

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

NZYQ

PLAINTIFF

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS & ANOR

DEFENDANTS

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs
[2023] HCA 37

Date of Hearing: 7 & 8 November 2023

Date of Order: 8 November 2023

Date of Publication of Reasons: 28 November 2023

S28/2023

ORDER

The questions stated for the opinion of the Full Court in the further amended special case filed on 31 October 2023 be answered as follows:

Question 1: On their proper construction, did sections 189(1) and 196(1) of the Migration Act 1958 (Cth) authorise the detention of the plaintiff as at 30 May 2023?

Answer: Yes, subject to section 3A of the Migration Act 1958 (Cth).

Question 2: If so, are those provisions beyond the legislative power of the Commonwealth insofar as they applied to the plaintiff as at 30 May 2023?

Answer: Yes.

Question 3: On their proper construction, do sections 189(1) and 196(1) of the Migration Act 1958 (Cth) authorise the current detention of the plaintiff?

Answer: Yes, subject to section 3A of the Migration Act 1958 (Cth).

Question 4: If so, are those provisions beyond the legislative power of the Commonwealth insofar as they currently apply to the plaintiff?

Answer: Yes.

Question 5: What, if any, relief should be granted to the plaintiff?

Answer: The following orders should be made:

- (1) It is declared that, by reason of there having been and continuing to be no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future:
 - (a) the plaintiff's detention was unlawful as at 30 May 2023; and*
 - (b) the plaintiff's continued detention is unlawful and has been since 30 May 2023.**
- (2) A writ of habeas corpus issue requiring the defendants to release the plaintiff forthwith.*

Question 6: Who should pay the costs of the further amended special case?

Answer: The defendants.

Representation

C L Lenehan SC and F I Gordon KC with J S Stellios and T M Wood for the plaintiff (instructed by Allens)

S P Donaghue KC, Solicitor-General of the Commonwealth, and P D Herzfeld SC with Z C Heger and A M Hammond for the defendants (instructed by Australian Government Solicitor)

P M Knowles SC with M F Caristo for the Australian Human Rights Commission, appearing as amicus curiae (instructed by Australian Human Rights Commission)

R C A Higgins SC with A M Hochroth, J R Murphy and K E W Bones for the Human Rights Law Centre and the Kaldor Centre for International Refugee Law, appearing as amici curiae (instructed by Human Rights Law Centre)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs

Constitutional law (Cth) – Judicial power of Commonwealth – Immigration detention – Indefinite detention without judicial order – Where plaintiff stateless Rohingya Muslim having well-founded fear of persecution in Myanmar – Where plaintiff's bridging visa cancelled following criminal conviction – Where following release from criminal custody plaintiff taken into immigration detention under s 189 of *Migration Act 1958* (Cth) ("Act") – Where plaintiff's application for protection visa refused and finally determined – Where ss 198(1) and 198(6) of Act imposed duty upon officers of Department administering Act to remove plaintiff from Australia as soon as reasonably practicable – Where s 196(1) of Act required plaintiff to be kept in immigration detention until removed from Australia, deported, or granted visa – Where attempts by Department to remove plaintiff from Australia unsuccessful as at date of hearing – Where no real prospect of removal of plaintiff from Australia becoming practicable in reasonably foreseeable future – Where plaintiff sought writ of habeas corpus requiring release from detention forthwith – Whether application for leave to reopen constitutional holding in *Al-Kateb v Godwin* (2004) 219 CLR 562 should be granted – Whether constitutional holding in *Al-Kateb* should be overruled – Whether detention of plaintiff punitive contrary to Ch III of *Constitution* – Whether separation of plaintiff from Australian community pending removal constitutes legitimate and non-punitive purpose – Whether detention of plaintiff reasonably capable of being seen as necessary for legitimate and non-punitive purpose.

Immigration – Unlawful non-citizens – Detention pending removal from Australia – Where no real prospect of removal of plaintiff from Australia becoming practicable in reasonably foreseeable future – Whether detention of plaintiff authorised by ss 189(1) and 196(1) of Act – Whether application for leave to reopen statutory construction holding in *Al-Kateb* should be granted.

Words and phrases – "alien", "conservative cautionary principle", "deportation", "deprivation of liberty", "executive detention", "habeas corpus", "indefinite detention", "judicial function", "judicial power of the Commonwealth", "legitimate and non-punitive purpose", "*Lim* principle", "penal", "power to exclude", "practicable", "punishment", "punitive", "real prospect", "reasonably capable of being seen as necessary", "reasonably foreseeable future", "removal from Australia", "separation from the Australian community", "unlawful non-citizen".

Constitution, s 51(xix), Ch III.

Migration Act 1958 (Cth), ss 3A, 189, 196, 198.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND
BEECH-JONES JJ. The plaintiff is a stateless Rohingya Muslim. He was born in
Myanmar between 1995 and 1997. He arrived in Australia by boat in 2012 and
was taken into immigration detention on arrival under s 189 of the *Migration Act*
1958 (Cth) ("the Migration Act"). He was granted a bridging visa in 2014.

2 In 2016, the plaintiff pleaded guilty in the District Court of New South
Wales to a sexual offence against a child. He was sentenced to imprisonment for
five years with a non-parole period of three years and four months. Upon his
release from criminal custody on parole in 2018, he was taken again into
immigration detention under s 189(1) of the Migration Act.

3 Whilst still in criminal custody, the plaintiff had applied for a protection
visa. His application was considered by a delegate of the Minister for Immigration,
Citizenship and Multicultural Affairs ("the Minister") in 2020. The delegate found
him to have a well-founded fear of persecution in Myanmar. On that basis, the
delegate found him to be a refugee in respect of whom Australia had protection
obligations. Having regard to his conviction, however, the delegate found there to
have been reasonable grounds for considering him a danger to the Australian
community. On the basis of that finding, the delegate found that the plaintiff failed
to satisfy the criterion for a protection visa set out in s 36(1C)(b) of the Migration
Act and for that reason refused to grant him a protection visa.

