crennan J, 1465 [455], [458]-[459] per Kiefel J; 292 ALR 243 at 267, 297-298, 348, 361-362; [2012] HCA 46.

Did the Minister decide to consider whether to make a s 46A(2) determination?

47 At all times relevant to this matter, s 46A(1) of the Act has provided that an application for a visa is not a valid application if it is made by an offshore entry person who is in Australia and is an unlawful non-citizen. Section 46A(2) provided:

> "If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination."

48 This power (often referred to as the power to "lift the bar") may only be exercised by the Minister personally[48]. Section 46A(7) provided that:

> "The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances."

The effect of s 46A(7) is often referred to as making the power "non-compellable".

49 Before the plaintiff arrived and was detained at Christmas Island, the Minister had established administrative processes for determining whether, as a matter of international law, Australia's obligations under the Convention were engaged in respect of particular offshore entry persons. These administrative processes were described in a "Refugee Status Assessment Procedures Manual" ("the RSA Manual").

50 This Court considered some aspects of the nature and effect of those administrative processes ("the RSA process") in *Plaintiff M61/2010E v The Commonwealth* ("the *Offshore Processing Case*")[49]. In particular, this Court held[50] that assessments made under the RSA process had to be made according to law and in a manner that afforded procedural fairness to the person whose claim was being assessed.

---

48 s 46A(3).

49 (2010) 243 CLR 319; [2010] HCA 41.

50 (2010) 243 CLR 319 at 355-357 [87]-[91].

51 The central premise[51] for the decision in the *Offshore Processing Case* was that offshore entry persons who were detained while the RSA process was conducted were detained under and for the purposes of the Act. More particularly, those persons were detained for the purpose of the Minister considering whether to exercise power under the Act. And argument of the present matter proceeded on the undisputed footing that the RSA process was engaged in the plaintiff's case for that purpose. Having regard, however, to the course taken in argument of the present matter, it is necessary to identify more precisely why the plaintiff's detention for the purpose of considering whether to lift the bar was detention under and for the purposes of the Act.

52 It will be recalled that one of the terminating events prescribed by s 196(1) as fixing the duration of immigration detention is that the unlawful non-citizen detained under s 189 "is granted a visa"[52]. When the obligation under s 198(2) to remove an unlawful non-citizen "as soon as reasonably practicable" is read with both the inability of an offshore entry person to make a valid application for a visa[53] and the Minister's power under s 46A(2) to lift the bar, it is evident that the Act authorises detention of an unlawful non-citizen for so long as is reasonably necessary for the Minister first, to decide whether to *consider* exercising the power to lift the bar and second, to *decide* whether to lift the bar[54].

53 In the case of this plaintiff, like other offshore entry persons to whom the RSA process was applied, the Minister had determined[55] (by establishing the RSA process and detaining the plaintiff and others while that process was conducted) to consider whether to lift the bar. The Minister could not have been compelled to embark upon that consideration. But the following observations require the conclusion that the Minister did embark upon that consideration.

54 The Minister decided that the RSA process would be followed for every offshore entry person who claimed that Australia owed protection obligations to him or her. The plaintiff made such a claim. The RSA process began and she was not removed from Australia as soon as reasonably practicable as would otherwise have been required by s 198(2). But the plaintiff was still detained and her continued detention was justifiable *only* if it was under and for the purposes of the Act. The only possible statutory purpose for detaining an offshore entry

---

51 (2010) 243 CLR 319 at 351 [70].

52 s 196(1)(c).

53 s 46A(1).

54 cf *Offshore Processing Case* (2010) 243 CLR 319 at 350 [70].

55 *Offshore Processing Case* (2010) 243 CLR 319 at 350-351 [70]-[71].

person, other than for removal, was for consideration of whether to permit that person (under s 46A(2)) to make a valid application for a visa. And if detention was for that purpose, consideration of whether to exercise the power given by s 46A(2) must have begun.

55 That is, by detaining an offshore entry person to follow the RSA process, the Minister necessarily decided to consider exercising the power given by s 46A(2) in respect of that person. To put the same point another way, the operation of s 46A(7) was exhausted once the RSA process was engaged in respect of an offshore entry person who was detained.

Relevant contextual considerations

56 The steps that were taken in respect of the plaintiff for the purposes of the Minister's consideration of whether to lift the bar must be understood having regard to the policy which was then being pursued. That, in turn, requires reference to some matters of history. Those matters are described[56] in some detail in the *Offshore Processing Case*. It is sufficient for present purposes to notice only the following features.

57 In 2001, the Parliament enacted six Acts[57], one after the other, which affected the entry into and remaining in Australia by non-citizens. The changes made by those Acts included provision for excising certain Australian territory, including the Territory of Christmas Island, from the migration zone[58] and the insertion into the Act of various sections, including ss 46A[59] and 198A[60].

---

56 (2010) 243 CLR 319 at 339-342 [29]-[40].

57 *Border Protection (Validation and Enforcement Powers) Act* 2001 (Cth); *Migration Amendment (Excision from Migration Zone) Act* 2001 (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth); *Migration Legislation Amendment Act (No 1)* 2001 (Cth); *Migration Legislation Amendment Act (No 5)* 2001 (Cth); *Migration Legislation Amendment Act (No 6)* 2001 (Cth).

58 *Migration Amendment (Excision from Migration Zone) Act* 2001, s 3, Sched 1, item 1.

59 *Migration Amendment (Excision from Migration Zone) Act* 2001, s 3, Sched 1, item 4.

60 *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001, s 3(1), Sched 1, item 6.

58 Section 198A(1) provided that offshore entry persons might be taken from Australia to a country declared under that section. The Republic of Nauru and the Independent State of Papua New Guinea were declared countries and persons were removed from Australia to those places in exercise of the power given by s 198A(1). This procedure came to be called the "Pacific Strategy".

59 As noted[61] in the *Offshore Processing Case*, the changes to the Act "that were worked by inserting s 46A and, in consequence, inserting s 198A, are to be seen as reflecting a legislative intention to adhere to that understanding of Australia's obligations under the [Convention] that informed other provisions made by the Act".

60 Following a change of government in 2007, offshore entry persons were no longer taken to Nauru or Papua New Guinea. The Government decided that *all* offshore entry persons would be "processed" on Christmas Island and that the RSA process would be followed in respect of offshore entry persons who claimed to be refugees. As was said[62] in the *Offshore Processing Case*, the adoption of the RSA process and its application to offshore entry persons could only be understood as implementing the decision no longer to follow the Pacific Strategy but instead to undertake the RSA process as the means of meeting Australia's obligations under the Convention.

The purpose and content of the RSA process

61 The RSA Manual recorded, under the heading "Background", that offshore entry persons "who raise claims or information which prima facie may engage Australia's protection obligations [will] have such claims examined under a separate RSA process *so that the Minister can be advised whether Australia's protection obligations under the Refugees Convention are engaged*" (emphasis added).

62 Not only did the RSA Manual show that the RSA process was directed to determining whether Australia owed protection obligations to any offshore entry person who made a claim to protection, offshore entry persons were told that this was what the process was deciding. Offshore entry persons to whom the RSA process was applied were told, at the start of the process, that what was being done was to "assess and process" their claims to be refugees.

63 The RSA Manual required that an offshore entry person who raised "claims or information that may engage Australia's protection obligations" was to be provided with an information sheet outlining the RSA process. That

---

61 (2010) 243 CLR 319 at 341 [34].

62 (2010) 243 CLR 319 at 342 [40].

information sheet (available in a number of languages) told the offshore entry person that:

> "If a finding is made that you are a refugee, the department will write to the Minister for Immigration and Citizenship (the minister) asking him to allow you to make a visa application to stay in Australia.
>
> If the minister allows you to lodge a visa application, you will be asked to complete and sign a form asking for a visa to stay in Australia. Your agent can help you with this.
>
> If you are successful with your application for a visa, you will be given a permanent visa to live in mainland Australia. You will be moved to mainland Australia and will receive help with settlement into the Australian community."

The information sheet also described what would happen if a finding was made that the person concerned was not a refugee and what would happen if that person sought review of the decision by an independent reviewer. It is not necessary, in this case, to refer to the review processes.

64 Although the special case does not state expressly that the plaintiff was given such an information sheet, it should be inferred that she was.

65 The RSA Manual provided that the assessment of claims made by an offshore entry person would be made by an "RSA officer": "a departmental employee tasked by the Minister ... to identify refugees according to the definition of a refugee as set out in the Refugees Convention". The RSA Manual required the RSA officer to consider eight issues:

(a) what the claimant's country of nationality or former habitual residence was;

(b) whether the claimant had the right to enter and reside in a safe third country;

(c) whether Art 1C of the Convention (providing for the cessation of protection obligations) applied;

(d) whether any of the exclusion clauses of Art 1D, 1E or 1F of the Convention applied;

(e) whether Art 33(2) of the Convention (providing, among other things, that the benefit of the obligation not to expel or return a refugee to the borders of a country where he or she fears persecution for a Convention reason "may not ... be claimed by a refugee whom there are reasonable grounds

for regarding as a danger to the security of the country in which he [or she] is") applied;

(f) whether the claimant feared harm for a Convention reason;

(g) whether the harm feared amounted to persecution; and

(h) whether the claimant's fear was well-founded.

66 The RSA Manual required the RSA officer, for each issue, to "set out, evaluate and weigh evidence", "set out, discuss and consider the relevant articles of the Refugees Convention", "state and explain the overall conclusion reached in relation to each issue" and "record a finding" for each of the issues considered.

67 Once an RSA officer completed the assessment of the claims made by an offshore entry person, the officer was "to record [his or her] finding on the claimant's claims and determine whether the claimant is or is not a refugee under Article 1 of the Convention".

68 As would be expected, the information set out in the information sheet provided to offshore entry persons was consistent with the RSA Manual's description of the way in which cases should be finalised by RSA officers. A "[p]ositive RSA outcome" was described in the following terms:

> "When an [offshore entry person] is found to be owed protection through the RSA process, and is not subject to exclusion clauses under Articles 1F and 33(2) of the Refugees Convention, Australia's protection obligations under the Convention are enlivened.
>
> *A submission will be provided to the Minister for [his or her] consideration of whether to exercise [his or her] power under section 46A(2) of the Migration Act and lift the section 46A(1) bar to allow a protection (or other) visa application to be made. If the Minister decides to lift the bar, the [offshore entry person] will be invited to lodge a Protection visa application using Form 866*. This application will be assessed with reference to the claims made during the RSA process. *Subject to health and character requirements being met*, a Protection visa will then be granted to the [offshore entry person]. Following grant, the [offshore entry person] will be resettled in Australia." (emphasis added)

69 The RSA Manual shows that the RSA process was directed to advising the Minister whether Australia's international obligations under the Convention were engaged. The RSA process had no wider purpose. In particular, the RSA process was not directed to determining whether a protection visa would be granted if a valid application could be made. The RSA Manual acknowledged, more than once, that if the Minister lifted the bar, the person concerned had to

make an application for a protection visa and meet necessary health and character requirements as part of the process of consideration of the visa application.

