HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

JOHN FALZON PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION DEFENDANT

Falzon v Minister for Immigration and Border Protection
[2018] HCA 2
7 February 2018
S31/2017

ORDER

Application dismissed with costs.

Representation

S B Lloyd SC with D P Hume for the plaintiff (instructed by Zali Burrows Lawyers)

A M Mitchelmore with C J Tran for the defendant and for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

CATCHWORDS

Falzon v Minister for Immigration and Border Protection

Constitutional law (Cth) – Judicial power – Ch III – Where plaintiff holder of Absorbed Person Visa and Class BF Transitional (Permanent) Visa – Where plaintiff convicted of trafficking large commercial quantity of cannabis and sentenced to 11 years' imprisonment – Where s 501(3A) of *Migration Act* 1958 (Cth) requires Minister for Immigration and Border Protection to cancel visa where visa holder has substantial criminal record and is serving sentence of imprisonment on full-time basis – Where plaintiff's visas cancelled under s 501(3A) – Where plaintiff held in immigration detention pending deportation – Whether s 501(3A) authorises or requires detention – Whether purpose of s 501(3A) is to punish – Whether s 501(3A) confers judicial power on Minister – Whether s 501(3A) invalid as contrary to Ch III of Constitution.

Words and phrases – "aliens", "character test", "immigration detention", "judicial power", "protection of society", "punishment", "punitive purpose", "substantial criminal record", "unlawful non-citizen".

Constitution, Ch III, s 51(xix).
Migration Act 1958 (Cth), ss 34, 189, 196, 198, 501, 501CA.

1 KIEFEL CJ, BELL, KEANE AND EDELMAN JJ. The plaintiff, Mr John Falzon, is a national of Malta who has lived in Australia for 61 years. He arrived in Australia with his family at the age of three. He did not at any time obtain Australian citizenship. Until 10 March 2016 he held an Absorbed Person Visa[1] and a Class BF Transitional (Permanent) Visa. His legal status as the holder of these visas was as a lawful non-citizen[2].

2 In 2008 the plaintiff was convicted of trafficking a large commercial quantity of cannabis and he was sentenced to 11 years' imprisonment with a non-parole period of eight years. He had previous convictions for drug-related and other offences. He was in custody in respect of the 2008 conviction when his Absorbed Person Visa was cancelled by a delegate of the Minister acting under s 501(3A) of the *Migration Act* 1958 (Cth) ("the Cancellation Decision"). The cancellation of this visa has the effect that the Minister is taken to have decided to cancel the plaintiff's other visa[3]. At the conclusion of the non-parole period, four days after the Cancellation Decision, the plaintiff was taken into immigration detention, where he remains.

3 Section 501(3A) provides that:

"The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) paragraph (6)(e) (sexually based offences involving a child); and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory."

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1 *Migration Act* 1958 (Cth), s 34.

2 *Migration Act* 1958 (Cth), s 13(1).

3 *Migration Act* 1958 (Cth), s 501F(3).

4 Section 501(6)(a) provides that a person does not pass the character test if the person has a substantial criminal record, as defined by s 501(7). Section 501(7)(a), (b) and (c), to which s 501(3A)(a)(i) refers, provide that a person has a substantial criminal record if the person has been sentenced to death, to imprisonment for life, or to a term of imprisonment of 12 months or more. Section 501(12) defines "imprisonment" to include "any form of punitive detention in a facility or institution". "Sentence" is there defined to include "any form of determination of the punishment for an offence".

5 By s 501(6)(e), a person also does not pass the character test if a court in Australia or a foreign country has convicted the person of one or more sexually based offences involving a child, or found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without conviction.

6 The Minister is obliged to invite the person whose visa is cancelled to make representations about the revocation of the original decision to cancel[4]. The manner and form of those representations are regulated by reg 2.52 of the Migration Regulations 1994 (Cth). Section 501CA(4) of the *Migration Act* provides that the Minister may revoke the original decision if the person whose visa has been cancelled makes representations in accordance with the invitation and the Minister is satisfied that the person passes the character test or that there is another reason why the original decision should be revoked. A decision not to exercise the power conferred by s 501CA(4) is not the subject of review under Pt 5 or Pt 7 of the *Migration Act*[5].

7 On 15 March 2016 the plaintiff sought revocation of the Cancellation Decision. On 10 January 2017 the Assistant Minister for Immigration and Border Protection ("the Assistant Minister") decided not to revoke the Cancellation Decision. The Assistant Minister was not satisfied that the plaintiff passed the character test given his substantial criminal record. The Assistant Minister then considered whether there was another reason why the Cancellation Decision should be revoked. The Assistant Minister acknowledged that the plaintiff has strong family ties to Australia and that his removal would cause substantial emotional, psychological and practical hardship to his family. The plaintiff has two sisters and four brothers, four adult children and 10 grandchildren in Australia as well as nieces, nephews and other minor family

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4 *Migration Act* 1958 (Cth), s 501CA(3)(b).

5 *Migration Act* 1958 (Cth), s 501CA(7).

members. The Assistant Minister accepted that after a lengthy absence from Malta the plaintiff may suffer some social isolation and emotional hardship. The Assistant Minister nevertheless concluded that the plaintiff represents an unacceptable risk of harm to the Australian community and its protection outweighs the interests of the plaintiff's family and other considerations. The Assistant Minister decided not to revoke the decision to cancel the plaintiff's Absorbed Person Visa.

8 The plaintiff contends that s 501(3A) of the *Migration Act* purports to confer the judicial power of the Commonwealth on the Minister and thereby infringes Ch III of the Constitution. Central to the plaintiff's argument is that, in its legal operation and practical effect, s 501(3A) further punishes him for the offences he has committed and that is its purpose. The plaintiff seeks orders quashing the Cancellation Decision and the decision not to revoke that decision, an order of mandamus requiring his removal from detention and a declaration that s 501(3A) is invalid.

The statutory scheme

9 Section 501(3A) forms part of a statutory scheme within the *Migration Act* which advances the object of regulating the presence in Australia of non-citizens, in the national interest, and the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by the Act[6].

10 The retention of a valid visa is essential to a non-citizen who wishes to remain in Australia. The status of a lawful non-citizen is accorded to a non-citizen in the migration zone who holds a visa that is in effect[7]. Any non-citizen who is not a lawful non-citizen is an unlawful non-citizen[8]. The effect of the cancellation of a visa is to render a person an unlawful non-citizen[9].

11 Provisions relating to the grounds for, and processes governing, the cancellation of visas are contained in Pt 9 of the *Migration Act*. Section 501, of which s 501(3A) forms part, provides for the refusal or cancellation of visas on character grounds. Section 501(1) provides that the Minister may refuse to grant

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6 *Migration Act* 1958 (Cth), ss 4(1) and 4(4).