4 The Administrative Appeals Tribunal affirmed the decision of the delegate
following which the Federal Court of Australia dismissed an application for
judicial review of the decision of the Tribunal in 2022. That final determination of
his visa application engaged the duty imposed on officers of the Department of
Home Affairs ("the Department") by s 198(6) of the Migration Act to remove the
plaintiff from Australia as soon as reasonably practicable. Also in 2022, the
plaintiff wrote to the Minister requesting his removal. That request engaged
another duty imposed on officers of the Department by s 198(1) of the Migration
Act to remove the plaintiff from Australia as soon as reasonably practicable.

5 By reason of the finding that the plaintiff had a well-founded fear of
persecution, and in the absence of any relevant change of circumstances, the
operation of s 197C(3) of the Migration Act was such that s 198(1) and (6) did not
require or authorise an officer to remove him to Myanmar. In any event, he does
not have any right of entry to or residence in Myanmar. The plaintiff had relatives
in Saudi Arabia and in Bangladesh. But there was no real prospect of him being
provided with a right to enter or reside in either of those countries. No country in

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the world has an established practice of offering resettlement to persons in Australia who have been convicted of sexual offences against children and the Department had never successfully removed from Australia any person convicted of a sexual offence against a child to a country other than a country which recognised the person as a citizen.

6 Against that background, on 5 April 2023 the plaintiff commenced a proceeding against the Minister and the Commonwealth of Australia in the original jurisdiction of the High Court under s 75(v) of the *Constitution* and s 30 of the *Judiciary Act 1903* (Cth). The plaintiff claimed in the proceeding that his continuing detention was not authorised by ss 189(1) and 196(1) of the Migration Act. He claimed that to be the result of the proper construction of those provisions. He claimed in the alternative that those provisions contravened Ch III of the *Constitution*.

7 By a Further Amended Special Case ("the special case") in the proceeding pursuant to r 27.08 of the *High Court Rules 2004* (Cth), the parties agreed on stating questions of law for the consideration of the Full Court of the High Court. The special case was heard by the Full Court on 7 and 8 November 2023. At the hearing, the position of the plaintiff was supported by the Australian Human Rights Commission, the Human Rights Law Centre, and the Kaldor Centre for International Refugee Law, each of which was granted leave to appear amicus curiae.

8 At the end of the hearing on 8 November 2023, the Full Court made an order stating answers to each of the questions of law stated for its consideration in the special case. The order was announced as having been agreed to by "at least a majority" because two members of the Court (Gleeson and Jagot JJ) did not agree that the Court should make orders without publishing reasons and, in any event, required further time to consider the matter. Having considered the matter, Gleeson and Jagot JJ agree with the order made on 8 November 2023.

9 The answers to the questions stated in the order made clear that the plaintiff failed in his claim that his continuing detention was not authorised on the proper construction of ss 189(1) and 196(1) of the Migration Act but succeeded in his claim that his continuing detention contravened Ch III of the *Constitution* with the result that those provisions lacked valid application to him. The answers went on to specify the relief to which the plaintiff was entitled. The relief included a declaration to the effect that his continuing detention had been unlawful since 30 May 2023 and continued to be unlawful by reason of there having then been,

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and continuing to be, no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future. The relief also included a writ of habeas corpus requiring his immediate release.

10 These are our reasons for having joined in the order made on 8 November 2023 or, after consideration, for agreeing with the order made.

Al-Kateb

11 Since they were inserted on 1 September 1994,¹ Divs 7 and 8 of Pt 2 of the Migration Act have provided for the mandatory detention and mandatory removal from Australia of an "unlawful non-citizen", being someone who is not an Australian citizen and who does not hold a valid visa permitting them to travel to and enter Australia or to remain in Australia.² The basic structure and the text of the critical provisions of Divs 7 and 8 have not altered since then. The critical provisions operate by imposing duties on "officers", including officers of the Department.³

12 Within Div 7, s 189(1) imposes a duty on an officer to detain a person who the officer "knows or reasonably suspects ... is an unlawful non-citizen". Critically, the duration of the detention authorised and required by s 189(1) is governed by s 196(1), which provides that the unlawful non-citizen "must be kept in immigration detention until" the occurrence of one of several specified events. One of those events, specified in s 196(1)(c), is that "he or she is granted a visa". Another, specified in s 196(1)(a), is that "he or she is removed from Australia under [s] 198".

13 Within Div 8, s 198 imposes duties on an officer to remove an unlawful non-citizen from Australia "as soon as reasonably practicable" in a range of specified circumstances. Section 198(1) imposes such a duty in respect of an unlawful non-citizen "who asks the Minister, in writing, to be so removed".

1 By the *Migration Reform Act 1992* (Cth) as amended by the *Migration Laws Amendment Act 1993* (Cth). See also the *Migration Legislation Amendment Act 1994* (Cth).

2 See ss 14(1) and 29(1) of the Migration Act.

3 See s 5(1) of the Migration Act (definition of "officer").

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Section 198(6) imposes such a duty in respect of an unlawful non-citizen in immigration detention who has applied for a visa which has been refused and whose application has been finally determined. As has been noted, both of those duties were engaged in respect of the plaintiff in 2022. Each of those duties would be compellable by a writ of mandamus under s 75(v) of the *Constitution* were removal of the plaintiff reasonably practicable. But a writ of mandamus compelling performance of those duties would be futile if there were no real prospect of removal becoming practicable in the reasonably foreseeable future and understandably that remedy has not been sought by the plaintiff in the proceeding.