The assessment of the plaintiff's claims

70 The RSA officer who assessed the plaintiff's claims under the RSA process determined that she was a refugee as defined by the Convention. The RSA officer found that Art 1F of the Convention was not engaged, there being "no serious reasons for considering that the [plaintiff] was complicit in any war crime or crimes against humanity". The RSA officer further found that the plaintiff did not come within the express exception provided by Art 33(2) of the Convention to the obligation not to expel or return a refugee to the borders of a country in which that person had a well-founded fear of persecution for a Convention reason. That is, the RSA officer found that there were not "reasonable grounds for regarding [the plaintiff] as a danger to the security" of Australia.

71 The decision made under the RSA process was communicated by the Department to the plaintiff. The plaintiff was told that she was "still subject to health, identity, security and character checking processes", as were family members who had made protection claims dependent on hers.

Steps following the adverse security assessment

72 As has already been noted, ASIO gave the Department an adverse security assessment in respect of the plaintiff in April 2012. The Department treated the adverse security assessment as requiring that it not refer the plaintiff's case to the Minister and it did not.

73 The Department's decision not to refer the plaintiff's case to the Minister was based upon two different ministerial communications, one in 2009 and the other in 2012. It is necessary to say something about each.

The 2009 ministerial comments

74 In 2009, well before the plaintiff had arrived at Christmas Island, the Department had made a submission to the Minister seeking what was described as "your decision on whether you wish to exercise your section 46A(2) power in the case of thirty two people" who had arrived on a particular boat.

75 Twenty-nine of the persons concerned had had health, character and security clearances finalised; three had outstanding security clearances. The Department's submission said that protection visa applications by those three persons would "remain undecided until all clearances have been finalised". It went on to point out that:

> "once the three clients are in the [protection visa] stream, and if they happen to receive a negative finding, they will have access to both merits and judicial review. Alternatively you may decide to defer your decision to exercise your section 46A(2) power for the three individuals until all mandatory checks have been completed."

76 The Minister declined to determine that any of the three persons awaiting a security clearance should be entitled to make a valid application for a visa. The Minister said that government policy was for health, identity and security checks to be completed prior to release from detention and that, unless there were extenuating or special circumstances, those requirements should be applied before seeking to lift the bar under s 46A(2).

77 The Minister's reference to completing health and security checks before release from detention assumed, wrongly, that deciding to permit the making of a valid application for a visa would release the plaintiff from detention. Permitting the making of a valid application for a visa would not have had that effect. The Act required continuing detention of every unlawful non-citizen until a visa was granted or one of the other terminating events specified in s 196(1) occurred. The plaintiff did not submit that anything turned upon this error and it may be put aside from further consideration.

78 The comments made by the Minister were treated by the Department as a general direction to be followed in later cases in which there was a question about seeking the Minister's exercise of power under s 46A(2). That is, they were treated as identifying when the Minister wished not to embark upon the task of deciding whether to lift the bar. But as has been demonstrated, the Minister had already taken that step. Whatever may have been the effect of the Minister's comments in the particular cases then under consideration, they were not comments which bore at all on whether the Minister should decide to lift the bar in the plaintiff's case. The comments which the Minister made in his 2009 decision were irrelevant to the plaintiff's case and the Department was wrong to treat them as applicable.

The 2012 direction

79 In 2012, one month before ASIO gave the adverse security assessment in respect of the plaintiff, the Minister gave directions about the circumstances in which he may wish to *consider* exercising his power under s 46A(2), and in which the Department should draw particular cases to his attention. One kind of case which the directions said should not be referred for the Minister's consideration was where an offshore entry person was found to engage Australia's protection obligations as provided by s 36(2) of the Act but had received an adverse security assessment.

80 Like the 2009 ministerial comments, the directions given in 2012 were, and are, irrelevant to the plaintiff's case. They were, and are, irrelevant because the Minister had already decided to consider exercising power under s 46A(2) in respect of the plaintiff. The directions given in 2012 dealt only with whether the Minister would consider exercising the power. Contrary to the premise for some of the submissions advanced by the Commonwealth parties, once the RSA process had begun, there was no further occasion upon which s 46A(7) could be applied in the plaintiff's case.

The s 46A(2) power remains unperformed

81 Having decided to consider exercising power under s 46A(2), the Minister has never done so. The Minister has never made a decision whether to permit the plaintiff to make a valid application for a visa. The power under s 46A(2) remains unperformed.

82 What consequences follow must be determined by first identifying the relationship between the RSA process and the power given by s 46A(2).

The RSA process and the power given by s 46A(2)

83 It is unsurprising that, in considering whether to permit making an application for a protection visa, the only question considered in the RSA process was whether Australia's international obligations were engaged, leaving for later determination, in accordance with the requirements of the Act, whether a visa should be granted. It is unsurprising, in other words, that the process which the Minister directed should be followed when an offshore entry person claimed to be owed protection obligations was not a process directed to informing the Minister whether he would be obliged to grant or refuse a visa if a valid application were to be made. It is unsurprising because whether to permit the making of a valid application for a protection visa was to be understood as a threshold question governed only by the need to avoid breaching Australia's international obligations. The Act would be left to do its work in respect of domestic requirements (including security requirements) *after* the making of an application.

84 It is to be recalled that the power given by s 46A(2), if exercised, would only permit an offshore entry person to make a valid *application* for a visa. If a valid application were made, it would have to be dealt with in accordance with the Act. After considering the application, the Minister would be bound[63] to grant the visa if satisfied that the health and other criteria for the visa had been met and if satisfied that the grant of the visa was not prevented by (among other

---

63 s 65(1)(a).

provisions) s 501. If not satisfied of these matters, the Minister would be bound[64] to refuse to grant the visa sought.

85 Section 46A(2) did not provide for, or permit, the establishment of a system for the *grant* of visas to offshore entry persons. The power under s 46A(2) concerned only the making of a valid *application* for a visa. Section 195A(2) of the Act gave the Minister discretionary power to grant a visa to any person in detention under s 189, including an offshore entry person. The fields of operation of ss 46A and 195A were distinct. There is no basis for reading them as overlapping in any way.

86 It may be that consideration of whether a visa would have to be granted could be said to be always irrelevant to the exercise of the power to determine whether a valid application could be made. It is not necessary to decide whether that is so. If consideration of whether a visa would have to be granted could be relevant to the exercise of the power given by s 46A(2), only lawfully made criteria for the grant of a visa could properly be taken into account. And this Court held in *Plaintiff M47/2012* that PIC 4002 was not a valid criterion for the grant of a protection visa. But there are more fundamental reasons for concluding that the particular steps which the Minister has taken in administering the Act have limited the considerations which can now be taken into account in exercising the power given by s 46A(2) in respect of the plaintiff. It is necessary to explain why that is so.

A power exercisable in "the public interest"

87 The power given by s 46A(2) (to permit the making of a valid application for a visa) might be exercised by the Minister "[i]f the Minister thinks that it is in the public interest to do so". The discretion thus given to the Minister is very wide[65]. Like the provision considered in *Water Conservation and Irrigation Commission (NSW) v Browning*[66], s 46A(2) granted a discretion that, "though ... neither arbitrary nor completely unlimited ... is certainly undefined". That is, "there is no positive indication of the considerations upon which it is intended

---

64 s 65(1)(b).

65 See, for example, *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 400-401 [42]; [2012] HCA 36.

66 (1947) 74 CLR 492 at 505 per Dixon J; [1947] HCA 21.

that the grant or refusal of [the determination] shall depend"[67]. Accordingly, as Dixon J pointed out in *Swan Hill Corporation v Bradbury*[68]:

> "only a negative definition of the grounds governing the discretion may be given. It may be possible to say that this or that consideration is extraneous to the power, but it must always be impracticable in such cases to make more than the most general positive statement of the permissible limits within which the discretion is exercisable and is beyond legal control."

88 The resolution of this case, however, does not depend upon attempting some a priori statement of the grounds which might fall outside the public interest. The questions to be considered are more particular. The Minister identified only one issue which bore upon the decision whether to lift the bar: is the plaintiff a refugee within the meaning of the Convention? Having decided that the plaintiff should be detained for consideration of whether to lift the bar by reference to the outcome of the RSA process, can the Minister now make no decision at all? If the Minister does make a decision, can any other consideration be taken into account?

89 The plaintiff's detention was under and for the purposes of the Act because (and *only* because) it was for the purpose of the Minister considering whether to make a determination that it is in the public interest to permit the plaintiff to make a valid application for a visa. The RSA officer who assessed the plaintiff's claims resolved the only issue which the Minister had identified as relevant to the exercise of the power in the plaintiff's favour.

90 The Commonwealth parties submitted, in this Court, that the Minister could refuse *at any time* to make a decision under s 46A(2). The Commonwealth parties further submitted that, if the Minister were to make a decision about whether he would permit the plaintiff to make a valid application for a visa, he could lawfully take *any* consideration relevant to the public interest into account and treat *any* public interest consideration as determinative, no matter what inquiries may have been made while the plaintiff was detained.

91 Both of these submissions should be rejected. Having decided to consider whether to make a determination under s 46A(2), the Minister had to conclude that consideration. Having identified only one issue as relevant to the decision to lift the bar, the Minister could not make that decision by reference to any other consideration.

---

67 (1947) 74 CLR 492 at 505.

68 (1937) 56 CLR 746 at 758; [1937] HCA 15.

The Minister must decide

92 Having decided that he would consider whether to make a determination under s 46A(2), the Minister must decide whether or not to lift the bar for the plaintiff.

93 As was said[69] in the *Offshore Processing Case*, "[i]t is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive." But there would be detention at the unconstrained discretion of the Executive if the Commonwealth parties were right to submit that the Minister could decide, at any time, to refuse to conclude, or to stop, consideration of whether to lift the bar. If the Minister, having decided to consider whether to exercise the power to lift the bar, had no *duty* to conclude that consideration, the Act would authorise detention at the will of the Minister. That construction of the Act should not be adopted. Rather, having decided to determine whether or not to lift the bar, the Minister should be held to be bound to make that decision and to do so within a reasonable time[70].

94 Section 46A(7) makes plain that the Minister has no duty, and may not be compelled, to consider whether to exercise the power given by s 46A(2). But once the Minister has decided to consider whether to exercise the power, neither s 46A(7) nor any other provision of the Act permits or requires the conclusion that the Minister may, at will, decline to make any decision under s 46A(2) even though the subject of consideration has been detained for the purposes of the Minister having inquiries made which are relevant to the exercise of the power given by that provision.

What may be considered?

95 Can the Minister now act on *any* matter which he considers relevant to the public interest?

96 Again, this question must be answered recognising the legal foundation for the plaintiff's detention. The Executive detained the plaintiff under and for the purposes of the Act. The detention was under and for the purposes of the Act, and lawful, only because the Minister had decided two things: first, to consider whether to make a determination under s 46A(2) to lift the bar and second, to have his Department inquire into and advise him, for the purposes of his making that decision, whether the plaintiff was a refugee to whom Australia owed protection obligations under the Convention.

---

69 (2010) 243 CLR 319 at 348 [64].

70 cf *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 581 per Dixon J; [1949] HCA 65.

97 The Minister could have left the Act to operate according to its terms in respect of the plaintiff, or in respect of offshore entry persons generally. He did not. That is, the Minister could have left the plaintiff (or other offshore entry persons detained in accordance with s 189 of the Act) to be removed from Australia in accordance with s 198(2) as soon after their arrival at an excised offshore place as was reasonably practicable. Carrying out the RSA process thus directly affected the liberty of those to whom it was applied. Those persons were detained for longer than whatever may have been the time to effect their removal from Australia as soon as reasonably practicable.