7 *Migration Act* 1958 (Cth), s 13(1).

8 *Migration Act* 1958 (Cth), s 14(1).

9 *Migration Act* 1958 (Cth), s 15.

a visa to a person if the person does not satisfy the Minister that the person passes the character test. Section 501(2) provides that the Minister may cancel a visa if the Minister reasonably suspects that the person does not pass the character test and the person does not satisfy the Minister that the person passes the character test. Section 501(3A), which is set out above, obliges the Minister to cancel a visa if the conditions there stated exist.

12 A person whose visa is cancelled and who becomes an unlawful non-citizen is liable to immigration detention. Section 189(1) provides that an officer who reasonably suspects that a person is an unlawful non-citizen must detain the person. Section 196 provides for the duration of that detention. Section 196(1)(a), (b) and (c) provide generally that a person detained under s 189 must be kept in immigration detention until he or she is removed from Australia, deported or granted a visa. Section 196(4) provides, subject to s 196(1)(a), (b) and (c), that if the person is detained as a result of the cancellation of his or her visa under s 501, the detention is to continue unless a court determines that the detention is unlawful or that the person detained is not an unlawful non-citizen. Section 196(5) provides that sub-s (4) applies whether or not there is a real likelihood of the person detained being removed under s 198 or s 199 in the reasonably foreseeable future and whether or not the decision relating to the person's visa is unlawful.

13 The plaintiff makes no challenge to the scheme of the *Migration Act* referred to above, nor does he challenge the validity of s 189 or s 196. A challenge of the latter kind would encounter the difficulty that, in *Al-Kateb v Godwin*[10] and in *Re Woolley; Ex parte Applicants M276/2003*[11], this Court held, applying the principles stated in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[12] ("*Lim*"), that ss 189 and 196 authorise and require the detention of a non-citizen for the purpose of his or her removal from Australia and do not infringe the separation of the judicial power of the Commonwealth under Ch III. It is to be inferred from the plaintiff's argument, to which reference will later be made, that at least for some part of his immigration detention he was not detained under s 189; but rather he was detained under and for the purposes of s 501(3A).

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10 (2004) 219 CLR 562; [2004] HCA 37.

11 (2004) 225 CLR 1; [2004] HCA 49.

12 (1992) 176 CLR 1 at 32; [1992] HCA 64.

The plaintiff's case

Chapter III – exclusively judicial functions

14 The plaintiff's case involves a series of propositions which are said to lead to a conclusion that s 501(3A) infringes Ch III and is therefore invalid. The first proposition advanced by the plaintiff is uncontroversial. It is that "the power to punish guilt for an offence against a law of the Commonwealth is exclusive to the Ch III judiciary".

15 In *Lim*, this Court confirmed that the power to adjudge and to punish guilt for an offence against a law of the Commonwealth is exclusive to the Ch III judiciary under the Commonwealth Constitution[13]. Chapter III therefore prevents the enactment of any law purporting to vest any part of that function in the Commonwealth Executive Government. The plaintiff seeks to clarify the statement of principle in *Lim* in one respect. He submits that the exclusive power is to "adjudge guilt of, *or* determine punishment for, breach of the law"[14]. On this view, it is sufficient for invalidity, by reference to Ch III, if the statutory provision punishes a person for an offence. This does not appear to be disputed by the defendant.

16 One form of punishment is involuntary detention. In *Lim* it was said that it would be beyond the legislative power of the Parliament to invest the Executive with arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt[15]. That is because the involuntary detention of a citizen in custody by the State is penal or punitive in character and under our system of government exists only as an incident of the exclusively judicial function of adjudging or punishing criminal guilt.

17 The plaintiff accepts that not all laws authorising or requiring detention will infringe Ch III. In *Lim*[16] it was held that the legislative power conferred by

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13 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

14 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 per Deane J; [1989] HCA 12 (emphasis added).

15 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

16 (1992) 176 CLR 1 at 32.

s 51(xix) of the Constitution encompasses the conferral on the Executive of authority to detain an alien for the purposes of expulsion or deportation. Such an authority constitutes an incident of the executive power of deportation or expulsion. This limited authority to detain an alien in custody can be conferred upon the Executive without infringing Ch III because the authority to detain is neither punitive in nature nor part of the judicial power of the Commonwealth. When conferred on the Executive it takes its character from the executive power to exclude or deport.

"All the circumstances"

18 The plaintiff's second proposition is that "whether a law purports to confer power to punish guilt for an offence against a law of the Commonwealth is to be assessed by reference to all the circumstances".

19 Clearly, whether a law has the character of one conferring a power to punish is a question of construction. The plaintiff accepts that, in accordance with ordinary principles of statutory construction, an important issue will be the purpose of the law. Indeed, in addressing a Ch III challenge it is necessary first to identify the purpose of detention[17].

20 In *Re Woolley*[18], McHugh J said that "[t]he terms of the law, the surrounding circumstances, the mischief at which the law is aimed and sometimes the parliamentary debates preceding its enactment will indicate the purpose or purposes of the law". Of course an enquiry into whether the purpose of a law is to punish guilt presupposes that the law provides a power to detain. That is a distinct question with respect to s 501(3A), which does not, in terms, authorise or require the detention of a person whose visa has been cancelled.

21 The plaintiff submits that a law may infringe the separation of powers even though it does not, in terms, authorise or require the extra-judicial detention of a person. He submits that the legal and practical operation of the law, not just its terms, is relevant to its constitutional character or purpose[19]. This submission is later developed in the plaintiff's argument in an attempt to show that s 501(3A)

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17 *Plaintiff M96A/2016 v The Commonwealth* (2017) 91 ALJR 579 at 584-585 [21]; 343 ALR 362 at 367-368; [2017] HCA 16.

18 (2004) 225 CLR 1 at 26 [60].

19 See *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at 198-199 [138]; [2009] HCA 51.

did in fact require his detention, at least for the period during which the question whether the Cancellation Decision was to be revoked was under consideration.

22 The defendant accepts that constitutional analysis proceeds from an appreciation of the legal and practical consequences of the challenged law, but says that s 501(3A) cannot sensibly be said to authorise detention in its legal and practical operation.

Executive detention is prima facie penal or punitive

23 The plaintiff's third proposition is that the default position is that non-judicial detention of a person is penal or punitive and therefore involves an exercise of the judicial power of the Commonwealth. The plaintiff's submission recognises that there may be detention by the Executive which is not penal or punitive and does not involve an exercise of judicial power, as *Lim* holds. On the plaintiff's argument the only way in which a law by which a person is detained by the Executive may escape characterisation as penal or punitive is to justify it by reference to a non-punitive purpose. In that regard, it is said that it is relevant to ask whether the law is proportionate to a non-punitive end.