14 Ten years after the insertion of Divs 7 and 8 of Pt 2 into the Migration Act, in *Al-Kateb v Godwin*,⁴ the High Court examined the application of ss 189(1) and 196(1) to an unlawful non-citizen in respect of whom there was no real prospect of removal under s 198(1) or s 198(6) becoming practicable in the reasonably foreseeable future. The ratio decidendi comprised two holdings. First, by majority (McHugh, Hayne, Callinan and Heydon JJ, Gleeson CJ, Gummow and Kirby JJ dissenting), the Court held that ss 189(1) and 196(1) on their proper construction applied to require the continuing detention of such a person. Secondly, and also by majority (McHugh, Hayne, Callinan and Heydon JJ, Gummow J dissenting, Gleeson CJ and Kirby J not deciding), the Court held that ss 189(1) and 196(1) as so applied did not contravene Ch III of the *Constitution*. *Al-Kateb* was immediately applied to uphold the continuing detention of an unlawful non-citizen in materially identical circumstances in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*.⁵

15 Unless and except to the extent *Al-Kateb* was to be reopened and overruled, *Al-Kateb* stood as an implacable obstacle to the plaintiff's claims. The plaintiff therefore needed leave to reopen *Al-Kateb* and appropriately sought that leave. The arguments of the parties and of the amici curiae on the hearing of the special case were primarily directed to whether the leave to reopen *Al-Kateb* sought by the plaintiff should be granted and, if so, whether *Al-Kateb* should be overruled. It was common ground that leave to reopen *Al-Kateb* should be considered separately for each of the two holdings of the majority.

4 (2004) 219 CLR 562.

5 (2004) 219 CLR 664.

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16 This was not the first time that the reopening and overruling of *Al-Kateb* had been argued before the Court. This was, however, the first time that there was shown to be a state of facts which made questions about reopening and overruling *Al-Kateb* necessary to be addressed by the Court in order to determine the rights of the parties in issue before it. In *Plaintiff M47/2012 v Director-General of Security*,⁶ two members of the Court (Gummow and Bell JJ) expressed the view that the statutory construction holding in *Al-Kateb* should be reopened and overruled; another (Heydon J) expressed the view that it should not. In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*,⁷ two members of the Court (Kiefel and Keane JJ) expressed the view that the statutory construction holding in *Al-Kateb* should not be reopened; another (Hayne J) emphasised that *Al-Kateb* had not been overruled and reiterated his view that *Al-Kateb* had been correctly decided. In neither of those cases did other members of the Court address *Al-Kateb*. In *Plaintiff M47/2018 v Minister for Home Affairs*,⁸ reopening and overruling *Al-Kateb* was again argued. Again, the arguments were found unnecessary to be addressed in order to resolve the controversy before the Court.

17 The considerations which inform when it can be appropriate for the Court to reopen and reconsider its own earlier decisions may have different weight, are incapable of exhaustive definition, and have been examined on numerous occasions.⁹ The evaluation of such considerations as may bear on the appropriateness of reopening a given decision in given circumstances was said by French CJ in *Wurridjal v The Commonwealth*¹⁰ to be "informed by a strongly conservative cautionary principle, adopted in the interests of continuity and consistency in the law, that such a course should not lightly be taken".

6 (2012) 251 CLR 1.

7 (2013) 251 CLR 322.

8 (2019) 265 CLR 285.

9 See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350-353 [65]-[71].

10 (2009) 237 CLR 309 at 352 [70].

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18 Informed by that strongly conservative cautionary principle, the applicable considerations weigh against reopening of the statutory construction holding in *Al-Kateb* but in favour of reopening of its constitutional holding.

No reopening of the statutory construction holding in *Al-Kateb*

19 Despite Gummow and Bell JJ's criticism in *Plaintiff M47/2012* of the construction of ss 189(1) and 196(1) adopted by the majority in *Al-Kateb*, the process of reasoning which led the majority in *Al-Kateb* to that construction cannot be said to have overlooked any principle of statutory construction on which the minority in *Al-Kateb* relied or on which the plaintiff and amici placed emphasis in argument on the special case. The difference between the majority and minority in *Al-Kateb* was in the application of those principles of statutory construction to the enacted text of ss 189(1) and 196(1), and in particular the weight to be given to textual considerations in ascertaining the meaning, which Hayne J in the majority described as "intractable".¹¹

20 In *Plaintiff M76/2013*,¹² Kiefel and Keane JJ observed that any suggestion that the majority's construction of ss 189(1) and 196(1) in *Al-Kateb* failed to give effect to the will of the Commonwealth Parliament had become difficult to sustain by 2013. Not only had the Parliament refrained from altering the critical text of those provisions despite making numerous amendments to the Migration Act in the ten years which had then elapsed since *Al-Kateb*, but the Parliament had also, in 2005,¹³ inserted other provisions into the Migration Act which assumed the correctness of the construction of ss 189(1) and 196(1) adopted in *Al-Kateb* and which were designed to ameliorate the harshness of the operation of those provisions, so construed. Kiefel and Keane JJ referred to s 195A, which was explained at the time of insertion as providing the Minister with "the flexibility to grant any visa that is appropriate ... where the detainee has no right to remain in Australia but removal is not practicable in the foreseeable future".¹⁴ Their Honours

11 (2004) 219 CLR 562 at 643 [241].

12 (2013) 251 CLR 322 at 382-383 [194]-[197].

13 *Migration Amendment (Detention Arrangements) Act 2005* (Cth).

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

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might also have referred to Subdiv B of Div 7 of Pt 2, which provides for the Minister to make a residence determination permitting a person required to be detained under s 189(1) to reside at a specified place instead of being detained at a place of detention, and Pt 8C, which provides for periodic assessment by the Commonwealth Ombudsman of the appropriateness of detention arrangements for a person who has been in immigration detention for two years or more.

21 In 2021, the considerations of legislative reliance and implicit legislative endorsement identified by Kiefel and Keane JJ in 2013 were reinforced by the Parliament's assumption as to the correctness of the *Al-Kateb* construction which informed the insertion of s 197C(3) by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth).¹⁵

22 To all of those considerations of legislative reliance and implicit legislative endorsement must now also be added the decision in *The Commonwealth v AJL20*.¹⁶ There the majority (Kiefel CJ, Gageler, Keane and Steward JJ) endorsed key aspects of the reasoning of the majority on the issue of statutory construction in *Al-Kateb*. The majority did so in referring to the statutory construction holding in *Al-Kateb*, and saying that the word "until" in conjunction with the word "kept" in s 196(1) indicates that detention under s 189(1) is "an ongoing or continuous state of affairs that is to be maintained up to the time that the event (relevantly, the grant of a visa or removal) *actually occurs*".¹⁷

23 The cumulation of these considerations leads inexorably to the conclusion, reflected in the answers stated in the order made at the end of the hearing of the special case, that leave to reopen the statutory construction holding in *Al-Kateb* should not be granted.