98 The power to detain unlawful non-citizens given by the Act should not be construed as unbounded. Nor are the applicable provisions of the Act to be construed as authorising detention for whatever period of time the Minister may choose.

99 The primary temporal limitation on the power to detain is provided by the imposition of the statutory duty to remove as soon as reasonably practicable. Further detention is authorised only if the detention is under and for the purposes of the Act. The bounds of that further detention must be ascertainable, and enforceable, at all times during its continuance. The lawfulness of the detention (as to both its purpose and its duration) must be capable of being fixed, and be fixed, by a criterion or criteria determined at the *start* of the detention. Fixing the lawful boundaries for the detention at its outset is essential because only if that is done can the lawfulness of the detention be adjudged and enforced by a court, including this Court in exercise of its jurisdiction under s 75(v) of the Constitution, at any time during its continuance.

100 The plaintiff was detained for the purpose of the Minister considering whether to make a determination under s 46A(2) to lift the bar. That purpose was being fulfilled, and the plaintiff's detention was lawful, only because the RSA process was engaged in respect of the plaintiff. But the purpose (the Minister considering whether to make a determination) could not be fulfilled by a means other than the means in virtue of which the purpose was first satisfied. That is, the means of pursuing the purpose were set according to the sole issue which was considered in the RSA process. By setting those means, the duration of the detention was set as the time reasonably necessary to carry out those means in order to decide whether to lift the bar.

101 The administrative choice which the Minister made by detaining the plaintiff on the basis described, rather than allowing performance of the duty to remove her from Australia "as soon as reasonably practicable", once made, could not be undone. It could not be undone because of the effect it had on the plaintiff's liberty. The administrative choice which the Minister made was a choice which prolonged the plaintiff's detention.

102 The administrative decision to detain the plaintiff for the purpose of deciding whether to lift the bar, once made, limited the purpose of detention by identifying at its outset only one consideration which the Minister would take into account in exercising power under s 46A(2). And by taking these steps the Minister fixed not only the means of pursuing the purpose of the detention but also the duration of the detention.

103 The Act does not authorise detention of an offshore entry person for whatever number of successive periods of detention would be necessary for the Minister to obtain information and advice about a series of disconnected inquiries said to relate to questions of public interest governing the exercise of the power under s 46A(2). To read the Act as permitting that to occur would be to read the Act as permitting detention at the will of the Executive. That construction should be rejected.

104 As it happens, nothing the Minister or the Department said or did in the course of the detention of the plaintiff departed from the operation of the Act that has been described. The Minister decided that those offshore entry persons who made claims to protection should have their claims investigated, assessed and, if need be, reviewed. The Minister established the RSA process for these purposes. One step in that process was to tell offshore entry persons, in the information sheet issued at the start of the process, what issue would be investigated.

105 Neither the RSA Manual nor the information sheet suggested that security criteria wider than those presented by the Convention, or any health criteria, would be investigated before a decision was made whether or not to lift the bar. The RSA Manual expressly stated, more than once, that these were issues that would be considered in the course of determining an application for a protection visa.

106 The Minister was not bound to limit the inquiry in the way he did. The Minister could have established less confined inquiries about *any* matters which could be thought to bear upon the relevant public interest criterion. But the Minister did not do that. And in light of the contextual considerations set out earlier in these reasons, it is unsurprising that the Minister did not. The policy then being pursued (by establishing and implementing the RSA process) was directed to ensuring that, using the then structures of the Act, Australia adhered to its international obligations. As the arguments advanced by the Commonwealth parties in the *Offshore Processing Case* showed, the intention was that this should be done by a "non-statutory" administrative process. But compliance with Australia's international obligations was the driving force for all of the procedures that were established.

107 The Act having been administered as it was, and the plaintiff having been detained as she was, the Minister may not now make the decision whether to

make a determination under s 46A(2) by reference to any consideration except the outcome of the RSA process.

108 It is important, however, to emphasise two points. First, as already explained, the Minister could lawfully have administered the Act in other ways. He did not. Second, the conclusion that the Minister may not now take account of the adverse security assessment which ASIO has provided in respect of the plaintiff, when deciding whether to make a determination under s 46A(2) to lift the bar, leaves the relevant security issues to be determined in the course of deciding whether a visa must be granted. Section 501(1) provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that he or she passes the character test. A person fails[71] that test if, among other things, there is a significant risk that the person, if allowed to enter or to remain in Australia, would "represent a danger to the Australian community or to a segment of that community".

The consequences of the s 46A(2) power being unperformed

109 What follows from the Minister's failure to decide whether to exercise the power given by s 46A(2)? The plaintiff has made no claim for mandamus. She claims a declaration that the Minister's power remains unperformed and a declaration to that effect should be made. Before turning to consider the construction and constitutional issues, however, it is convenient to consider the argument advanced by the Commonwealth parties that mandamus could not be granted in this matter.

110 The Commonwealth parties submitted that the *Offshore Processing Case* decided that mandamus will not go to compel consideration of the exercise of power under s 46A. In that case, the Court said[72]:

> "Because ss 46A and 195A both state, in terms, that the Minister does not have a duty to consider whether to exercise the power given by the section, mandamus will not issue to compel the Minister to consider or reconsider exercising either power. That the Minister decided to consider exercising the powers and, for that purpose, directed the making of Refugee Status Assessments and Independent Merits Reviews does not entail that, if the process of inquiry miscarried, the Minister can be compelled again to consider exercising the power."

111 It is important to notice, however, that the complaints made in the *Offshore Processing Case* were about steps taken in the course of conducting the

---

71 s 501(6)(d)(v).

72 (2010) 243 CLR 319 at 358 [99].

inquiries which the Minister had directed be undertaken. The complaints that were made and considered in that case were not complaints about the Minister failing to exercise power under s 46A(2) or s 195A(2). Rather, the issue was whether the Minister could be required, by mandamus, to make fresh inquiries about matters which had been examined imperfectly. Neither the argument in that case, nor the reasons for judgment, focused directly upon whether mandamus could issue to compel the Minister, having *already* embarked upon consideration of whether to exercise the power given by s 46A(2), to decide whether to *exercise* that power. And, as was made plain in the Court's reasons[73], it was not necessary for the Court to examine whether submissions then made by the Commonwealth parties "might permit or require modification to accommodate cases ... where the right that is affected by conducting the impugned process of decision making is a right to liberty".

112 In this matter, the special case prepared by the parties recorded that, if the Court declared "that the Minister erred in failing to decide whether to exercise his power under s 46A(2) ... or that an officer of the Department erred in failing to refer the Plaintiff's case to the Minister for him to exercise his power under s 46A(2), consideration would be given by the Department" to whether the plaintiff's case should be referred to the Minister. Although this was expressed in terms of the Department giving *consideration* to taking action, the Solicitor-General of the Commonwealth accepted that, as would be expected, the Department and the Minister would give effect to any declaration the Court made.

113 If some controversy were later to emerge about what the Minister had or had not done in response to this Court's decision, that controversy would fall for consideration on the facts and in the circumstances as they then existed. Whether, or to what extent, that controversy would require examination of the availability of mandamus as a remedy which will go "[w]here there is no specific remedy and by reason of the want of that specific remedy justice cannot be done unless a mandamus is to go"[74] need not be decided.

---

73 (2010) 243 CLR 319 at 359 [100].

74 *In re Nathan* (1884) 12 QBD 461 at 473 per Brett MR. See also *R v Bank of England* (1780) 2 Dougl 524 at 526 per Lord Mansfield [99 ER 334 at 335]; *R v Lambourn Valley Railway Co* (1888) 22 QBD 463 at 466 per Pollock B; Blackstone, *Commentaries on the Laws of England*, (1768), bk 3, c 7 at 110; *Halsbury's Laws of England*, 1st ed, vol 10, par 160.

The construction and constitutional issues

114 It is nonetheless desirable to deal with the construction and constitutional issues which were argued. The construction issue must be determined in light of the scheme which is revealed by the relevant provisions of the Act.

The scheme of the Act

115 Sections 189, 196 and 198 of the Act are the central provisions regulating detention of unlawful non-citizens. The relevant text of those sections is set out in the reasons of other members of the Court and need not be repeated here. The questions which arise in this matter about the construction and application of those provisions cannot be answered without first identifying the place of those provisions in the overall scheme of the Act.

116 As I have previously pointed out[75], the Act has a binary structure. Its central provisions posit a choice between two outcomes for non-citizens within Australia's migration zone. The Act divides[76] non-citizens into "lawful non-citizens" and "unlawful non-citizens" according to whether the non-citizen in question holds a visa that is in effect. If a non-citizen can make a valid application for a visa, the Minister must decide either to grant[77] or refuse to grant[78] that application according to whether the Minister is satisfied that the requirements stated within the Act or regulations are met.

117 Subject to some presently irrelevant exceptions, an officer is bound[79] to detain a person whom the officer knows or reasonably suspects to be an unlawful non-citizen. An unlawful non-citizen who has been detained under s 189 must be kept in immigration detention until the occurrence of one of the terminating events prescribed by s 196(1). Section 198(2) obliges an officer to remove an unlawful non-citizen from Australia "as soon as reasonably practicable".

118 These provisions of the Act are directed to the regulation of persons entering and remaining in Australia. Those whom the Act classifies as "unlawful non-citizens" are persons who have no permission to travel to and enter Australia or to remain in Australia. Sections 189, 196 and 198 provide powers of detention

---

75 *Plaintiff M47/2012* (2012) 86 ALJR 1372 at 1413 [176]; 292 ALR 243 at 291.

76 ss 13(1) and 14(1).

77 s 65(1)(a).

78 s 65(1)(b).

79 s 189.

and removal in aid of effecting a fundamental purpose of the Act, namely, providing that those who are not citizens of Australia may travel to and enter Australia and may remain in Australia only if they have permission to do so. No provision of the Act countenances any middle ground between being a lawful non-citizen (who is entitled to remain in Australia in accordance with any applicable visa requirements) and being an unlawful non-citizen (who may, and who usually must, be detained and who, assuming no other relevant provision or procedure under the Act remains unperformed, must be removed from Australia as soon as reasonably practicable).

119 An unlawful non-citizen cannot be removed from Australia unless he or she will be received at the place to which he or she is taken. Removal means removal *to* a place. Ordinarily, the country of which the person concerned is a national is bound[80] to receive that person and there may be other countries that are willing to do so. But the Act is silent on these matters. And it says nothing about the case of the unlawful non-citizen who is stateless and thus without a country of nationality that is bound to receive that person.

120 Likewise, the Act does not deal expressly with the case of an unlawful non-citizen who has a well-founded fear of persecution for a Convention reason in his or her country of nationality but who is not entitled to a protection visa. But, as the decision in *Plaintiff M47/2012* demonstrates, the Act does recognise expressly that persons with a well-founded fear of persecution for a Convention reason may validly be refused a protection visa under the Act. The Act recognises expressly that a person who is a refugee may be and remain an unlawful non-citizen whom an officer is bound to remove from Australia as soon as reasonably practicable.

121 The plaintiff and the Commonwealth parties submitted that s 198(2) should be construed as not permitting removal from Australia of a person found to have a well-founded fear of persecution for a Convention reason in his or her country of origin to that country. It is not necessary to examine whether that is right. The plaintiff has not asked to be returned to Sri Lanka and the Minister does not propose to remove her there.