24 The plaintiff points to decisions of this Court in which it has been said that *Lim* establishes a constitutional principle in the nature of a prohibition against detention of a person "without just cause"[20] and that any form of detention is penal or punitive "unless justified as otherwise"[21]. It is doubtless correct to observe that the detention of a person by the Executive without more is likely to permit an inference to be drawn that, for some reason, the legislature wishes to punish the person to be detained[22]. That means that the legislature must provide a reason consonant with a non-punitive purpose if the detention is to be justified. In *Lim*, the purpose of the detention was to support and facilitate the exercise of the executive power to remove non-citizens from Australia.

25 Contrary to the plaintiff's submissions, these decisions do not establish that there is a constitutionally guaranteed freedom from executive detention. They do not support the notion, for which the plaintiff contends by analogy with

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20 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 429-430 [53]; [2014] HCA 13.

21 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 611-612 [98]; [2015] HCA 41.

22 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 25-26 [60].

cases such as *McCloy v New South Wales*[23], that any restriction on such a freedom must be justified by showing that the legislative restriction is proportionate.

26 In the joint judgment in *Lim*[24], the issue was raised whether two of the statutory provisions there in question, which required a designated person to be detained and kept in custody, were valid by reference to Ch III. The issue was stated to be whether the detention so authorised and required 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". If the detention is not limited to those purposes, their Honours said, the authority conferred on the Executive "cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates."[25]

27 In *Kruger v The Commonwealth*[26], Gummow J, referring to this passage in *Lim*, said that the question whether a power to detain persons and take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether that detention and custody "are reasonably capable of being seen as necessary for a legitimate non-punitive objective".

28 The plaintiff relies upon these and similar statements in other cases in aid of a submission that what is here involved is the application of an aspect of proportionality testing. It seems, however, that the question posed by *Lim* is quite different from that which arises in proportionality testing.

29 The starting point for the enquiry referred to in *Lim* is that the power to remove or deport aliens from a country is executive in nature and it is non-punitive. The question which then arises with respect to a statutory power given to the Executive to detain an alien in custody is whether it is given in order to facilitate or effect the removal of that person, which is the subject of executive power. The enquiry is as to whether it is "necessary" to that purpose. If it is, it

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23 (2015) 257 CLR 178; [2015] HCA 34.

24 (1992) 176 CLR 1 at 33.

25 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.

26 (1997) 190 CLR 1 at 162; [1997] HCA 27.

may be considered to be an incident of the executive power and will not be an exercise of judicial power. If the power goes further than to achieve that limited purpose it may be otherwise. In such circumstance, it may be inferred that the law has a purpose of its own, a purpose to effect punishment.

30 The test of "reasonable necessity" in proportionality testing[27], on the other hand, asks whether a legislative measure which restricts a constitutionally guaranteed freedom is reasonably necessary to achieve the valid purpose of the statute in question. The enquiry may involve asking whether there are other equally practicable means to achieve the purpose. If there are no such alternative means, the legislative restriction cannot be justified.

31 The two enquiries are different because they arise in different constitutional contexts. Proportionality analysis is applied to constitutionally guaranteed freedoms. Such freedoms are not absolute[28]. Legislation may restrict those freedoms to an extent without being invalid. In that context, the question is how to determine the limits of that legislative power. Proportionality analysis is used to resolve part of that question. The test of reasonable necessity in proportionality analysis asks whether the legislative measure is necessary at all. Whether a legislative power of detention is necessary in the Ch III sense is an enquiry as to the true purpose of the law authorising detention, it is not an enquiry as to whether that law is necessary to the achievement of a relevant legislative purpose.

32 Chapter III contains an absolute prohibition on laws which involve the exercise of the judicial power of the Commonwealth. There is no question about the extent to which a law may vest exclusively judicial functions in the Executive. We therefore agree with what McHugh J said in *Re Woolley*[29], that "[a] law that confers judicial power on a person or body that is not authorised by or otherwise infringes Ch III cannot be saved by asserting that its operation is proportionate to an object that is compatible with Ch III". Questions of proportionality cannot arise under Ch III.

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27 *McCloy v New South Wales* (2015) 257 CLR 178 at 210 [57].

28 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561; [1997] HCA 25; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 136 [444]; [2010] HCA 46; *Maloney v The Queen* (2013) 252 CLR 168 at 232 [166]; [2013] HCA 28.

29 (2004) 225 CLR 1 at 34 [80].

33 It may nevertheless be accepted that a legislative power to detain must be justified, in the sense that it must be shown to be directed to a purpose other than to punish. The plaintiff submits that the need for justification is just as strong in relation to a non-citizen, or alien, as it is to an Australian citizen. This is because the protective principle stated in *Lim* applies just as much to aliens as it does to citizens.

34 The plaintiff also submits that there is a distinction to be drawn between his circumstance and that of other aliens. His situation differs from that of an alien "who presents uninvited and unheralded at the border with no right to enter"[30]. He relies on what was said by Gummow J in *Fardon v Attorney-General (Qld)*[31], that "aliens are not outlaws; many will have a statutory right or title to remain in Australia for a determinate or indeterminate period and at least for that period they have the protection afforded by the Constitution and the laws of Australia".

35 These references are intended to highlight the plaintiff's status as an absorbed person, or, more correctly stated, as the holder of an Absorbed Person Visa. But that visa did not alter the plaintiff's status as an alien and the visa was at all times liable to cancellation.

36 Section 34 of the *Migration Act* came into effect on 1 September 1994[32]. It relevantly provides that a non-citizen in the migration zone who was in Australia before 2 April 1984 and had ceased to be an immigrant is taken to have been granted an Absorbed Person Visa on 1 September 1994. The purpose of the provision was to overcome the unintended effect of earlier amendments to the *Migration Act* which had caused some non-citizens to become prohibited non-citizens. Persons who had been absorbed into the Australian community prior to 2 April 1984 were not to be rendered prohibited non-citizens even if their visa status was irregular[33].

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30 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 385 [207]; [2013] HCA 53.

31 (2004) 223 CLR 575 at 611-612 [78]; [2004] HCA 46 (footnote omitted).

32 *Migration Legislation Amendment Act* 1994 (Cth).

33 See *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 577 [19]; [2006] HCA 50.

37 In *Pochi v Macphee*[34] the plaintiff argued that his absorption into the Australian community meant that he was no longer an alien. The Court considered this argument to be "impossible to maintain"[35]. As Gibbs CJ explained[36], naturalisation can be achieved only by Act of Parliament. A person's nationality is not changed by length of residence or an intention permanently to remain in a country of which he or she is not a national.