15 See Australia, House of Representatives, *Migration Amendment (Clarifying International Obligations for Removal) Bill 2021*, Explanatory Memorandum, Attachment A (Statement of Compatibility with Human Rights) at 13.

16 (2021) 273 CLR 43 at 66 [33]-[34].

17 (2021) 273 CLR 43 at 72 [49] (emphasis in original).

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Reopening of the constitutional holding in *Al-Kateb*

24 The facts of *AJL20* did not raise whether, on the construction of ss 189(1) and 196(1) of the Migration Act adopted in *Al-Kateb* and endorsed in *AJL20*, those provisions have valid application to an unlawful non-citizen in respect of whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. The majority in *AJL20*¹⁸ specifically recorded that the correctness of the constitutional holding in *Al-Kateb* did not arise for consideration.

25 Twelve years before *Al-Kateb* and two years before the insertion of Divs 7 and 8 of Pt 2 of the Migration Act, the Court decided *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.¹⁹ There it was necessary to determine the constitutional validity of two earlier and then recently inserted²⁰ sections of the Migration Act²¹ which authorised and required the detention of a person who was within a category of non-citizens who had entered Australia unlawfully by boat. The detention was required to continue unless and until the person was either removed from Australia or granted an entry permit,²² but the maximum period of detention was capped at 273 days²³ and the person was required to be removed from Australia "as soon as practicable" if the person asked for that to occur.²⁴ The impugned sections were held to be supported by s 51(xix) and not to contravene Ch III of the *Constitution*.

26 The reasoning of three members of the Court (Brennan, Deane and Dawson JJ), with whom a fourth (Mason CJ) agreed, that the impugned sections

18 (2021) 273 CLR 43 at 64 [26].

19 (1992) 176 CLR 1.

20 By the *Migration Amendment Act 1992* (Cth).

21 Sections 54L and 54N of the Migration Act.

22 Section 54L of the Migration Act.

23 Section 54Q of the Migration Act.

24 Section 54P of the Migration Act.

did not contravene Ch III of the *Constitution* contained three statements of background principle which have come to be regarded as authoritative.

27 The first principle was that "any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of ... an alien [subject to qualification in the case of an enemy alien in a time of war] without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision".²⁵ That was a more specific statement of the fundamental and long-established principle that no person – alien or non-alien – may be detained by the executive absent statutory authority or judicial mandate.²⁶

28 The second principle was that the effect of Ch III is that, exceptional cases aside, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".²⁷ That statement of principle reflects that Ch III is concerned with substance and not mere form, and that it is the involuntary deprivation of liberty itself that ordinarily constitutes punishment.²⁸ It also recognised that it is not sufficient merely that detention be in consequence of an exercise of judicial power; other than in exceptional cases, it is necessary that the detention be in consequence of the performance of the "exclusively judicial function of adjudging and punishing criminal guilt".²⁹ Although the statement of principle in *Lim* referred to a "citizen", the principle has been held to apply to an alien albeit that an alien's status, rights

25 (1992) 176 CLR 1 at 19. See *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 230-231 [24]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 101-102 [147]-[149], 105-106 [162]-[163], 158 [372].

26 See *Williams v The Queen* (1986) 161 CLR 278 at 292; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-521, 528.

27 (1992) 176 CLR 1 at 27. See *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 90-91 [18]-[19], 108 [65], 130-131 [130]-[134], 159-160 [207]-[208].

28 (1992) 176 CLR 1 at 27-28.

29 See *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 110-111 [71].

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and immunities under the law differ from those of a non-alien in a number of important respects.³⁰

29 The third principle was that the relevant difference between a non-alien and an alien for the purposes of Ch III "lies in the vulnerability of the alien to exclusion or deportation".³¹ The plurality in *Lim* observed that this vulnerability flows from both the common law and the *Constitution*, referring also to matters of territorial sovereignty and international law.³²

30 Adherence to these background principles led in *Lim* to a formulation of constitutional principle which provided the criterion to determine the validity of the sections of the Migration Act impugned in that case. That constitutional principle was formulated in the following terms:³³

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

31 The constitutional principle so formulated and applied in *Lim* was not disavowed by the majority in *Al-Kateb*. But the insistence in *Lim* that the detention

30 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 344 [33], 346 [39]-[40]; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 110 [71].

31 (1992) 176 CLR 1 at 29.

32 (1992) 176 CLR 1 at 29-32.

33 (1992) 176 CLR 1 at 33 (emphasis added).

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of an alien must be limited to a period that is "reasonably capable of being seen as necessary" for one or other of two legitimate and non-punitive purposes, identified in terms of removing the alien from Australia or enabling an application by the alien for permission to remain in Australia to be made and considered, is difficult to reconcile with the constitutional holding in *Al-Kateb* that ss 189(1) and 196(1) of the Migration Act have valid application to an unlawful non-citizen in respect of whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. The statements of background principle in the reasoning in *Lim* are also difficult to reconcile with some passages in the reasoning of the majority in *Al-Kateb* which can be read as suggesting that Ch III of the *Constitution* has diminished application to the detention of an alien pursuant to a law of the Commonwealth Parliament enacted under s 51(xix) of the *Constitution*.³⁴

32 The tension between *Al-Kateb* and *Lim* was highlighted by McHugh J in *Re Woolley; Ex parte Applicants M276/2003*.³⁵ Addressing the potential for ss 189(1) and 196(1) of the Migration Act to result in indefinite detention, McHugh J nevertheless said in *Re Woolley*:³⁶

"In *Lim*, Brennan, Deane and Dawson JJ regarded the prescribed maximum time limit on detention for which the Act then provided as one element that rendered the Executive's powers of detention under the Act reasonably capable of being seen as necessary for the purpose of making and considering entry applications ... No doubt cases may also arise where the connection between the alleged purpose of detention and the length of detention becomes so tenuous that it is not possible to find that the purpose of the detention is to enable visa applications to be processed pending the grant of a visa. If the law in question has such a tenuous connection, the proper inference will ordinarily be that its purpose is punitive. The fact that the law may also have a non-punitive purpose will not save it from invalidity."