The plaintiff's detention is authorised

122 The parties in this case agreed that the plaintiff has no present right to enter and remain in any country other than Sri Lanka. They agreed that "[a]t present" there is no other country to which the plaintiff can be sent and that efforts made by the Department to resettle persons to whom Australia owes

---

80 See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (*Malaysian Declaration Case*) (2011) 244 CLR 144 at 190 [92]; [2011] HCA 32.

protection obligations but who are the subject of adverse security assessments have been unavailing. The Court must decide the questions reserved on the footing that the plaintiff cannot and will not be removed from Australia unless or until circumstances change. There is no basis for saying whether or when that might occur.

123 The plaintiff submitted that, in these circumstances, the Act does not authorise her detention even though she has no permission to enter Australia or remain in Australia. That is, the effect of the plaintiff's submissions was that, the plaintiff having come within the international boundaries of Australia, the Act does not, or at least does not validly, prevent her entering and remaining in Australia free from any form of detention. That submission must be rejected.

Construing the Act

124 In *Al-Kateb*, this Court decided, by majority[81], that ss 189, 196 and 198 authorised and required the detention of an unlawful non-citizen, even if his or her removal from Australia was not reasonably practicable in the foreseeable future. In *Plaintiff M47/2012*, two members of the Court concluded[82] that the dissenting opinion about the construction of those provisions expressed[83] by Gleeson CJ in *Al-Kateb* was to be preferred. But *Al-Kateb* has not been overruled.

125 Fundamental principle requires[84] that this Court not now depart from the construction of the relevant provisions which was adopted by the majority in *Al-Kateb*. All that has changed since *Al-Kateb* was decided is the composition of the Bench. That is not reason enough to revisit the decision[85]. And when the Parliament has had repeated opportunities to amend the effect of the decision in

---

81 (2004) 219 CLR 562 at 581 [33]-[35] per McHugh J, 640 [231]-[232], 643 [241] per Hayne J, 659-662 [292], [295], [298] per Callinan J, 662-663 [303] per Heydon J.

82 (2012) 86 ALJR 1372 at 1403-1404 [117]-[120], 1408 [145] per Gummow J, 1477-1479 [527]-[534] per Bell J; 292 ALR 243 at 276-277, 282, 378-381.

83 (2004) 219 CLR 562 at 576-578 [17]-[22].

84 See, for example, *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 per Gibbs J; [1977] HCA 60; *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at 1106-1107 [62]-[66]; 302 ALR 363 at 390-391; [2013] HCA 39.

85 *The Tramways Case [No 1]* (1914) 18 CLR 54 at 69; [1914] HCA 15; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 600.

that case, but has not done so, this Court should not depart from what was then held to be the proper construction of the relevant provisions.

126 The Act fixes the end of immigration detention by reference to the occurrence of one of the four terminating events prescribed by s 196(1) and referred to at the start of these reasons: removal from Australia, deportation, grant of a visa, or an officer beginning to deal with the non-citizen for the purpose of taking that person to a regional processing country. The requirement of s 196(1) that an unlawful non-citizen detained under s 189 must be kept in immigration detention "until" the happening of one of those events cannot be construed as using the word "until" in some purposive sense. One of the terminating events is the grant of a visa and it is not to be supposed that detention could be for the purpose of granting the person detained a visa. It thus follows that the word "until" must be read in s 196(1) as fixing the end of detention, not as fixing the purpose or purposes for which detention is or may be effected.

127 Understood in that way, s 196 (when read with ss 189 and 198) takes its place as a provision which is central to effecting the overall purpose of the whole of Pt 2 (ss 213-274) of the Act. That purpose is to control the arrival and presence of non-citizens in Australia. Mandatory detention under and for the purposes of the Act is the means which the Parliament has adopted to assert control over the arrival and presence of such persons. Sections 189, 196 and 198 do that by preventing those who have no permission to travel to and enter Australia and no permission to remain in Australia from doing so. Detention under and for the purposes of the Act in accordance with those provisions serves the purpose of controlling the arrival and presence of non-citizens in Australia.

Validity of the provisions

128 The Court decided[86], in *Al-Kateb*, that ss 189, 196 and 198 of the Act, construed in the manner that has been described, are valid. Again, this conclusion should not now be revisited. It may be accepted[87] that this Court may more readily reconsider constitutional issues than it should reconsider questions of statutory construction. Nonetheless, the conclusion reached by the majority in *Al-Kateb* should be affirmed.

---

86 (2004) 219 CLR 562 at 585-586 [48] per McHugh J, 650-651 [266]-[268] per Hayne J, 661 [298] per Callinan J, 662-663 [303] per Heydon J.

87 See, for example, *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278 per Isaacs J; [1913] HCA 41; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 per Gibbs J.

129 For the reasons which I gave in *Al-Kateb*, I consider that the provisions of ss 189, 196 and 198, when construed in the manner I have described, are valid laws of the Commonwealth. Nothing is to be gained by my rehearsing what I said there.

130 Chapter III of the Constitution does not limit the powers given by s 51(xix) and (xxvii) in a way which precludes the enactment of those provisions or, in the events that have happened, their continued valid application to the plaintiff. A law which requires the detention of a person who has no permission to travel to and enter Australia and no permission to remain in Australia until that person is removed from Australia does not constitute any exercise of the judicial power of the Commonwealth, regardless of whether removal can be seen to be reasonably practicable in the foreseeable future. It is a law within the legislative powers of the Parliament and is valid. Whether it is thought to be a good law or a bad law, a fair law or an unfair law, or a law that is consistent with basic tenets of common humanity is a matter for the Parliament and "the people of the Commonwealth"[88], not for the courts.

Conclusion and orders

131 For these reasons, the plaintiff fails in her challenge to the construction of ss 189, 196 and 198 of the Act. She fails in her challenge to the validity of those provisions in their application to her. She succeeds in her arguments that the Minister's power under s 46A(2) remains unperformed and a declaration to that effect should be made. She should have one half of her costs of the special case.

132 I would answer the questions stated for the opinion of the Full Court as follows:

1. Do ss 189, 196 and 198 of the *Migration Act* 1958 (Cth) authorise the detention of the Plaintiff?

Answer: Yes.

2. If the answer to question 1 is "yes", are these provisions beyond the legislative power of the Commonwealth insofar as they apply to the Plaintiff?

Answer: No.

3. Does the fact that the Plaintiff's case was not referred to the Minister for him to consider whether to exercise his power under s 46A(2) reveal an error of law?

---

88 Constitution, s 24.

Answer: Yes.

4. What relief, if any, should issue?

Answer: There should be a declaration that the Minister was and is bound to determine whether s 46A(1) of the Act does not apply to an application by the plaintiff for a protection visa.

5. Who should pay the costs of and incidental to this Special Case?

Answer: The defendants should pay one half of the plaintiff's costs.

133 CRENNAN, BELL AND GAGELER JJ. By application in the original jurisdiction of the High Court, for declaratory relief and habeas corpus, the plaintiff claims her present detention is not authorised by ss 189 and 196 of the *Migration Act* 1958 (Cth) ("the Act"). It was not disputed in this Court that the plaintiff, a Sri Lankan national, has a well-founded fear of persecution for the reasons of race and political opinion if she returns to Sri Lanka.

134 The parties have agreed in stating questions of law in the form of a special case for the opinion of the Full Court. Those questions, the background facts and the relevant statutory provisions are all set out in the reasons for judgment of Kiefel and Keane JJ. As their Honours note, the defendants have not sought to argue that *Plaintiff M47/2012 v Director-General of Security*[89] was not correctly decided. Their Honours go on to conclude that as at 24 April 2012 an error of law led the Department to conclude that PIC 4002 was a basis on which a visa could have been lawfully refused to the plaintiff[90]. We agree with the answers given by Kiefel and Keane JJ to Questions 3 and 4 for the reasons given by their Honours.

135 It follows from those answers to Questions 3 and 4 that the Minister has yet to complete his consideration under s 46A of the Act as to whether or not to lift the bar so as to allow the plaintiff to apply for a visa. Accordingly, the plaintiff's present detention can and should be held to be validly authorised by ss 189 and 196 of the Act. Her present detention is for the purpose of completing statutory processes, which will result in a determination of whether she is or is not to be granted permission to remain in Australia, and for the purpose of removing her if that permission is not granted.

136 On that basis, we would answer "Yes" to Question 1 without reaching the constitutional issue determined in *Al-Kateb v Godwin*[91], which is the subject-matter of Question 2. Any reconsideration of that constitutional issue can and should await another day.

137 To explain why the constitutional issue determined in *Al-Kateb* need not be reached, it is necessary to start with the prior constitutional holding in

---

89 (2012) 86 ALJR 1372; 292 ALR 243; [2012] HCA 46.

90 Reasons of Kiefel and Keane JJ at [222].

91 (2004) 219 CLR 562; [2004] HCA 37.

Chu Kheng Lim v Minister for Immigration[92]. The plaintiff seeks not to challenge that prior holding but rather to rely on it.

138 The constitutional holding in *Lim* was that of Brennan, Deane and Dawson JJ, with whom Mason CJ agreed. They constituted a majority of the Court and their views "reflect the principles for which the case stands as authority"[93]. Their holding was that laws authorising or requiring the detention in custody by the executive of non-citizens, being laws with respect to aliens within s 51(xix) of the Constitution, will not contravene Ch III of the Constitution, and will therefore be valid, only if[94]:

> "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."

139 The necessity referred to in that holding in *Lim* is not that detention *itself* be necessary for the purposes of the identified administrative processes but that the *period* of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified[95]. The temporal limits and the limited purposes are connected such that the power to detain is not unconstrained. So much is clear from their Honours' separate observations that Ch III is not contravened by laws which require or authorise the executive to detain non-citizens in custody "in the context and for the purposes of", and in that sense as an "incident of", processes allowing for application for, and consideration of, the grant of permission to remain in Australia, and providing for deportation or removal if permission is not granted[96]. The common law does not recognise any executive warrant authorising arbitrary detention. A non-citizen can therefore invoke the original jurisdiction of the Court under s 75(iii) and (v) of the Constitution in respect of any detention if and when that

---

92 (1992) 176 CLR 1; [1992] HCA 64.

93 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 11 [14]; [2004] HCA 49.

94 (1992) 176 CLR 1 at 33.

95 See *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 14 [26].

96 (1992) 176 CLR 1 at 10, 32.

detention becomes unlawful[97]. What begins as lawful custody under a valid statutory provision can cease to be so.

140 The constitutional holding in *Lim* was therefore that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted, is consistent with Ch III if, but only if, the detention in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes.

141 Subject to *Al-Kateb*, and its companion case, *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*[98], that is the constitutional principle for which *Lim* remains authority. The majority in those cases did not overrule *Lim*. The minority neither advanced nor supported a proposition, contrary to *Lim*, that it is unlawful to detain in custody a non-citizen while administrative processes capable of resulting in admission to Australia have not been exhausted.

142 The constitutional issue raised for determination in *Al-Kateb* and *Al Khafaji* was whether detention in custody by the executive of a non-citizen can continue consistently with Ch III once the point is reached when (1) the administrative processes allowing for application for, and consideration of, the grant of permission to remain in Australia have been exhausted and (2) there is no real prospect that removal of the non-citizen from Australia will be practicable in the reasonably foreseeable future.