38 Consistently with this view, the *Migration Legislation Amendment Act* 1994 (Cth) sought to shift the constitutional basis of the relevant provisions of the *Migration Act* from the immigration power in s 51(xxvii) to the aliens power in s 51(xix). In the Explanatory Memorandum to the Bill[37] for those amendments it was stated that "[a]n alien only ceases to be an alien by becoming an Australian citizen".

39 The joint judgment in *Lim* did not suggest that the Constitution, and laws made under it, offer the same protection to an alien as they do to a citizen. The joint judgment[38] pointed out that, whilst an alien present in this country enjoys the protection of our law, his or her status, rights and immunities under the law differ from those of an Australian citizen in a number of important respects. Relevantly, the most important difference lies in the vulnerability, arising under the common law and provisions of the Constitution, of an alien to exclusion or deportation. The effect is significantly to diminish the protection which Ch III provides a citizen against detention otherwise than pursuant to judicial power. The sovereign power to make laws providing for the expulsion and deportation of aliens extends to authorising the Executive to restrain them in custody to the extent necessary to make their deportation effective[39].

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34 (1982) 151 CLR 101; [1982] HCA 60.

35 *Pochi v Macphee* (1982) 151 CLR 101 at 111, 112, 116.

36 *Pochi v Macphee* (1982) 151 CLR 101 at 111.

37 Australia, House of Representatives, Migration Legislation Amendment Bill 1994, Explanatory Memorandum at 9 [24].

38 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29-30.

39 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 30-31; see also *Koon Wing Lau v Calwell* (1949) 80 CLR 533; [1949] HCA 65.

40 The plaintiff understates the importance of his status as an alien and the scheme of the *Migration Act* as directed to him as a person having that status.

Section 501(3A) purports to confer judicial power on the Minister

41 The plaintiff's fourth, and central, proposition is that s 501(3A) purports to invest the judicial power of the Commonwealth in the Minister and his delegates. In support of this proposition, the plaintiff points to what he contends are features of judicial power in s 501(3A) and he submits that the extrinsic materials confirm that the purpose of his detention is punishment.

42 The principal feature of judicial power which the plaintiff identifies is the conclusiveness, in the sense of finality, of a cancellation decision. It is reinforced by the fact that merits review is not available, no interlocutory release is possible, the decision may be made on the basis of information which is protected from publication and the decision to revoke is wholly discretionary.

43 It may be accepted that, unless a decision is made to revoke an otherwise valid cancellation decision, it has consequences for the detention and removal of the non-citizen and is "final" in that sense. The same consequences attend the exercise of the other powers under s 501. The plaintiff does not suggest that ss 501(1) and 501(2) infringe Ch III or that they are punitive in the relevant sense.

44 The plaintiff seeks to distinguish s 501(3A) from ss 501(1) and 501(2) because s 501(3A) is mandatory in its terms. If the conditions for its exercise are present, the Minister is obliged to cancel the visa. The matters which are taken into account in the exercise of the discretion provided in the other provisions are not addressed where a person's visa is cancelled under s 501(3A) until consideration is given to revocation of the cancellation decision.

45 The defendant correctly points out that it does not follow from the premise that a discretionary determination involves no exercise of judicial power that a legislative determination which mandates that certain offending (or certain levels of offending) results in cancellation necessarily involves the exercise of judicial power. In other words, a permissive/mandatory dichotomy is not useful to mark a power as punitive in nature or purpose. In any event, there is nothing to prevent Parliament from legislating by reference to a class of persons, rather than on a basis which requires a case-by-case approach. Section 501(3A) constitutes a legislative judgment that a class of persons identified by two features – offending and imprisonment – are not to remain in Australia. This is consistent with the

object of the *Migration Act*, namely, to regulate the coming into and presence in Australia of non-citizens[40].

46 The plaintiff relies upon the operation of s 501(3A) as being based upon a primary and characteristic factum that the person has committed an offence or offences, and the further factum that, at the time the power is exercised, the person is in criminal detention, as showing that s 501(3A) is concerned with punishment for and by reference to criminal offending additional to that imposed by a court. Moreover, before the power is exercised, the Minister must reach a positive state of satisfaction in relation to the prior offending.

47 The exercise of a power of cancellation of a visa by reference to the fact of previous criminal offending does not involve the imposition of a punishment for an offence and does not involve an exercise of judicial power. It has long been recognised that the deportation of aliens does not constitute punishment. The cancellation of a visa as a step necessary to achieve the removal of a person from Australia should be viewed in the same light. In *Ex parte Walsh and Johnson; In re Yates*[41], Isaacs J drew a distinction between punishment for a crime and deportation as a political precaution carried out by the Executive. In *O'Keefe v Calwell*[42], Latham CJ referred to the deportation of a convicted immigrant as a measure of protection of the community and not as punishment for any offence.

48 The power to cancel a visa by reference to a person's character, informed by their prior offending, is not inherently judicial in character. It operates on the status of the person deriving from their conviction[43]. By selecting the objective facts of conviction and imprisonment, Parliament does not seek to impose an additional punishment.

49 In the Explanatory Memorandum[44] to the Bill which introduced s 501(3A) it was said that "[t]he intention of this amendment is that a decision to cancel a

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40 *Migration Act* 1958 (Cth), s 4(1).

41 (1925) 37 CLR 36 at 96; [1925] HCA 53.

42 (1949) 77 CLR 261 at 278; [1949] HCA 6.

43 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 610 [74].

44 Australia, House of Representatives, Migration Amendment (Character and General Visa Cancellation) Bill 2014, Explanatory Memorandum at 8 [34].

person's visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued". In the course of the Second Reading Speech the then Minister said that s 501(3A) was calculated to ensure that "noncitizens who pose a risk to the community will remain in either criminal or immigration detention until they are removed or their immigration status is otherwise resolved"[45].

50 It may be accepted that these extrinsic materials show an awareness on the part of the Parliament about the operation of s 501(3A) in the statutory scheme and that one of its purposes is to keep the person out of the community until he or she is removed from Australia. Such a purpose is consistent with those of the other cancellation powers in s 501. The extrinsic materials do not reveal any purpose to ensure that a person is detained in order to punish them.

51 The observation in *O'Keefe v Calwell*, referred to above, provides part of the answer to the plaintiff's contention that s 501(3A) does not involve the pursuit of a protective purpose. The plaintiff submits that the Minister is neither obliged nor permitted to have regard to the protection of the Australian community or any other protective considerations when deciding to cancel a visa and that these matters do not arise for consideration until a decision as to whether to revoke the cancellation decision under s 501(3A) is made.