34 (2004) 219 CLR 562 at 582-583 [39], [42], 584 [45], 648-649 [255]-[258], 649 [261]-[262], 650-651 [266]-[267], 658 [289], 659 [291].

35 (2004) 225 CLR 1 at 23-32 [54]-[77].

36 (2004) 225 CLR 1 at 36-37 [88].

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33 Nothing said in *Al-Kateb* has been taken subsequently to detract from the significance of *Lim*. To the contrary, in *Plaintiff M76/2013*,³⁷ Crennan, Bell and Gageler JJ restated and reaffirmed the constitutional principle for which *Lim* remained authority after *Al-Kateb* in terms 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".

34 During the 20 years since *Al-Kateb*, the *Lim* principle has been repeatedly acknowledged and frequently applied.³⁸ The principle was most recently applied in *Alexander v Minister for Home Affairs*,³⁹ in *Benbrika v Minister for Home Affairs*⁴⁰ and in *Jones v The Commonwealth*.⁴¹

35 The consequence is that the constitutional holding in *Al-Kateb* has come increasingly to appear as an outlier in the stream of authority which has flowed from *Lim*. In language used by French CJ in *Wurridjal*,⁴² deriving from that of Dixon CJ in *Attorney-General (Cth) v Schmidt*,⁴³ the authority of the constitutional holding in *Al-Kateb* has been "weakened" by later decisions to a degree that weighs strongly in favour of its reopening. To reopen the constitutional holding in *Al-Kateb*, and to do so on the first occasion on which the facts of a case squarely engage the constitutional holding, involves no disrespect for the approach of the

37 (2013) 251 CLR 322 at 370 [140]-[141].

38 See *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 593 [21] and the cases there cited; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343-344 [29].

39 (2022) 96 ALJR 560; 401 ALR 438.

40 [2023] HCA 33.

41 [2023] HCA 34.

42 (2009) 237 CLR 309 at 353 [71].

43 (1961) 105 CLR 361 at 370.

majority in *Al-Kateb*. Using again the language of French CJ in *Wurridjal*, reopening *Al-Kateb* "does not require the taxonomy of 'truth' and 'error'" but rather reflects "an evolving understanding of the *Constitution* albeit subject to the conservative cautionary principle referred to earlier".⁴⁴

36 Having regard to the importance of continuity and consistency in the application of fundamental constitutional principle, the legislative reliance and implicit legislative endorsement which weighed in favour of not reopening the statutory construction holding in *Al-Kateb* necessarily assumes less significance in considering reopening of its constitutional holding. The same is true of administrative inconvenience. Adapting what was said by Dixon CJ, McTiernan, Fullagar and Kitto JJ in *R v Kirby; Ex parte Boilermakers' Society of Australia*,⁴⁵ whilst considerations of legislative reliance and administrative inconvenience are appropriately treated as considerations having weight, "it is necessary to stop short of treating them as relieving this Court of its duty of proceeding according to law in giving effect to the Constitution which it is bound to enforce".

37 The weight of the consideration of continuity and consistency in the application of constitutional principle ultimately compels the conclusion that leave to reopen the constitutional holding in *Al-Kateb* should be granted.

Reconsidering *Al-Kateb* in light of the *Lim* principle

38 The question whether the constitutional holding in *Al-Kateb* should be overruled is to be determined by reference to the consistency of that holding with the *Lim* principle as stated in *Lim* itself and as understood and applied in subsequent cases.

39 Expressed at an appropriate level of generality, the principle in *Lim* is that a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the *Constitution* unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive

44 (2009) 237 CLR 309 at 353 [71] (footnote omitted).

45 (1956) 94 CLR 254 at 295.

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purpose. In other words, detention is penal or punitive unless justified as otherwise.⁴⁶

40 The purpose of the law in this context, as elsewhere in constitutional discourse, must be identified at an appropriate level of generality.⁴⁷ So identified at the appropriate level of generality, the purpose is that which the law is designed to achieve in fact.⁴⁸ For an identified legislative objective to amount to a legitimate and non-punitive purpose, the legislative objective must be capable of being achieved in fact. The purpose must also be both legitimate *and* non-punitive. "Legitimate" refers to the need for the purpose said to justify detention to be compatible with the constitutionally prescribed system of government. Consistently with the principle in *Lim*, the legitimate purposes of detention – those purposes which are capable of displacing the default characterisation of detention as punitive – must be regarded as exceptional.⁴⁹

41 Consistency with the *Lim* principle accordingly entails that "a Commonwealth statute which authorises executive detention must limit the duration of that detention to what is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose which is reasonably capable of being achieved".⁵⁰

46 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 611-612 [98]; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 342 [24], 344 [33]; *Benbrika v Minister for Home Affairs* [2023] HCA 33 at [35], [63]; *Jones v The Commonwealth* [2023] HCA 34 at [43], [78], [153].

47 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 584 [103], 612 [242]; 401 ALR 438 at 462, 498-499.

48 *Brown v Tasmania* (2017) 261 CLR 328 at 392 [209]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171].

49 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-28.

50 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 625 [374]. See also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 111 [184], 163 [392].

42 It is appropriate to identify the point of departure between our reasoning and the reasoning of the majority in *Al-Kateb* in support of the constitutional holding. In *Al-Kateb*,⁵¹ McHugh J observed:

"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."

43 This Court is unanimous in concluding that this is an incomplete and, accordingly, inaccurate statement of the applicable principle. Two different approaches are taken to that conclusion. The first approach is taken by six of us and set out below. The second approach is taken by Edelman J.