143 Mr Al-Kateb was a stateless Palestinian born in Kuwait. He requested in writing to be removed from Australia either to Kuwait or to Gaza. Nine months later, all attempts to obtain the international co-operation necessary for that removal to occur had been unsuccessful. At first instance in the Federal Court, von Doussa J rejected a submission that he should find "that removal from Australia [would] be achievable, but may take time" or that "there remain[ed] a number of options which [were] yet to be exhausted"[99] and found instead "that removal from Australia [was] not reasonably practicable at the [then] present time as there [was] no real likelihood or prospect of removal in the reasonably

---

97 (1992) 176 CLR 1 at 19-20.

98 (2004) 219 CLR 664; [2004] HCA 38.

99 *SHFB v Goodwin* [2003] FCA 294 at [19].

foreseeable future"[100]. In this Court, Gleeson CJ treated that finding as equivalent to a finding that the purpose of removal had become "incapable of fulfilment"[101].

144 Mr Al Khafaji was an Iraqi citizen. He was denied a protection visa, despite being found to have a well-founded fear of persecution should he be returned to Iraq, because he had not taken all available steps to avail himself of a right to reside in Syria. He then asked in writing to be removed to Syria or to any third country but the international co-operation necessary for that to occur was not forthcoming after nearly two years. At first instance in the Federal Court, Mansfield J found "nothing to indicate that there [was] any real prospect of [Mr Al Khafaji] being returned to Syria in the reasonably foreseeable future, and nothing to indicate that he [could] successfully be removed to another country in any measurable timeframe"[102].

145 The point reached in *Al-Kateb* and in *Al Khafaji* has not been reached in the present case.

146 First, because the answers to Questions 3 and 4 have the effect that the steps to be taken in relation to the plaintiff under and for the purposes of the RSA process have not been completed, the administrative processes capable of resulting in the plaintiff being granted permission to remain in Australia have not yet been exhausted. The agreement of the parties is that the Department will in such event consider "whether the [p]laintiff's case should be referred to the Minister for the possible exercise of his power under s 46A(2)". There is no dispute that steps taken under and for the purposes of the RSA process are "steps taken under and for the purposes of the [Act]"[103]. The present case is in this respect indistinguishable from *Plaintiff M47/2012 v Director-General of Security*[104], in which the majority held it to be unnecessary and inappropriate to revisit *Al-Kateb* and *Al Khafaji*.

---

100 [2003] FCA 294 at [21].

101 (2004) 219 CLR 562 at 572 [3].

102 *Al Khafaji v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1369 at [21].

103 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 334 [9]; [2010] HCA 41.

104 (2012) 86 ALJR 1372 at 1397 [72], 1421-1422 [226], 1457 [404]-[405], 1465 [460]; 292 ALR 243 at 267, 302, 350-351, 362.

147 Secondly, notwithstanding the qualified concession of the Minister that it "would be open" to the Court to do so, we are not prepared to draw from the material contained in the special case an inference of fact that there is currently no realistic prospect that the plaintiff will be able to be removed from Australia in the reasonably foreseeable future. The special case contains no agreement between the parties to that effect. The material contained in the special case discloses that the plaintiff has close relatives living both in India and in another country which has an established practice of offering substantial resettlement places on an annual and ongoing basis, and that the plaintiff has quite recently been invited to approach India and that other country directly to seek resettlement and has not suggested through her legal representatives either that she has done so or cannot do so. The special case also discloses that the Department intends to keep her case under review with a view to approaching resettlement countries should there be a change in circumstances that would make such an approach appropriate, the possible changes in circumstances including "a change in the [p]laintiff's personal circumstances, or further information being obtained regarding the [p]laintiff's relatives in resettlement countries". Unlike Mr Al-Kateb and Mr Al Khafaji, the plaintiff has not asked the Minister in writing to be removed to any country. The options for her removal have not yet been exhausted.

148 As has been said and referred to many times[105]:

> "It is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties."

Adherence to that practice is especially important in a case, such as the present, where consideration of the constitutional question sought to be raised would involve the reconsideration of an earlier decision, a course the contemplation of which independently attracts a "strongly conservative cautionary principle"[106].

149 The plaintiff seeks to argue, contrary to the holding of the majority in *Al-Kateb* and *Al Khafaji* and in reliance on the holding in *Lim*, that once the grant

---

105 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283. See also *Cheng v The Queen* (2000) 203 CLR 248 at 270 [58]; [2000] HCA 53; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [248]-[252]; [2001] HCA 51; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 437 [355]; [2009] HCA 2.

106 *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352 [70]. See also *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599; [1977] HCA 60.

of permission to remain in Australia is no longer an available option for a non-citizen, the continuation of detention can only be for the purpose of deportation, which purpose is "necessarily limited by the capacity to achieve it". In circumstances where consideration of granting the plaintiff permission to remain in Australia has not been completed and where incapacity to achieve removal of the plaintiff has not been shown, a state of facts which would make it necessary to investigate and decide the argument does not exist. Acceptance of the argument would not deny the validity of the plaintiff's current detention under ss 189 and 196 of the Act.

150 For the reasons given we would answer the questions stated for the opinion of the Full Court as follows:

Question 1

Do ss 189, 196 and 198 of the *Migration Act* 1958 (Cth) authorise the detention of the Plaintiff?

Answer

The plaintiff's present detention is authorised by ss 189 and 196 of the Act.

Question 2

If the answer to question 1 is "yes", are these provisions beyond the legislative power of the Commonwealth insofar as they apply to the Plaintiff?

Answer

Save that the plaintiff's present detention is validly authorised by ss 189 and 196 of the Act, it is not necessary to answer this question.

Question 3

Does the fact that the Plaintiff's case was not referred to the Minister for him to consider whether to exercise his power under s 46A(2) reveal an error of law?

Answer

Yes.

Question 4

What relief, if any, should issue?

Answer

It should be declared that the exercise of the Minister's power was affected by an error of law in that, in deciding whether to refer the plaintiff's application to the Minister, an officer of the Commonwealth acted upon PIC 4002 as a consideration relevant to the decision.

Question 5

Who should pay the costs of and incidental to this Special Case?

Answer

The defendants.

151 KIEFEL AND KEANE JJ. On 8 May 2010 the plaintiff, a Sri Lankan national of Tamil ethnic origin, and her two eldest sons arrived in Australia by boat from India. The plaintiff had been a member of the Liberation Tigers of Tamil Eelam.

152 On arrival the plaintiff and her sons were detained under s 189(3) of the *Migration Act* 1958 (Cth) ("the Act") and were transported to Christmas Island.

153 On 7 June 2010 the plaintiff and her sons were moved to Leonora Alternative Place of Detention in Western Australia. From that point they were held in immigration detention under s 189(1) of the Act.

154 On 27 July 2010 the plaintiff submitted to the Department of Immigration and Citizenship ("the Department") a request for protection as a refugee. The request was made under the Refugee Status Assessment process ("the RSA process"), which was directed to whether the Minister should exercise his discretion under s 46A(2) of the Act. That assessment was undertaken.

155 On 28 March 2011 the Minister made a "residence determination" pursuant to s 197AB of the Act permitting the plaintiff and her sons to reside in "community detention".

156 On 19 September 2011 the plaintiff was advised by the Department that she had been found to be a person in respect of whom Australia owes protection obligations under the Refugees Convention[107].

157 On 8 December 2011 the Australian Security Intelligence Organisation ("ASIO") interviewed the plaintiff for the purpose of conducting a security assessment of her. On 24 April 2012, ASIO furnished the Department with an "adverse security assessment" with respect to the plaintiff.

158 On 24 April 2012 the plaintiff was advised by the Department that, as a result of that security assessment, she would not satisfy Public Interest Criterion 4002 ("PIC 4002") and was therefore not eligible under the Act for the grant of a permanent visa.

159 On 10 May 2012, following the adverse security assessment from ASIO, the Minister revoked the residence determination under s 197AD; and the plaintiff and her sons have been in immigration detention ever since.

---

107 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

160 It was common ground between the parties that the plaintiff has a well-founded fear of persecution in Sri Lanka for reasons of race and political opinion.

161 The defendants accepted that it is open to this Court to proceed on the footing that, because other countries are unwilling to receive the plaintiff, removing her from Australia to another country is not reasonably practicable at the present, and there is no real likelihood or prospect of removal in the reasonably foreseeable future. On the other hand, the defendants did not accept that there is no reasonable future prospect of resettling the plaintiff in another country.

162 The defendants asserted that the plaintiff's detention is authorised pursuant to s 189(1) and s 196(1) of the Act for the purpose of removing her from Australia as soon as it is reasonably practicable to do so and segregating her from the community pending her removal.

163 The parties agreed that the plaintiff has no present right to enter and remain in any country other than Sri Lanka. The Minister does not propose to remove the plaintiff to Sri Lanka against her will; and the plaintiff has not asked the Minister in writing to be removed to Sri Lanka or any other country. Approaches to other countries with a view to resettling the plaintiff have met with negative responses. While the plaintiff remains in detention, the Department intends to keep her case under review with a view to approaching other countries to accept the plaintiff for resettlement should there be a change in circumstances that would make such an approach appropriate.

Special Case questions

164 In proceedings commenced in the original jurisdiction of the Court in which the plaintiff claimed that her detention is unlawful, the following questions have been stated for determination:

1. Do ss 189, 196 and 198 of the Act authorise the detention of the plaintiff?

2. If the answer to question 1 is "yes", are these provisions beyond the legislative power of the Commonwealth insofar as they apply to the plaintiff?

3. Does the fact that the plaintiff's case was not referred to the Minister for him to consider whether to exercise his power under s 46A(2) reveal an error of law?

4. What relief, if any, should issue?

5. Who should pay the costs of and incidental to this Special Case?

165 These questions will be addressed in turn.

166 The first four questions involve the further agitation of arguments concerning the operation of the Act which have been the subject of extensive discussion in recent decisions of this Court[108]. In the light of this discussion, and in the interests of coherence and clarity, the discussion of these questions may be relatively brief. In order to deal with these questions it is neither necessary nor desirable to traverse yet again the detailed examinations of the Act undertaken in recent cases, or to review the reasons which led to the resolution of each of those cases. The one exception in this regard is the decision in *Al-Kateb v Godwin*[109], which was said by the plaintiff to have been incorrectly decided. It will be necessary to review the basis of that decision in the course of addressing the first question.

Question 1: the detention of the plaintiff under the Act

167 The plaintiff contended that her detention is not authorised by ss 189, 196 and 198 of the Act. It is necessary to set out these provisions at some length.

168 Section 189 concerns the detention of unlawful non-citizens. It provides relevantly:

> "(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
>
> ...
>
> (3) If an officer knows or reasonably suspects that a person ... in an excised offshore place is an unlawful non-citizen, the officer must detain the person."

---

108 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1; [2002] HCA 14; *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1; [2004] HCA 49; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161; [2005] HCA 6; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1; [2006] HCA 53; *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319; [2010] HCA 41; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; [2011] HCA 32; *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372; 292 ALR 243; [2012] HCA 46.

109 (2004) 219 CLR 562.

169 It was common ground that, by virtue of ss 5(1) and 14 of the Act, the plaintiff became an "unlawful non-citizen" upon her arrival in Australia.