52 The fact that the Minister is not obliged to consider the need to protect the community when determining whether to cancel a visa in the circumstances provided by s 501(3A) is not determinative of that provision's purpose. The defendant submits that, consistently with s 501, of which it forms part, its purpose is to exclude from the Australian community, by means of visa cancellation, a category of aliens which the Parliament has determined should not be part of the community due to their record of criminal offending. The criteria of which the Minister must be satisfied are those upon which a sovereign State may properly decide to exclude non-citizens in the interest of protecting the peace, order and good government of the Commonwealth. That submission should be accepted.

53 None of the plaintiff's arguments which have been dealt with to this point address the question whether s 501(3A) actually authorises or requires the plaintiff's detention. They proceed upon an assumption that it does. On its face

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45 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 September 2014 at 10328.

s 501(3A) is simply a provision which mandates the cancellation of a visa if the conditions stated are present.

54 The plaintiff submits that s 501(3A) may nevertheless be seen as concerned with punishment because it exposes a person who qualifies for cancellation to detention. It will also be recalled that the plaintiff contends that, regardless of its terms, the legal operation and effect of the provision extend his punishment beyond what has been ordered by a court.

55 In the latter respect, the plaintiff argues that s 501(3A) has the effect that a person is detained for a period after the conclusion of his or her criminal detention whilst consideration is given to whether to revoke a cancellation decision. On this argument there is a period, or periods, after a cancellation decision when a person is not being detained for the purpose of removal under s 189, but is detained for the purpose of the revocation process. The minimum period for detention for the latter purpose is the period between the cancellation decision and the date by which the person the subject of the visa cancellation must apply for revocation under s 501CA, namely 28 days. If the person applies for revocation the period extends to the date of the decision or revocation, in the plaintiff's case 10 months.

56 These submissions fail to take account of the statutory scheme and the effect of a cancellation decision. A cancellation decision has the immediate effect that the person's status is changed from that of a lawful non-citizen to an unlawful non-citizen. Section 501(3A) merely provides the basis for the change in status. It does not authorise detention. It is that new status that exposes the person to detention under s 189. The person is liable to removal from Australia and to detention for that purpose from the time that a cancellation decision is made. The possibility that a cancellation decision might be revoked, so that that decision may be taken not to have been made[46], does not alter the fact that the person retains the status of an unlawful non-citizen for the whole of the period in question, from the time of the cancellation decision to the making of the revocation decision.

57 Where a person seeks revocation, his or her detention for the purpose of removal will be prolonged by his or her act in applying for reconsideration of the decision to cancel his or her visa. Section 501CA provides a process by which it may be decided whether a cancellation decision under s 501(3A) should be revoked, but neither it nor s 501(3A) authorises or requires detention for the

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46 *Migration Act* 1958 (Cth), s 501CA(5).

purpose of that process being undertaken. Section 196 expressly deals with the duration of immigration detention arising in these circumstances. It will be recalled that s 196(4) provides that the detention of a person who is detained as a result of the cancellation of his or her visa is to continue unless a court finally determines either that the detention is unlawful or that the person detained is not an unlawful non-citizen.

58 The plaintiff submits that, "loosely speaking", a cancellation decision under s 501(3A) may have the effect of "converting" criminal detention into immigration detention. He refers to the possibility that the two detentions might operate concurrently. The circumstance that he envisages is where a non-citizen was sentenced to some years of imprisonment, but his or her visa is cancelled during the first week of that term.

59 Criminal detention cannot be "converted" into immigration detention. A person is imprisoned by order of the court which authorises his or her detention by the State following conviction for an offence against the laws of the State. A person so detained cannot be said to be detained by an officer acting under s 189 of the *Migration Act*.

60 The possibility that, in the circumstance to which the plaintiff refers, a person might be a prisoner serving a term of imprisonment for an offence and an unlawful non-citizen liable to be detained and removed from Australia as soon as reasonably practicable points to a possible tension between the provisions of Commonwealth, State and Territory laws and the *Migration Act*.

61 The *Migration Act* contains provisions intended to address that problem. The provisions of Pt 2, Div 4 permit a non-citizen to stay in Australia for the purposes of the administration of justice[47], which is defined to include punishment, by way of imprisonment of a person, for the commission of an offence[48]. The focus of the Division is on maintaining the presence in Australia of persons who would not otherwise be permitted to enter or remain here[49].

62 It is not necessary to detail each of the provisions of Pt 2, Div 4. It is sufficient to observe that they involve the grant by the Commonwealth Attorney-

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47 *Migration Act* 1958 (Cth), s 141.

48 *Migration Act* 1958 (Cth), s 142.

49 *Minister for Immigration and Citizenship v Zhang* (2009) 179 FCR 135 at 146 [97].

General or an official of a State of a criminal justice certificate[50] which has the effect that, during its currency, the person is not to be removed or deported from Australia[51] and the issue of a warrant by a court to stay the removal or deportation of a non-citizen[52]. If a criminal justice certificate or a criminal stay warrant is in force the Minister may consider the grant of a criminal justice visa[53]. The possibility of the concurrent operation of the *Migration Act* with criminal detention does not arise in the plaintiff's case, since it is acknowledged that he was taken into immigration detention at the conclusion of his non-parole period.

Conclusion and orders

63 Section 501(3A) did not authorise or require the detention of the plaintiff. It required that a visa granted to him as a non-citizen be cancelled on account of his criminal history and his imprisonment. The change in his legal status to that of an unlawful non-citizen had the effect that he was liable to removal from Australia and to detention to facilitate that removal. That is the scheme of the *Migration Act*.

64 The plaintiff's application should be dismissed with costs.

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50 *Migration Act* 1958 (Cth), ss 147 and 148.

51 *Migration Act* 1958 (Cth), s 150.

52 *Migration Act* 1958 (Cth), s 151.

53 *Migration Act* 1958 (Cth), s 159(1).

65 GAGELER AND GORDON JJ. The plaintiff, Mr Falzon, is a national of Malta who arrived in Australia on 29 February 1956. Between 1 September 1994 and 10 March 2016, the plaintiff held an Absorbed Person visa. On 26 June 2008, the plaintiff was convicted of one count of trafficking a large commercial quantity of cannabis. He was sentenced to 11 years' imprisonment with a non-parole period of eight years.

66 On 10 March 2016, shortly before the plaintiff was due to be released from criminal custody, a delegate of the defendant – the Minister for Immigration and Border Protection ("the Minister") – cancelled the plaintiff's visa under s 501(3A) of the *Migration Act* 1958 (Cth) ("the Act"). Upon being released from criminal custody on 14 March 2016, the plaintiff was taken into immigration detention, where he has since remained. On 15 March 2016, the plaintiff sought to have the delegate's decision to cancel his visa revoked under s 501CA(4) of the Act. On 10 January 2017, the Assistant Minister decided not to revoke the delegate's decision.