The approach of six members of the Court

44 This statement of the scope of the power to detain aliens differs from that in *Lim*, which, as noted, has become authoritative. The application of the principle in *Lim*, although ultimately directed to a single question of characterisation (whether the power is properly characterised as punitive), requires an assessment of both means and ends, and the relationship between the two.⁵² Applying that principle in circumstances where there is no real prospect of the removal of the alien from Australia becoming practicable in the reasonably foreseeable future, it cannot be said that, objectively determined, 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" pending the making of a decision as to whether or not they will be allowed entry.

45 Therein lies the reason why the constitutional holding in *Al-Kateb*, having been reopened, must be overruled. The *Lim* principle would be devoid of substance were it enough to justify detention, other than through the exercise of judicial power in the adjudgment and punishment of guilt, that the detention be designed

51 (2004) 219 CLR 562 at 584 [45]. See also at 584-586 [45]-[48], 648 [255], 649 [262], 650-651 [266]-[267], 658 [289], 662-663 [303].

52 *Jones v The Commonwealth* [2023] HCA 34 at [43], [78], [154]-[155], [188].

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to achieve an identified legislative objective that there is no real prospect of achieving in the reasonably foreseeable future.

46 Translated to the case at hand, if the only purposes peculiarly capable of justifying executive detention of an alien are, as was said in *Lim*, removal from Australia or enabling an application for permission to remain in Australia to be made and considered, then the absence of any real prospect of achieving removal of the alien from Australia in the reasonably foreseeable future refutes the existence of the first of those purposes.

47 Faced with that fundamental difficulty, the primary submission of the defendants was that a legitimate and non-punitive purpose of detention of an alien can be properly identified as separation from the Australian community pending removal (if ever). The defendants sought to support that submission by reference to passages in the reasoning of the majority in *AJL20*.⁵³ Recalling that the majority in *AJL20* specifically recorded that the correctness of the constitutional holding in *Al-Kateb* did not arise for consideration,⁵⁴ none of those passages can be read as having been directed to that constitutional issue.

48 The purpose of separation of an alien from the Australian community is outside the limited range of legitimate purposes identified in *Lim*, and repeatedly affirmed in cases following *Lim*.⁵⁵ The separation of an alien from the Australian community by means of executive detention was identified in *Lim* as permissible not as an element of some more expansive purpose but only as an "incident" of the implementation of one or other of the two legitimate purposes of considering whether to grant the alien permission to remain in Australia and deporting or removing the alien if permission is not granted. To the extent that reasoning of the

53 (2021) 273 CLR 43 at 65 [28], 70-71 [44]-[45].

54 (2021) 273 CLR 43 at 64 [26].

55 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369-370 [138]-[140]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [26]; *Plaintiff M96A/2016 v The Commonwealth* (2017) 261 CLR 582 at 593-594 [21]; *The Commonwealth v AJL20* (2021) 273 CLR 43 at 64-65 [27]-[28], 85-86 [85], 102-103 [128]-[129].

majority in *Al-Kateb* might be read as supportive of the legitimacy of the more expansive identified purpose,⁵⁶ that reasoning was in tension with *Lim*.

49 The principle in *Lim* necessitates that the purpose of detention, in order to be legitimate, must be something distinct from detention itself. The terms in which the defendants couched the postulated purpose demonstrated its constitutional illegitimacy. If "separation from the Australian community" is equated with separation from the Australian community by means of detention, as was necessarily implicit in the defendants' formulation, then the postulated purpose impermissibly conflates detention with the purpose of detention and renders any inquiry into whether a law authorising the detention is reasonably capable of being seen to be necessary for the identified purpose circular and self-fulfilling. The submission that the detention of an alien can be justified by reference to a purpose which includes detention of an alien amounted to a submission that detention is justified consistently with Ch III of the *Constitution* if the detention is for the purpose of detention.

50 The defendants' attempt to rely on references in *Lim*⁵⁷ to the detention of aliens being permissible as an incident of the executive power to exclude aliens as supportive of the postulated legitimate purpose of separation of an alien from the Australian community is misconceived. As Gleeson CJ explained in *Re Woolley*:⁵⁸

"Plainly [the plurality in *Lim*] did not contemplate that it is essential for a person to be in custody in order to make an application for an entry permit, or that it is only possible for the Executive to consider such an application while the applicant is in custody. They were referring to the time necessarily involved in receiving, investigating and determining an application for an entry permit. In a particular case, that time may be brief, or, depending upon the procedures of review and appeal that are invoked, it may be substantial. If a non-citizen enters Australia without permission, then the power to

56 (2004) 219 CLR 562 at 584-586 [45]-[49], 646-647 [251], 648 [255], 649 [261]-[262], 650-651 [266]-[267], 658-662 [289]-[299].

57 (1992) 176 CLR 1 at 26, 29, 32.

58 (2004) 225 CLR 1 at 14 [26], cited with approval in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [139].

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exclude the non-citizen extends to a power to investigate and determine an application by the non-citizen for permission to remain, and to hold the non-citizen in detention for the time necessary to follow the required procedures of decision-making. The non-citizen is not being detained as a form of punishment, but as an incident of the process of deciding whether to give the non-citizen permission to enter the Australian community. Without such permission, the non-citizen has no legal right to enter the community, and a law providing for detention during the process of decision-making is not punitive in nature."

The approach of Edelman J

51 The approach of Edelman J is slightly different, although perhaps only because it disaggregates the concept of punishment as used in *Lim*, an approach which has not yet been recognised by this Court. His approach begins with the premise that *Lim* uses the concept of punishment in two different senses. The core instance of the first sense is where harsh consequences are imposed based upon classic criminal notions of just desert. Chapter III of the *Constitution* extends beyond these classic criminal notions of punishment based upon just desert to other, analogous instances of "protective punishment".⁵⁹ The purpose of a law which is concerned with executive punishment in this sense would be illegitimate.