170 Once an unlawful non-citizen has been detained under s 189, s 196 comes into operation. So far as is relevant, it provides:

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

171 Section 198 of the Act provides, relevantly to question 1:

> "(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.
>
> …
>
> (2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:
>
> …
>
> (c) who either:
>
> (i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined."

172 In *Al-Kateb*, this Court held that these provisions, properly construed, authorised the continued detention of an unlawful non-citizen whose prospects of removal from Australia were substantially the same as those of the plaintiff. The plaintiff submitted that *Al-Kateb* should be re-opened and overruled.

173 In that case, the appellant was a "stateless person", as that term is defined in Art 1 of the Convention relating to the Status of Stateless Persons. He arrived in Australia by boat without a passport or Australian visa[110]. He was taken into immigration detention and unsuccessfully applied for a protection visa[111]. The appellant wrote to the Minister and requested that he be removed from the country, thus enlivening s 198(1) of the Act. Because of difficulties in securing the co-operation of other countries in relation to the appellant's resettlement, removal to another country was not possible. It was common ground that removing the appellant from Australia was not reasonably practicable and there was no real likelihood or prospect of removal in the reasonably foreseeable future[112].

174 The majority of the Court, consisting of McHugh, Hayne, Callinan and Heydon JJ, held that ss 189, 196 and 198 authorised the continued detention of an unlawful non-citizen even in circumstances where the removal of the unlawful non-citizen from Australia was not reasonably practicable in the foreseeable future. In their Honours' view, the authority to detain an unlawful non-citizen was not limited to a reasonable period within which the removal of that person might be arranged.

175 In the leading judgment of the majority, Hayne J noted[113] that "[t]he provisions requiring detention of unlawful non-citizens do not expressly refer to the purpose of detention." Instead, "s 189 requires officers to detain unlawful non-citizens and s 196 identifies the period of detention." The imposition of the

---

110 (2004) 219 CLR 562 at 596 [79].

111 (2004) 219 CLR 562 at 630 [195].

112 (2004) 219 CLR 562 at 631 [197].

113 (2004) 219 CLR 562 at 638 [224].

duty on an officer under s 198 to remove an unlawful non-citizen recognised that[114]:

> "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." (emphasis in original)

176 Hayne J concluded that[115]:

> "[i]t 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 ... The time for removal is fixed by this legislation by reference to reasonable *practicability*." (emphasis in original)

177 Hayne J expressly adverted[116] to the principle of construction that "legislation is not to be construed as interfering with fundamental rights and freedoms unless the intention to do so is unmistakably clear." His Honour said that[117]:

> "Reading the three sections together ... 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. ... [T]he time limit imposed by the Act cannot be transformed by resort to the general principle identified. The words are, as I have said, intractable."

---

114 (2004) 219 CLR 562 at 638-639 [226].

115 (2004) 219 CLR 562 at 640 [231].

116 (2004) 219 CLR 562 at 643 [241].

117 (2004) 219 CLR 562 at 643 [241].

178 In relation to the construction of ss 189, 196 and 198, McHugh and Heydon JJ agreed with Hayne J[118]. The reasoning of Callinan J did not expressly discuss the principle of legality addressed by Hayne J; but it is apparent from his reasons that Callinan J regarded the effect of the statutory language as sufficiently clear to leave no room for doubt as to the meaning of the Act[119].

179 The plaintiff submitted that *Al-Kateb* was wrongly decided and that it should not be followed. The minority in *Al-Kateb* reached their conclusions by somewhat different paths of reasoning[120]. In their separate reasons in *Plaintiff M47/2012 v Director-General of Security*[121], Gummow and Bell JJ expressed their preference for the approach of Gleeson CJ in *Al-Kateb*. We will, therefore, focus upon the reasoning of Gleeson CJ.

180 In *Al-Kateb*, the nub of the reasoning of Gleeson CJ[122] was that the Act makes no express provision for indefinite detention. In resolving questions raised by legislative silence, regard should be had to a fundamental principle of interpretation, that of legality. It presumes that the legislature does not intend to abrogate or curtail human rights or freedoms (of which personal liberty is the most basic) unless such an intention is manifested by unambiguous language.

181 This reasoning invites attention to two questions: first, whether the Act is indeed "silent" on the question of detention where "the assumption underlying s 198 (the reasonable practicability of removal) is false", and secondly, whether the plaintiff has a fundamental right to be at liberty within the Australian community so as to engage the principle of interpretation referred to by Gleeson CJ.

182 As to the first of these questions, there is much to be said in favour of the view that the Act is not relevantly "silent". The scheme of the Act contemplates that only those aliens who hold a visa are entitled to be at large in the Australian community. In this context, the absence of an express limitation upon continued detention where removal is not practicable within a reasonable time is not

---

118 (2004) 219 CLR 562 at 581 [33] per McHugh J, 662-663 [303] per Heydon J.

119 (2004) 219 CLR 562 at 661-662 [297]-[298].

120 (2004) 219 CLR 562 at 576-578 [17]-[22] per Gleeson CJ, 607-609 [118]-[125] per Gummow J, 630 [193] per Kirby J.

121 (2012) 86 ALJR 1372 at 1402-1404 [110]-[121] per Gummow J, 1479 [532]-[534] per Bell J; 292 ALR 243 at 275-278, 380-381.

122 (2004) 219 CLR 562 at 576-577 [18]-[19].

"silence" on the part of the legislature. The circumstance that the language of ss 189, 196 and 198 is not qualified by any indication that the mandate requiring detention depends upon the reasonable practicability of removal within any time frame is eloquent of an intention that an unlawful non-citizen should not be at large in the Australian community: the mandate in s 189 is unqualified in its terms, and the operation of the mandate in s 196(1) is, in terms (subject only to the possibility of the Minister making a "residence determination" under s 197AB of the Act), *until* the unlawful non-citizen is removed from Australia under s 198 or the unlawful non-citizen is granted a visa.

183 It has been said[123] that the authority to detain conferred by s 196(1) is constrained under s 198(2) by the purpose of removal within a reasonable time, and that where this purpose is presently incapable of fulfilment, the authority to detain expires. But to say that is to fail to recognise that ss 196 and 198 are parts of a legislative scheme which includes s 189. Even if it were to be accepted that s 196(1) ceased to authorise the continuing detention of an unlawful non-citizen, and the detainee were released, s 189 would then be engaged to require immediate detention in order to serve the evident purpose of preventing unauthorised entry into the Australian community.

184 As to the second of these points, an alien's right to be at liberty in Australia is to be approached as a matter of statutory entitlement under the Act rather than as a "fundamental right". The view of the minority in *Al-Kateb*, viz, that the Act leaves room for the possibility that an alien who is an unlawful non-citizen may lawfully be at liberty within the Australian community without a visa issued pursuant to the provisions of the Act, derives no support from the language of the Act. Nor does it derive support from any principle of the common law that an alien who is unlawfully in Australia is entitled to be at liberty in the Australian community as if he or she were an Australian citizen or a non-citizen lawfully present in Australia.

185 In *Chu Kheng Lim v Minister for Immigration*, Brennan, Deane and Dawson JJ said[124]:

> "While an alien who is actually within this country enjoys the protection of our law, his or her status, rights and immunities under that law differ from the status, rights and immunities of an Australian citizen in a variety of important respects. For present purposes, the most important difference … lies in the vulnerability of the alien to *exclusion or*

---

123 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 608 [121]-[122] per Gummow J.

124 (1992) 176 CLR 1 at 29; [1992] HCA 64. See also at 57 per Gaudron J.

deportation. That vulnerability flows from both the common law and the provisions of the Constitution." (emphasis added; footnote omitted)

186 While it may not be practicable to deport the plaintiff now or within the reasonably foreseeable future, the provisions of the Act serve to exclude the plaintiff from the Australian community, she having no right under the Act to enter, and be at large in, that community.

187 As a matter of ordinary language, these provisions do not have the meaning and effect that an unlawful non-citizen who has not obtained a visa, but whose removal from Australia is not reasonably practicable because no other country is willing to accept him or her for resettlement, is to be allowed to go at large in the Australian community. Notwithstanding the high value accorded to individual liberty in the tradition of the common law, and even though a less stringent regime might have been adopted, it is hardly surprising that the Act operates to prevent entry into the Australian community save pursuant to authority granted by the Act.

188 Thus, in the Supreme Court of the United Kingdom, it was said that it was unlikely that any State party to the Refugees Convention would have agreed to grant to refugees the freedom to move freely within its territory before the State had decided according to its own domestic laws whether or not to admit them to the territory in the first place[125].

189 In summary to this point, there is much force in the view of the majority in *Al-Kateb* that the Act does not leave room for the possibility that an unlawful non-citizen who does not hold a visa, but who cannot practicably be removed to another country because he or she is not yet welcome in Australia, is entitled to be at liberty within the Australian community, either generally or until removal might become practicable. Indeed, with great respect to those who thought otherwise, it is difficult to accept that it is not the better view of the relevant provisions of the Act.

190 But even if it could not be said that the interpretation of the Act for which the decision in *Al-Kateb* stands is definitely correct, there are powerful reasons not to permit the decision in *Al-Kateb* now to be called into question.

Should Al-Kateb be re-opened?

191 It is not disputed that this Court may reconsider and depart from its previous decisions. Although there is "no very definite rule" as to the

---

125 *R (ST) v Secretary of State for the Home Department* [2012] 2 AC 135 at 153 [37].

circumstances in which this Court will do so[126], a number of factors have been recognised to be relevant. Those factors were considered by Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ in *John v Federal Commissioner of Taxation*[127]:

> "The first was that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases. The second was a difference between the reasons of the justices constituting the majority in one of the earlier decisions. The third was that the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience. The fourth was that the earlier decisions had not been independently acted on in a manner which militated against reconsideration, as had been the case in *Queensland v The Commonwealth*[128]."

192 In *Wurridjal v The Commonwealth*, French CJ said[129] that, when considering whether to overrule previous decisions, this Court should be "informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law". While this Court's ultimate obligation is to give effect to the statute, departure from a previous interpretation by this Court is "a course [that] should not lightly be taken."

193 In terms of the second factor referred to in *John*, there was no serious divergence between the reasoning adopted by the Justices who constituted the majority in *Al-Kateb*.

194 Given that the principle of legality, on which the minority view in *Al-Kateb* depends, operates "to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted"[130], and given that the decision in *Al-Kateb* has stood for nine years without legislative correction, the suggestion that the majority view did not give effect to the will of Parliament has little practical attraction. It may be accepted that there may be many reasons why the legislature does not move to correct a judicial misinterpretation of its will; but

---

126 *Attorney-General (NSW) v The Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 243-244; [1952] HCA 2.

127 (1989) 166 CLR 417 at 438-439; [1989] HCA 5.

128 (1977) 139 CLR 585; [1977] HCA 60.

129 (2009) 237 CLR 309 at 352 [70]; [2009] HCA 2.

130 (2004) 219 CLR 562 at 577 [19].

that consideration has little force in relation to legislation where the legislature has been active in making amendments to the legislation in question but has refrained from altering the text the subject of earlier interpretation.

195 Importantly in this regard, and with particular reference to the fourth factor referred to in *John*, the Parliament has acted on the basis of the majority view, introducing s 195A into the Act by the *Migration Amendment (Detention Arrangements) Act* 2005 (Cth) ("the Amendment Act"). Section 195A relevantly provides that:

> "(1) This section applies to a person who is in detention under section 189.
>
> ...
>
> (2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa)."