67 Section 501(3A) of the Act requires the Minister to cancel a non-citizen's visa if the Minister is satisfied that the non-citizen has a "substantial criminal record" and is serving a full-time custodial sentence.

68 The plaintiff contended that s 501(3A) purports to confer the judicial power of the Commonwealth on the Minister, contrary to Ch III of the Constitution. That contention was put in two broad ways: first, an exercise of s 501(3A) "results in" or "causes" detention for a punitive purpose contrary to the limitations identified in *Chu Kheng Lim v Minister for Immigration*[54]; and second, the power conferred by s 501(3A) took on a judicial character because of, among other things, the nature of the criteria which enlivened the duty to exercise it.

69 The plaintiff's contention is untenable. The principle in *Lim* concerning the limits on the executive detention of non-citizens is only concerned with laws that require or authorise detention and has no broader operation. Section 501(3A) neither requires nor authorises the detention of non-citizens. The provisions that require and authorise the detention of unlawful non-citizens are found in Div 7 of Pt 2 of the Act. None of those provisions was challenged by the plaintiff. The fact that a person whose visa is cancelled under s 501(3A) will become liable to detention is not enough to attract the principle in *Lim*. Moreover, s 501(3A) does not otherwise confer judicial power on the Minister.

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54 (1992) 176 CLR 1 at 32-33; [1992] HCA 64.

Statutory framework

70 The object of the Act is "to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens"[55]. To advance that object, the Act "provides for visas permitting non-citizens to enter or remain in Australia" and states that the Parliament intends that the Act "be the only source of the right of non-citizens to so enter or remain"[56]. The Act also "provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by [the] Act"[57].

71 Section 501 contains powers to refuse or cancel a visa on character grounds. Sub-sections (1), (2) and (3) identify circumstances in which the Minister *may* refuse to grant a visa to a person or *may* cancel a visa that has been granted to a person. The operation of each sub-section depends on the Minister forming an opinion or state of satisfaction about whether the person passes the statutory "character test".

72 Section 501(3A) is in different terms. It relevantly provides that the Minister *must* cancel a person's visa if:

> "(a) the Minister is satisfied that the person does not pass the character test because of the operation of:
>
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) …; and
>
> (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory."

The sub-section imposes an obligation on the Minister to cancel a visa whenever its terms are met[58]. If the pre-conditions to the exercise of the power exist, the Minister does not have a discretion to decide not to consider exercising the power in s 501(3A).

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55 s 4(1) of the Act.

56 s 4(2) of the Act.

57 s 4(4) of the Act.

58 See s 33(1) of the *Acts Interpretation Act* 1901 (Cth).

73 The circumstances in which a person does not pass the character test are set out in s 501(6). Section 501(6)(a) provides that a person does not pass the character test if the person has a "substantial criminal record", as defined by s 501(7). Relevantly, s 501(7)(c) provides that a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

74 A decision to cancel a visa pursuant to s 501(3A) may be revoked under s 501CA. As soon as practicable after making a decision to cancel a person's visa, the Minister must give the person notice of the cancellation decision and particulars of the information on which the decision was based, and invite the person to make representations to the Minister about revocation of the cancellation decision[59]. If the person makes representations in accordance with the invitation, and the Minister is satisfied that the person passes the character test or that there is another reason why the cancellation decision should be revoked, the Minister *may* revoke the cancellation decision[60].

75 The Act draws a distinction between lawful non-citizens and unlawful non-citizens. A non-citizen in the migration zone[61] who holds a visa that is in effect is a lawful non-citizen[62]. Any other non-citizen in the migration zone is an unlawful non-citizen[63]. A lawful non-citizen whose visa is cancelled becomes an unlawful non-citizen immediately upon cancellation[64].

76 The scheme for the mandatory detention and removal of unlawful non-citizens is found in Divs 7 and 8 of Pt 2 of the Act. Division 7, entitled "Detention of unlawful non-citizens", includes s 189(1), which provides that an officer who knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen must detain the person.

77 Section 196 governs the duration of the detention of a person detained under s 189. Section 196(1) relevantly provides that an unlawful non-citizen

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59 s 501CA(2) and (3) of the Act.

60 s 501CA(4) of the Act.

61 See the definition of "migration zone" in s 5(1) of the Act.

62 s 13 of the Act.

63 s 14 of the Act.

64 s 15 of the Act.

detained under s 189 must be kept in immigration detention until removed, deported or granted a visa. Section 196(4) expressly deals with the detention of non-citizens whose visas are cancelled under s 501 of the Act[65] and relevantly provides that:

> "if the person is detained *as a result of the cancellation of his or her visa under section 501*, the detention is to continue unless a court finally determines that the detention is unlawful, or that the person detained is not an unlawful non-citizen." (emphasis added)

78 As is evident from s 196(1), the potential removal of an unlawful non-citizen constitutes one of the bounds on the duration of detention. The removal of unlawful non-citizens is dealt with in Div 8. Section 198(5) provides that an officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen is a detainee and, relevantly, did not apply for a substantive visa under s 195(1).

79 Section 198(2B), inserted into the Act by Item 11 of Sched 1 to the *Migration Amendment (Character Cancellation Consequential Provisions) Act* 2017 (Cth) ("the Amendment Act"), provides:

> "An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
>
> (a) a delegate of the Minister has cancelled a visa of the non-citizen under subsection 501(3A); and
>
> (b) since the delegate's decision, the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and
>
> (c) in a case where the non-citizen has been invited, in accordance with section 501CA, to make representations to the Minister about revocation of the delegate's decision—either:
>
> (i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or
>
> (ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the delegate's decision."

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65 See also s 196(5) of the Act.

It commenced on 23 February 2017[66] and applies in relation to a decision under s 501(3A) of the Act made before or after its commencement and to an invitation under s 501CA of the Act given before or after its commencement[67].

No conferral of judicial power

80 The provisions of Ch III of the Constitution constitute "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested"[68]. As a corollary, the grants of legislative power in s 51 of the Constitution "do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth"[69].

81 One important consequence of these principles, which were restated in *Lim*, is that the Parliament's legislative power to provide for the executive to be able to effect compulsory detention, and associated trespass to the person, without judicial order is limited[70].

82 *Lim* establishes that the power to require or authorise the executive to detain a non-citizen is limited. The "constitutional holding" in *Lim* was described in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* in the following terms[71]:

> "[T]hat 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: 'the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to

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66 s 2(1) of the Amendment Act.

67 Item 22(3) of Sched 1 to the Amendment Act.

68 *Lim* (1992) 176 CLR 1 at 26 quoting *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; [1956] HCA 10.