52 A second, and separate, sense of punishment was also recognised in *Lim*.⁶⁰ The separate sense is a novel conception of punishment which concerns forms of detention that have been described as "prima facie" punitive,⁶¹ or which have been deemed to be punitive,⁶² because the detention imposed is disproportionate to, in the sense of being not reasonably capable of being seen as necessary for, a

59 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 155-159 [197]-[204], 161-164 [210]-[214].

60 See *Jones v The Commonwealth* [2023] HCA 34 at [149].

61 *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 at 98 [37], 133 [140]. See also at 113 [78].

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

legitimate purpose.⁶³ In this sense, the law is treated as punitive because it employs means that are disproportionate to its legitimate purpose.

53 The approach of Edelman J treats the relevant purpose of ss 189(1) and 196(1) as legitimate. His Honour would express the purpose by adapting the phrase used by the Solicitor-General of the Commonwealth, based on words of Dixon J⁶⁴ – "detention pending removal" – to what the provisions are designed to achieve in fact. As so expressed, the purpose is detention pending removal to ensure that the unlawful non-citizen will remain "available for deportation when that becomes practicable".⁶⁵ It is possible for Parliament to enact a law which seeks to achieve a purpose by measures which, at the boundaries, might have very little, or no, effect in advancing the purpose. In this respect, parliamentary purposes are no different from those of other groups. If a specialist sports squad implements a program with a purpose of training to reach the Olympics, that remains a genuine purpose even if under that program some members of the squad have no real prospect of achieving that goal in the reasonably foreseeable future. There is a difference between a purpose and its implementation. It is a difference between ends and means.

54 The problem, for Edelman J, with the decision of their Honours in the majority in *Al-Kateb* does not arise from their recognition of the purpose of ss 189(1) and 196(1) as legitimate but arises because they either ignored or paid insufficient attention to the proportionality requirement of *Lim*. As McHugh J said in *Re Woolley*,⁶⁶ "[n]one of the Justices in the majority in [*Al-Kateb*] applied the 'reasonably capable of being seen as necessary' test as the determinative test for ascertaining whether the purpose of the detention was punitive". For instance, Hayne J in *Al-Kateb*⁶⁷ focused only on the first sense of punishment in *Lim* and did "not consider that the Ch III question which is said now to arise can be answered

63 *Jones v The Commonwealth* [2023] HCA 34 at [149].

64 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 581.

65 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [45], approved in *The Commonwealth v AJL20* (2021) 273 CLR 43 at 64 [25].

66 (2004) 225 CLR 1 at 30-31 [71].

67 (2004) 219 CLR 562 at 650 [265]-[266].

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by asking whether the law in question is ... 'reasonably capable of being seen as necessary' to the purpose of processing and removal of an unlawful non-citizen".⁶⁸ More specifically, if there is no real prospect of removal of some unlawful non-citizens becoming practicable in the reasonably foreseeable future, it is not reasonably capable of being seen as necessary to detain them to ensure that they are available for removal when practicable.

Expressing the constitutional limitation

55 For the reasons already given, expressing the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia as coming to an end when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future follows directly from the principle in *Lim*. This is the appropriate expression of the applicable constitutional limitation under a statutory scheme where there is an enforceable duty to remove an alien from Australia as soon as reasonably practicable.

56 Nevertheless, there is a need to explain why variations of the expression of the applicable constitutional limitation proffered by the defendants and by certain amici must be rejected.

57 The defendants, as a fallback from their primary submission, submitted that the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia should be simply expressed as coming to an end when there is no real prospect of the removal of the alien from Australia. The notions of practicability and of the reasonably foreseeable future were said to be unnecessary distractions. They are not. They are essential to anchoring the expression of the constitutional limitation in factual reality.

58 At the other extreme, the Human Rights Law Centre and the Kaldor Centre for International Refugee Law submitted that the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia should be expressed as coming to an end at any point when it can be determined to be more probable than not that the alien will not be removed from Australia in the foreseeable future. Quite apart from this leaving the constitutional limitation to have an unstable operation as probabilities of removal

68 (2004) 219 CLR 562 at 648 [256].

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fluctuate, expression of the constitutional limitation in those terms would uncouple the limitation from its underlying constitutional justification. Demanding compliance with a limitation expressed in those terms would go beyond merely ensuring that the non-punitive purpose of detention remains a purpose capable of being achieved in fact. It would also go beyond merely ensuring that the detention is limited to what is reasonably capable of being seen as necessary for the purpose of removal.

Applying the constitutional limitation

59 If *Al-Kateb* was to be reopened and overruled, the defendants made a correct and important concession. The plaintiff having discharged an initial evidential burden of establishing that there was reason to suppose that his detention had ceased to be lawful by reason that it transgressed the applicable constitutional limitation on his detention, the defendants conceded that they bore the legal burden of proving that the constitutional limitation was not transgressed. The concession was correct having regard to the coincidence of two fundamental principles. The first, a principle of common law reflected in the traditional procedure for obtaining a writ of habeas corpus, is that where a person in the detention of another adduces sufficient evidence to put the lawfulness of that detention in issue, the legal burden of proof shifts to the other to establish the lawfulness of that detention.⁶⁹ The second, a principle of constitutional law, is that "it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation".⁷⁰

60 To establish that ss 189(1) and 196(1) of the Migration Act validly applied to authorise continuation of the plaintiff's detention, the defendants were accordingly required to prove that there existed a real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future. Whilst the proof was required to be to a standard sufficient to support the making of a finding

69 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 at 299-300 [39]; *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 at 619-620 [60], 663 [273]; *Sami v Minister for Home Affairs* [2022] FCA 1513 at [36].

70 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 222. See also *Unions NSW v New South Wales* (2019) 264 CLR 595 at 622 [67] and the cases there cited.

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of fact to the level of satisfaction appropriate in a civil proceeding where individual liberty is in issue, the prospective and probabilistic nature of the fact in issue (that is, the fact of a real prospect of the plaintiff's removal from Australia becoming practicable in the reasonably foreseeable future) would have the potential to be confused were the standard of proof to be "on the balance of probabilities".⁷¹

61 The notions of the practicability and the foreseeability of removal embedded in the expression of the constitutional limitation accommodate "the real world difficulties that attach to such removal".⁷² The real world context also entails that proof of a real prospect must involve more than demonstration of a mere un-foreclosed possibility.