196 The Explanatory Memorandum to the Amendment Act sheds further light on the Parliament's intention. It explains that[131]:

> "The Bill inserts a new section 195A, which provides the Minister with a non-compellable power to grant a visa to a person who is being held in immigration detention where the Minister is satisfied that it is in the public interest to do so. In the exercise of this power the Minister will not be bound by the provisions of the [Act] or regulations governing application and grant requirements. The Minister will have the flexibility to grant any visa that is appropriate to that individual's circumstances, including a Removal Pending Bridging Visa where the detainee has no right to remain in Australia but removal is not practicable in the foreseeable future."

197 The introduction of this section may readily be understood as an attempt by the Parliament to ameliorate individual hardship that might follow from the decision in *Al-Kateb*. The assumption on which it proceeds is that the decision in *Al-Kateb* stands as an accurate interpretation of the legislative will.

---

131 Australia, House of Representatives, Migration Amendment (Detention Arrangements) Bill 2005, Explanatory Memorandum at 3 [10].

198 Regularity and consistency are important attributes of the rule of law[132]. As Kirby J said in *K-Generation Pty Ltd v Liquor Licensing Court*[133], "care should be taken to avoid (especially within a very short interval) the re-opening and re-examination of issues that have substantially been decided by earlier decisions in closely analogous circumstances." While it is true that the obligation of this Court is to construe legislation faithfully rather than to perpetuate an erroneous interpretation[134], there comes a point when a view of statutory construction which may reasonably have been contestable on the first occasion on which it was agitated must be acknowledged to have been settled.

199 Whatever the original balance of strengths and weaknesses in the majority and minority views in *Al-Kateb* might have been, the decision should now be regarded as having decisively quelled the controversy as to the interpretation of the Act which arose in that case and in this. It should not be re-opened.

200 For the sake of completeness, it may be noted that in the plaintiff's written submissions it was also argued that the present case is distinguishable from *Al-Kateb* because, unlike Mr Al-Kateb, the plaintiff is a person to whom s 198(2) rather than s 198(1) of the Act applies. The difference between the two provisions is immaterial for present purposes[135]. This argument was not pressed in oral argument. It should be rejected.

201 For these reasons, the first question should be answered "Yes".

Question 2: the validity of ss 189, 196 and 198 of the Act

202 Section 51(xix) of the Constitution empowers the Parliament to make laws with respect to aliens. That this power includes the making of measures to prevent entry into the Australian community by those who have not been given

---

132 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 569 [67]; [2002] HCA 49; *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168 at 201 [92]; [2006] HCA 43; *PGA v The Queen* (2012) 245 CLR 355 at 401 [124]; [2012] HCA 21.

133 (2009) 237 CLR 501 at 569 [246]; [2009] HCA 4.

134 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13; [1987] HCA 19; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 439-440.

135 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1442 [331]; 292 ALR 243 at 330-331.

permission to do so under Australian law is not at all remarkable. In *Ruddock v Vadarlis*, French J, as his Honour then was, said[136]:

> "The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australian community, from entering."

203 The plaintiff submitted that, exceptional cases aside, the involuntary detention of a person in the exercise of the Parliament's power to make laws with respect to aliens, and, in that regard, to authorise detention by the executive "to prevent people not part of the Australian community, from entering", is permissible only as a consequence of the judicial adjudication of the criminal guilt of that person for past acts. This submission was said to be derived from Ch III of the Constitution, and to be applicable to citizen and non-citizen alike.

204 The plaintiff contended that, if ss 196 and 198 are construed to authorise continued detention where removal is not reasonably practicable within a reasonable time, then such detention is inconsistent with Ch III of the Constitution.

205 That contention was rejected by the majority in *Al-Kateb*. In that regard, McHugh J said[137]:

> "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 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."

206 It may readily be accepted that the common law right of every Australian citizen to be at liberty means that, generally speaking, any involuntary detention of a citizen would be characterised as penal and punitive. Such a state of affairs

---

136 (2001) 110 FCR 491 at 543 [193].

137 (2004) 219 CLR 562 at 584 [45].

may only be consequential upon a judicial finding of criminal guilt[138]. But the character of a law which affects the right of a citizen under the common law to be at liberty is radically different from that of a law which affects an alien who seeks to enter the Australian community without its permission. Thus, in *Lim*, Gaudron J said[139]:

> "Aliens, not being members of the community that constitutes the body politic of Australia, have no right to enter or remain in Australia unless such right is expressly granted. Laws regulating their entry to and providing for their departure from Australia (including deportation, if necessary) are directly connected with their alien status."

207 That being so, immigration detention is readily characterised, not as a mode of punishment for an offence, but as a means evidently capable of serving the purpose of ensuring that an alien who presents uninvited and unheralded at the border with no right to enter Australia does not do so while consideration is given by the Australian government to whether permission to enter should be given. It is also an obvious means to ensure that an alien is available for deportation if permission to enter is not forthcoming. Thus, in *Re Woolley; Ex parte Applicants M276/2003*, Hayne J, with whom Heydon J agreed[140], said[141]:

> "Once it is accepted, as I do, that the aliens and immigration powers support a law directed to excluding a non-citizen from the Australian community (by segregating that person from the community) the effluxion of time, whether judged alone or in the light of the vulnerability of those who are detained, will not itself demonstrate that the purpose of detention has passed from exclusion by segregation to punishment."

208 That a less stringent regime might have been adopted by the Parliament does not deny the competence of the Parliament to establish the regime for which the Act provides. It may be noted, however, that the Act now makes provision in s 195A to ameliorate the hardship that might arise in circumstances where removal is impracticable.

---

138 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 29.

139 (1992) 176 CLR 1 at 57.

140 (2004) 225 CLR 1 at 87 [270]. See also to similar effect at 85 [261]-[262] per Callinan J.

141 (2004) 225 CLR 1 at 77 [227].

209 Question 2 should be answered "No".

Question 3: s 46A(2) and error of law

210 At all relevant times s 46A(1) of the Act precluded "unlawful non-citizens" who were "offshore entry persons" (now "unauthorised maritime arrivals") from making a valid visa application. Section 46A(2) contemplated that this preclusion might be relaxed.

211 Section 46A of the Act relevantly provided:

> "(1) An application for a visa is not a valid application if it is made by an offshore entry person who:
>
> (a) is in Australia; and
>
> (b) is an unlawful non-citizen.
>
> (2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.
>
> (3) The power under subsection (2) may only be exercised by the Minister personally.
>
> …
>
> (7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances."

212 It was common ground that, under the terms of the Act at the time, the plaintiff was an "offshore entry person" as that term was defined by s 5(1) of the Act for the purposes of s 46A of the Act.

213 In *Plaintiff M61/2010E v The Commonwealth*[142] ("the *Offshore Processing Case*"), the Court explained the operation of s 46A:

> "The power given by s 46A is, in effect, to determine that an offshore entry person may make a valid application for a visa of a class specified.

---

142 (2010) 243 CLR 319 at 336 [13].

> It is commonly referred to as a decision to 'lift the bar' (scil on making a valid application for a visa)."

The Court also explained[143] that the exercise of power under s 46A is constituted by two distinct steps, the first of which is to consider exercising the power to lift the bar. The second is whether to lift the bar.

214 In the *Offshore Processing Case*, the Minister had decided that consideration was to be given to the exercise of the statutory powers under s 46A with respect to offshore entry persons. That decision was consistent with, and was to be understood by reference to, Australia's obligations under the Refugees Convention[144]. Having decided that he would consider the exercise of power, the Minister required his Department to undertake the necessary enquiries to make an assessment. The importance of those steps for the *Offshore Processing Case* was that, while those enquiries were made, detention was lawful[145].

215 The establishment and implementation of the RSA process evidenced the Minister's decision to consider whether to exercise the powers under s 46A with respect to an offshore entry person who claimed protection[146]. The fact remains that the Minister has begun the task of considering whether to exercise the powers under s 46A even if no submission is put before the Minister or even if there has been an unfavourable outcome of the RSA process[147].

216 The Court in the *Offshore Processing Case*[148] explained what follows from this:

> "[O]nce it is decided that the assessment and review processes were undertaken for the purpose of the Minister considering whether to exercise power under either s 46A or s 195A, it follows from the consequence upon the claimant's liberty that the assessment and review must be procedurally fair and must address the relevant legal question or questions. The right of a claimant to liberty from restraint at the behest of the Australian

---

143 (2010) 243 CLR 319 at 350 [70].

144 (2010) 243 CLR 319 at 350 [70].

145 (2010) 243 CLR 319 at 341-342 [35].

146 (2010) 243 CLR 319 at 349 [66].

147 (2010) 243 CLR 319 at 349-350 [67].

148 (2010) 243 CLR 319 at 353-354 [77]-[78].

> Executive is directly affected. The claimant is detained for the purposes of permitting the Minister to be informed of matters that the Minister has required to be examined as bearing upon whether the power will be exercised.
>
> The Minister having decided to consider the exercise of power under either or both of ss 46A and 195A, the steps that are taken to inform that consideration are steps towards the exercise of those statutory powers. That the steps taken to inform the consideration of exercise of power may lead at some point to the result that further consideration of exercise of the power is stopped does not deny that the steps that were taken were taken towards the possible exercise of those powers. Nor does it deny that taking the steps that were taken directly affected the claimant's liberty. … [T]he consideration must proceed by reference to correct legal principles, correctly applied."

217 The letter of 19 September 2011 by the Department to the plaintiff advised, in effect, that she had been assessed to be a refugee. Government policy at that time was that requirements relating to health, identity and security checks should be applied before considering whether to lift the bar under s 46A(2).

218 On 24 April 2012 ASIO furnished to the Minister an adverse security assessment in respect of the plaintiff. ASIO assessed that the plaintiff was directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act* 1979 (Cth) ("the ASIO Act"). By letter dated the same day, the Department informed the plaintiff that she was not eligible for the grant of a visa to remain in Australia because the ASIO assessment meant that she could not satisfy the requirements of PIC 4002 as a criterion for the grant of a protection visa[149]. The letter also informed the plaintiff that ASIO's assessment was not amenable to merits review.

219 PIC 4002 was in the following terms:

> "The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the [ASIO Act]."

220 It was agreed between the parties that, as a consequence of the adverse security assessment, no consideration is currently being given to the making of a determination under s 46A(2) or of otherwise granting a visa to the plaintiff. That would not appear to us to be relevant to any question in the case.

---

149 *Migration Act* 1958 (Cth), s 65(1)(a)(ii).

221 In *Plaintiff M47/2012*, which was delivered subsequent to the decision communicated to the plaintiff, the majority, consisting of French CJ, Hayne, Crennan and Kiefel JJ, held that cl 866.225 of Sched 2 to the Migration Regulations 1994 (Cth) was invalid to the extent that it prescribed PIC 4002 as a criterion for the grant of a protection visa. The regulation operating by reference to that criterion was inconsistent with the Act[150].

222 The defendants did not seek to argue that *Plaintiff M47/2012* had not been correctly decided. We therefore conclude that, as at 24 April 2012, an error of law led the Department to conclude that PIC 4002 was a basis on which a visa could lawfully have been refused to the plaintiff. The failure to satisfy PIC 4002 was the only reason given by the Department for the decision communicated to the plaintiff by its letter of 24 April 2012.