69 *Lim* (1992) 176 CLR 1 at 27.

70 (1992) 176 CLR 1 at 32; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 69-70 [40], 86 [98], 160 [379]-[381]; [2016] HCA 1.

71 (2013) 251 CLR 322 at 369 [138]; [2013] HCA 53 (footnote omitted).

enable an application for an entry permit to be made and considered.'" (emphasis added)

The reason that such laws are valid is that detention for those purposes is "neither punitive in nature nor part of the judicial power of the Commonwealth"[72].

83 Consideration of these well-established principles directs attention to s 501(3A). Contrary to the plaintiff's contention, that provision does not confer the judicial power of the Commonwealth on the Minister contrary to Ch III of the Constitution. The starting point in assessing the plaintiff's contention about the constitutional validity of s 501(3A) is to identify the legal effect and practical operation of the provision[73]. That inquiry yields the conclusion that s 501(3A) neither requires nor authorises the detention of non-citizens.

84 Both legally and practically, s 501(3A) requires the Minister to cancel the visas of certain non-citizens in certain circumstances. Once a visa is cancelled under s 501(3A), the visa holder becomes an unlawful non-citizen[74]. At that point, and by reason of that status, s 189 requires the person to be taken into immigration detention. The duration of their detention is then governed by s 196. The consequences of a person becoming an unlawful non-citizen, including the requirement that the person be detained and the prescribed duration of that detention, are not found in s 501(3A); they are addressed elsewhere in the Act.

85 In this case, a decision was made under s 501(3A) to cancel the plaintiff's visa on 10 March 2016, and the plaintiff was subsequently invited to make representations about the revocation of that decision. The plaintiff's detention arose from the legal effect and practical operation of s 189 and s 196(1), (4) and (5) of the Act, not s 501(3A).

86 At all times while the plaintiff has been detained, the Act has imposed a duty on an officer to remove the plaintiff as soon as reasonably practicable. When the plaintiff was first taken into immigration detention on 14 March 2016, the obligation to remove him was to be found in s 198(5) of the Act, because he had not applied for a visa under s 195(1)[75]. In addition, the effect of s 198(2B) is

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72 *Lim* (1992) 176 CLR 1 at 32 (footnote omitted). See also *Plaintiff M68/2015* (2016) 257 CLR 42 at 69-70 [40], 86 [98], 160 [381].

73 See *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 42 [23]; [2014] HCA 22.

74 s 15 of the Act.

75 See s 198(5)(b) of the Act.

that it applies "in relation to" both the decision to cancel the plaintiff's visa and the invitation issued to the plaintiff to make representations about revocation[76]. Since its commencement, that sub-section has imposed an obligation on an officer to remove the plaintiff as soon as reasonably practicable following the decision not to revoke the cancellation of his visa.

87 In short, the principle in *Lim* is engaged only by laws that require or authorise detention. Section 501(3A) does not take on that character, and does not engage the principle in *Lim*, simply because a person whose visa is cancelled under that provision becomes liable to be detained under different provisions (none of which were themselves suggested to be invalid).

88 What s 501(3A) does is to require the cancellation of a visa in certain circumstances. It confers a power, which the Minister has a duty to exercise, to determine whether a non-citizen can enter, or remain in, Australia. That power is administrative in character. It forms no part of the judicial power of the Commonwealth. In particular, the exercise of that power does not trespass on the exclusively judicial function of determining or punishing criminal guilt[77].

89 The Parliament has a broad choice as to the factum upon which a power to cancel a visa will operate. The factum relevantly identified in s 501(3A) is the Minister's state of satisfaction that a non-citizen has a "substantial criminal record" and is serving a full-time custodial sentence. The need for a person to have a substantial criminal record and to be serving a custodial sentence does not mean that the cancellation of a visa is directed to the imposition of punishment for criminal guilt. The purpose of cancelling a visa pursuant to s 501(3A) is to exclude from the Australian community a class of persons who, in the view of the Parliament, should not be permitted to remain in Australia. Cancellation of a visa for that purpose does not involve any determination or punishment of criminal guilt and does not involve the exercise of judicial power.

90 Finally, the plaintiff sought to identify a large assortment of matters which showed that a decision under s 501(3A) had a "significant degree of conclusiveness". Whatever that phrase is intended to connote, the burden of the plaintiff's challenge is to show that judicial power has been conferred. The matters identified – for example, that the avenues for review of a purported decision under s 501(3A) are limited, that the rules of natural justice do not apply

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76 Item 22(3) of Sched 1 to the Amendment Act.

77 See *Lim* (1992) 176 CLR 1 at 27; *Magaming v The Queen* (2013) 252 CLR 381 at 396 [47], 399 [61], 413 [100]; [2013] HCA 40; *Kuczborski v Queensland* (2014) 254 CLR 51 at 120 [233]; [2014] HCA 46; *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41]; [2015] HCA 13.

to a decision under s 501(3A)[78] and that the Minister has a discretion rather than a duty to revoke a decision to cancel a visa – do not show, individually or together, that the cancellation of a visa under s 501(3A) involves an exercise by the Minister of judicial power.

91 We agree that the plaintiff's application should be dismissed with costs.

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78 s 501(5) of the Act.

92 NETTLE J. I agree with Gageler and Gordon JJ but wish to add the following. As a sovereign nation, Australia has the sole right to decide which non-citizens shall be permitted to enter and remain in this country[79]. Consequently, as was decided in *Robtelmes v Brenan*[80] and has ever since been regarded as settled law[81], Parliament has power under s 51(xix) of the Constitution to make laws for the deportation of non-citizens for whatever reason Parliament thinks fit. And, as Gibbs CJ observed[82] in *Pochi v Macphee*, it is only to be expected that it should be so; for such a power is essential to national security.

93 By s 501(3A) of the *Migration Act* 1958 (Cth), Parliament has conferred on the Minister for Immigration and Border Protection one of a number of powers calculated to give effect to Australia's sovereign right to determine which non-citizens shall be permitted to remain in this country. Relevantly, the factum of its operation is that the Minister be satisfied that the subject non-citizen does not pass the "character test" because he or she has been sentenced to death, sentenced to life imprisonment or sentenced to a term of imprisonment of 12 months or more, or because he or she has been convicted or found guilty of one or more sexually based offences involving a child, and the subject non-citizen is serving a sentence of imprisonment on a full-time basis in a custodial institution. Contrary to the plaintiff's submissions, however, it does not follow that the provision imposes a punishment. Deportation may be burdensome and severe for a non-citizen, and, in the plaintiff's case, I have no doubt it will be. But s 501(3A), either alone or by reference to ss 189 and 196, does not increase the punishment for the crime or crimes of which the non-citizen has been convicted or found guilty.