223 The plaintiff's contention in relation to question 3 was that the Minister embarked upon a process of consideration of whether to exercise his power under s 46A(2) of the Act having regard to Australia's protection obligations under the Refugees Convention, and that process was terminated as a result of an error of law in that PIC 4002 was not a basis on which a visa could lawfully have been refused.

224 On 24 March 2012 the Minister issued guidelines ("the guidelines") in relation to the circumstances in which he wished to consider the possible exercise of his power under s 46A(2) of the Act. The guidelines stated that a person who was a person to whom Australia owed protection obligations as provided for in s 36(2) of the Act, but who had received an adverse security assessment, should not be referred to him for the purposes of s 46A(2). It is common ground that the guidelines applied, and continue to apply, to the plaintiff.

225 The defendants sought to rely upon the circumstance that the guidelines indicated that the Minister did not wish to consider exercising his power under s 46A(2) of the Act to lift the bar with respect to persons who, like the plaintiff, have received adverse security assessments from ASIO quite apart from specific reliance upon PIC 4002. In this regard, it was agreed between the parties that the plaintiff's case was not referred to the Minister for him to consider whether to exercise his power under s 46A(2) because the plaintiff did not satisfy PIC 4002 and the plaintiff had an adverse security assessment from ASIO. The defendants argued that the existence of an additional and independent disqualifying criterion – the fact that the plaintiff had received an adverse security assessment – rendered the Department's reliance on PIC 4002 a harmless error. The

---

150 (2012) 86 ALJR 1372 at 1396-1397 [71], 1421 [221], 1455 [399], 1465 [458]; 292 ALR 243 at 267, 301, 348, 361-362.

non-referral of the plaintiff's case to the Minister for consideration of the possible exercise of the power under s 46A(2) was not caused, in the defendants' submission, by an error of law on the part of an officer of the Department.

226 The plaintiff argued that this circumstance does not cure the flaw in the process which has occurred in relation to the lifting of the bar under s 46A(2) of the Act. It was submitted that, given Australia's protection obligations under the Refugees Convention, the prospect of the grant of a protection visa under s 65(1)(a) of the Act was not foreclosed by reason of other provisions of the Act including ss 500 and 501, provisions which ought to be considered by the Minister in exercising his discretion under s 46A(2) of the Act[151]. In that regard, as was observed in *Plaintiff M47/2012*, the notion of security for the purpose of an assessment under the ASIO Act may be wider than that contemplated by Arts 32 and 33(2) of the Refugees Convention, which are relevant to decisions under ss 500(1)(c) and 501(1) of the Act[152].

227 The further consideration given to the plaintiff's case at the time the error concerning PIC 4002 occurred was for the purpose of the Minister's decision under s 46A(2), whether to lift the bar and allow the plaintiff to make a valid application for a protection visa. It follows from the *Offshore Processing Case* that such consideration was undertaken for the purposes of the Act. Her continued detention at that point was justified by reference to that further consideration for those purposes. It was required to be undertaken in accordance with a correct view of the law. It was not.

228 The Minister's decision whether to lift the bar was foreclosed by the error concerning PIC 4002. It was wrongly considered that the failure to meet that criterion meant that the plaintiff was not eligible for the grant of a protection visa. That is what the letter of 24 April 2012 advised. On that view, there would be no point in referring the matter to the Minister for his decision.

---

151 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1391 [43], 1416 [193], 1453-1454 [389], 1464 [451]; 292 ALR 243 at 259-260, 294-295, 346, 360.

152 (2012) 86 ALJR 1372 at 1418 [204], 1460-1461 [432]-[433]; 292 ALR 243 at 297, 355-356.

229 The defendants submitted, by reference to s 46A(7), that the Minister was under no duty to decide to lift the bar. So much may be accepted. But the point is that a decision had been made to consider whether to exercise that power. That is what the security assessment and consideration of PIC 4002 were directed to. Section 46A(7) is beside the point.

230 The defendants' reliance upon an alternative basis for non-referral of the plaintiff's matter to the Minister, namely the existence of the adverse ASIO assessment, is misplaced. The question whether the Minister can halt the process of decision-making on the basis of such an assessment, given the provisions of the Act relating to relevant aspects of security, may be put to one side. The defendants' submission denies the basis in fact upon which the process was halted.

231 The fact that a non-referral might, in the terms of the guidelines, be justified on another basis is irrelevant. The question whether ASIO's adverse security assessment could and would have led, justifiably, to the plaintiff's application not being referred to the Minister for his consideration under s 46A(2) is hypothetical given that it does not arise in respect of a process of decision-making which has actually occurred. It is neither necessary nor appropriate for this Court to seek to resolve the defendants' argument that the Department's reliance on PIC 4002 was a harmless error. The Court cannot speculate as to whether the plaintiff has no prospects of a favourable decision, because of the existence of the ASIO assessment, and whether any referral to the Minister is therefore futile.

232 On this view, the third question posed for determination should be answered "Yes". The nature and extent of the relief appropriate to that conclusion is the subject of the next question.

Question 4: relief

233 There are reasons for making a declaration to the effect of the answer to question 3, even if it cannot be shown that it will have practical consequences for the future.

234 First, there is support in the authorities for taking such a course. In *Ainsworth v Criminal Justice Commission*[153] the Criminal Justice Commission had prepared a report on the gaming machine industry, which, inter alia, ascribed certain conduct to the appellants (who were manufacturers and suppliers of poker machines) and was critical of that conduct. The report recommended that the appellants' corporate group should "not be permitted to participate in the gaming

---

153 (1992) 175 CLR 564; [1992] HCA 10.

machine industry in Queensland."[154] Under the relevant legislation, the report was granted all the immunities and privileges that it would have been provided with if it had been tabled and printed in Parliament. However, the appellants were not afforded procedural fairness during the report's preparation in that they were not informed of the Commission's investigation, nor were they given the chance to respond to the allegations before the report was published[155].

235 The appellants sought relief by way of certiorari and mandamus. The Court refused to grant either writ. Certiorari could not be granted because the Commission's report had, by itself, no legal effect or consequence[156]. Similarly, mandamus was not available because the Commission was not under a duty to investigate and report the appellants' dealings in the Queensland gaming machine industry[157].

236 The Court proceeded to make a declaration that the appellants had been denied procedural fairness in the publication of the report. The plurality stated[158]:

> "It does not follow that, because mandamus and certiorari are inapplicable, the appellants must leave this Court without remedy. The law with respect to procedural fairness has developed in spite of the technical aspects of the prerogative writs. Moreover, had the appellants had advance notice of the Commission's intention to report adversely, its failure to observe the requirements of procedural fairness would have entitled them to relief by way of prohibition preventing it from reporting adversely without first giving them an opportunity to answer the matters put against them and to put submissions as to findings or recommendations that might be made. ... [A]lthough it [the report] had no legal effect or consequence, it had the practical effect of blackening the appellants' reputations. Prima facie, at least, these matters suggest that the appellants are entitled to declaratory relief". (footnotes omitted)

237 In the *Offshore Processing Case*, the Court made a declaration in circumstances where a writ of mandamus could not compel the Minister to

---

154 (1992) 175 CLR 564 at 571.

155 (1992) 175 CLR 564 at 571.

156 (1992) 175 CLR 564 at 580.

157 (1992) 175 CLR 564 at 579.

158 (1992) 175 CLR 564 at 581.

consider or reconsider the exercise of the power reposed in him so that there was no utility in granting mandamus. For the same reason, certiorari would also have been inutile[159]. Nevertheless, the Court said[160]:

> "Although the plaintiffs' claims for certiorari and mandamus should be rejected, a declaration should be made in each case that the processes undertaken to arrive at the reviewer's recommendation were flawed in the respects that have been identified. In many cases, the conclusion that certiorari and mandamus do not lie would require the further conclusion that no declaration of right should be made."

238 It was held that a declaration was appropriate because the plaintiffs had a "real interest" in raising the question with which the declaration was concerned[161]. In this case, the plaintiff has a real interest in raising the question as to the error in the decision-making process.

239 Secondly, it was common ground in the Special Case stated for determination by the Court that:

> "[i]n the event that the Court declares in this proceeding that … an officer of the Department erred in failing to refer the [p]laintiff's case to the Minister for him to exercise his power under s 46A(2), consideration would be given by the Department … to whether the [p]laintiff's case should be referred to the Minister for the possible exercise of his power under s 46A(2)."

240 Accordingly, it should be declared that the exercise of the Minister's power under s 46A(2) was affected by an error of law in that, in deciding whether to refer the plaintiff's application to the Minister, an officer of the Commonwealth acted upon PIC 4002 as a consideration relevant to the decision.

Question 5: costs

241 The disposition of the costs of the litigation is in the discretion of the Court[162]. Usually, in the exercise of this discretion, it is ordered that the costs

---

159 (2010) 243 CLR 319 at 358-359 [99]-[100].

160 (2010) 243 CLR 319 at 359 [101].

161 (2010) 243 CLR 319 at 359 [103].

162 Rule 50.01 of the High Court Rules 2004 provides that "[s]ubject to the provisions of any law of the Commonwealth and to these Rules, the costs of and incidental to all proceedings in the Court are in the discretion of the Court or a Justice."

should follow the event[163]. In some cases the "event" may be contestable, especially where separate issues have fallen in different ways. This is such a case.

242 The plaintiff has been unsuccessful in her challenges to *Al-Kateb*, and to the validity of ss 189, 196 and 198 of the Act. On the other hand, the plaintiff has succeeded in obtaining declaratory relief. Whether that success will enure to her substantial benefit is not a matter upon which the Court can speculate. It is correct to say, however, that while the plaintiff has enjoyed some success, it has largely been a Pyrrhic victory, given the rejection of substantial aspects of her case. It may be said that, although the order which the Court should make in her favour reflects only a modest level of success on her part, the determination of the questions by the Court was necessary to enable her to achieve even that level of relief. That would not be a sound basis on which to make an award of costs in the plaintiff's favour.

243 It appears from the Special Case that the plaintiff's parents and brothers reside in India and that she has sisters who live in another country. On 23 July 2013 the Department wrote to the plaintiff's legal advisers suggesting, among other things, that the plaintiff contact her family members in order to enlist their support regarding her possible resettlement. This letter elicited the following response from the plaintiff's legal advisers:

> "We are instructed that our client does not feel comfortable asking her family directly whether or not they would support or sponsor her to resettle in another country, as they do not share a close relationship and they have not been disposed to help her previously. She has requested that we instead speak to her family directly. If that is not agreed, we request that you make it clear in communications with our client's family that it is not at her instigation that these enquiries are being made."

244 The attitude manifest in that response detracts from the force of the suggestion that the plaintiff's predicament is such that the only means of relief available to her was the pursuit of her claim in this Court.

245 In these circumstances, each side should bear its own costs. There should be no order as to costs.

---

163 See, for example, *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 [67] per McHugh J; [1998] HCA 11.

Conclusion

246 The questions stated for determination should be answered as follows:

1. Yes.

2. No.

3. Yes.

4. It should be declared that the exercise of the Minister's power was affected by an error of law in that, in deciding whether to refer the plaintiff's application to the Minister, an officer of the Commonwealth acted upon PIC 4002 as a consideration relevant to the decision.

5. There should be no order as to costs.