94 Punishment in the relevant sense consists of the measures taken in the name of society to exact just retribution on those who have offended against the laws of society and thus, it is hoped, to facilitate their rehabilitation[83]. By

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79 See *Attorney-General for Canada v Cain* [1906] AC 542 at 546; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29 per Brennan, Deane and Dawson JJ (Mason CJ relevantly agreeing at 10); see also at 44-45 per Toohey J, 64-65 per McHugh J; [1992] HCA 64.

80 (1906) 4 CLR 395 at 404 per Griffith CJ, 415 per Barton J, 418-419 per O'Connor J; [1906] HCA 58.

81 *Pochi v Macphee* (1982) 151 CLR 101 at 106 per Gibbs CJ (Mason J and Wilson J agreeing at 112, 116); [1982] HCA 60.

82 (1982) 151 CLR 101 at 106.

83 See *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 473-474 per Mason CJ, Brennan, Dawson and Toohey JJ, 490-491 per Deane J; [1988] HCA 14. See also

(Footnote continues on next page)

contrast, powers of the kind conferred on the Minister by s 501(3A) give effect to Parliament's right to rid the nation of persons who, in the judgment of the Parliament, have shown by their offending that their continued presence here would be opposed to the safety and welfare of the nation. Powers of such a kind are measures for the protection of society[84]. As Isaacs J said[85] in *Ex parte Walsh and Johnson; In re Yates*:

> "[D]eportation as a means of self-protection in relation to constitutional functions is within the competency of the legislative organ of the Australian people. This nation cannot have less power than an ordinary body of persons, whether a State, a church, a club, or a political party who associate themselves voluntarily for mutual benefit, to eliminate from their communal society any element considered inimical to its existence or welfare."

95 Given that the plaintiff came to this country as a three-year-old child more than 60 years ago, it might be thought that whatever risk he now poses to the safety and welfare of the nation is one that the nation should bear. In general, however, it is for Parliament to select the "trigger" for legislative consequences and especially so in the case of deportation[86]. It is not the role of this Court to say that the criteria of deportation are overly harsh or unduly burdensome or otherwise disproportionate to the risk to the safety and welfare of the nation posed by the subject non-citizen remaining in this country. Contrary to the plaintiff's submissions, there is no constitutionally guaranteed freedom from executive detention such that legislative provisions for the deportation of non-citizens and their consequent detention must be justified as appropriate and adapted or proportionate to a non-punitive end. At least in this context,

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Al-Kateb v Godwin (2004) 219 CLR 562 at 650-651 [264]-[268] per Hayne J; [2004] HCA 37.

84 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 95-96 per Isaacs J; [1925] HCA 53; *O'Keefe v Calwell* (1949) 77 CLR 261 at 278 per Latham CJ; [1949] HCA 6. See also *Mahler v Eby* 264 US 32 at 39-40 (1924).

85 (1925) 37 CLR 36 at 94.

86 *Baker v The Queen* (2004) 223 CLR 513 at 522 [9] per Gleeson CJ, 532 [43] per McHugh, Gummow, Hayne and Heydon JJ, 571 [170] per Callinan J; [2004] HCA 45; *Ex parte Walsh* (1925) 37 CLR 36 at 94-96 per Isaacs J.

proportionality analysis of the kind essayed in *McCloy v New South Wales*[87] and more recently applied in *Brown v Tasmania*[88] has no role to play.

96 As Gageler and Gordon JJ observe[89], the effect of the Minister cancelling a non-citizen's visa under s 501(3A) of the *Migration Act* is to change the status of the non-citizen from lawful non-citizen to unlawful non-citizen. Thereupon the unlawful non-citizen is liable to be detained under s 189 for removal from Australia, as soon as reasonably practicable under s 196(1) in accordance with s 198, unless the Minister revokes the original decision to cancel the non-citizen's visa in accordance with s 501CA(4). But contrary to the plaintiff's submissions, the fact that s 501(3A) provides for mandatory cancellation of a visa, rather than cancellation at the discretion of the Minister, does not mean that the non-citizen's consequent detention under s 189 is punitive. Detention derives its character from its purpose[90], and, in light of the decision of this Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[91], there can be no doubt that immigration detention under s 189 is valid as reasonably capable of being seen as necessary for the purpose of removing a non-citizen from Australia. It is not punitive and it involves no exercise of judicial power.

97 Moreover, contrary to the plaintiff's submissions, it makes no difference that it cannot be known at the commencement of the detention whether the Minister will revoke the original decision. Logically, and at law, the detention is from the outset for the purpose of ensuring that the non-citizen will be available for removal from Australia as soon as reasonably practicable, and logically, and at law, the detention will retain that character until and unless the Minister revokes the original decision to cancel the visa.

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87 (2015) 257 CLR 178; [2015] HCA 34.

88 (2017) 91 ALJR 1089; 349 ALR 398; [2017] HCA 43.

89 See above at [84].

90 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45] per McHugh J, 660 [294] per Callinan J; *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 25-26 [60] per McHugh J, 61 [167] per Gummow J, 85 [261]-[262] per Callinan J; [2004] HCA 49; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 385 [206]-[207] per Kiefel and Keane JJ; [2013] HCA 53.

91 (1992) 176 CLR 1 at 33 per Brennan, Deane and Dawson JJ (Mason CJ relevantly agreeing at 10), 46-47 per Toohey J, 65 per McHugh J. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 573 [4] per Gleeson CJ, 583 [41]-[42], 584 [45], 595 [74] per McHugh J, 604-605 [110], 613 [139] per Gummow J, 644 [245], 648 [255], 649 [259]-[260] per Hayne J.

98 Of course, if the Minister does revoke the original decision to cancel the visa, the status of the non-citizen will once again become that of a lawful non-citizen and the non-citizen will thereupon cease to be "[a]n unlawful non-citizen detained under section 189" within the meaning of s 196(1). In that event, the detention should cease. Section 501CA(5) provides that revocation under s 501CA(4) of an original decision to cancel a visa under s 501(3A) has the effect that the original decision is taken not to have been made, with the result in effect that the non-citizen is taken always to have been a lawful non-citizen (albeit that, perforce of s 501CA(6), the detention that occurred between the making of the original decision and the revocation of the original decision is deemed to have been lawful). When that occurs, the non-citizen is to be released from detention pursuant to s 196(2) and, if not released, will have the right to apply to the court for relief, as is contemplated in s 196(4). Nevertheless, it will remain that, for so long as the original decision to cancel the visa was on foot, and thus for so long as the non-citizen was lawfully detained, he or she was detained for the purpose of ensuring availability for removal from Australia as soon as reasonably practicable.

99 The plaintiff's application should be dismissed with costs.