62 The special case recorded the agreement of the parties as to the fact that the plaintiff had complied with requests for information made by officers of the Department and had otherwise assisted the Department with its inquiries. This was not a case of a person in immigration detention having contributed to the frustration of the pursuit of lines of inquiry by officers of the Department attempting to bring about the person's removal.⁷³ Nor was it a case where officers of the Department remained in the process of pursuing lines of inquiry based on circumstances peculiar to the person in detention.⁷⁴

63 The special case further recorded the agreement of the parties as to two important facts as at 30 May 2023 (being the date when the original form of the special case was agreed). One was that the plaintiff could not then be removed from Australia. The other was that there was then no real prospect of the plaintiff being removed from Australia in the reasonably foreseeable future.

71 See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282-283. Contra *Sami v Minister for Home Affairs* [2022] FCA 1513 at [157].

72 *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625 at [59].

73 Compare *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285. See at 297 [30]-[33], 301-302 [47].

74 Compare *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322. See at 334-335 [4], 368 [135].

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64 The parties were in dispute about the significance of certain inquiries undertaken by officers of the Department after 30 May 2023. Those inquiries were in one respect ongoing at the time of the hearing of the special case. They were the subject of affidavit and documentary evidence tendered at the hearing.

65 The evidence showed that recent inquiries by officers of the Department had been triggered by an instruction which the Minister gave to the Department on 29 August 2023. The instruction then given was to inquire into the potential for the plaintiff to be removed to one of the "Five Eyes" countries: the United States, the United Kingdom, Canada or New Zealand. In compliance with the instruction, inquiries were promptly made through diplomatic channels of officials in each of those "Five Eyes" countries. The responses of officials in the United Kingdom, Canada and New Zealand quickly made clear that none of those countries would accept the plaintiff.

66 However, an inquiry made through the Australian embassy in Washington of an official within the United States Department of State led to a response on 30 September 2023 that the Department of State would "consider" the plaintiff's case and "have a hard look" but would require detail about the plaintiff's criminal offending and would need to confer with the Department of Homeland Security and the United States Citizenship and Immigration Services. The official advised that, if the United States were to progress acceptance of the plaintiff's case, it would likely need to receive the case through the United Nations High Commissioner for Refugees or the United States embassy in Canberra and would seek to interview the plaintiff through its embassy in Thailand or Malaysia. The requested details of the plaintiff's offending were provided on 6 October 2023. Despite frequent follow-up contact, the Department of State had provided no further substantive response by the time of the commencement of hearing of the special case on 7 November 2023 and still had provided no further substantive response by the time the hearing of the special case ended the following day.

67 By affidavit dated 26 October 2023, the First Assistant Secretary, International Division, within the Department of Home Affairs explained that she was aware of only two other cases in which an approach had been made to the United States for third country removal of a specific individual and that both of those other approaches had been quickly rejected. She opined that the response of 30 September 2023 that the Department of State would "consider" the plaintiff's case and "have a hard look" made the plaintiff's case unique. She opined that it was impossible for her to predict the prospects of the plaintiff being accepted for

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resettlement by the United States or to describe any set process or pathway that might be followed in respect of the plaintiff.

68 Evidence of law and practice in the United States adduced on behalf of the plaintiff indicated that acceptance of the plaintiff into the United States could not occur without the exercise of multiple statutory discretions by multiple agencies within the United States including some discretions involving waiver of statutory prohibitions. The evidence did not allow for the making of any meaningful assessment either of the likelihood of those discretions being exercised or of the timeframes within which those discretions might be exercised.

69 The position at the end of the hearing on 8 November 2023 was therefore that, although removal of the plaintiff to the United States remained a possibility, the evidence failed to establish that the prospect of removal to the United States occurring in the foreseeable future was realistic. Neither party submitted that the position at the end of the hearing was in any other respect different from that which had been agreed as at 30 May 2023.

70 The necessary conclusion of fact is that by the end of the hearing there was, and had been since 30 May 2023, no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future. It followed from that conclusion of fact that ss 189(1) and 196(1) of the Migration Act did not validly apply to authorise the continuation of the plaintiff's detention then and had not validly applied to authorise the plaintiff's detention since 30 May 2023.

Consequence of invalidity for the liberty of the plaintiff

71 The consequence of ss 189(1) and 196(1) of the Migration Act not validly applying⁷⁵ to authorise the continuation of the plaintiff's detention at the end of the hearing on 8 November 2023 is that the sole statutory basis relied on by the defendants for the continuation of his detention fell away and the plaintiff was entitled to his common law liberty.

72 Release from unlawful detention is not to be equated with a grant of a right to remain in Australia. Unless the plaintiff is granted such a right under the Migration Act, the plaintiff remains vulnerable to removal under s 198. Issuing of

75 Section 3A of the Migration Act. Cf s 15A of the *Acts Interpretation Act 1901* (Cth).

a writ of habeas corpus would not prevent re-detention of the plaintiff under ss 189(1) and 196(1) of the Migration Act in the future if, and when, a state of facts comes to exist giving rise to a real prospect of the plaintiff's removal from Australia becoming practicable in the reasonably foreseeable future. Nor would grant of that relief prevent detention of the plaintiff on some other applicable statutory basis, such as under a law providing for preventive detention of a child sex offender who presents an unacceptable risk of reoffending if released from custody.

73 For completeness, it should be recorded that there was no issue between the parties that the invalidity of ss 189(1) and 196(1) of the Migration Act in their application⁷⁶ to authorise the plaintiff's detention in circumstances found to contravene the applicable constitutional limitation cannot affect the validity of those provisions in their application to authorise detention in other circumstances.

Formal answers to questions reserved

74 For these reasons, the order made at the conclusion of the hearing of the special case formally answered the questions reserved as follows:

Question 1: On their proper construction, did ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) authorise the detention of the plaintiff as at 30 May 2023?

Answer: Yes, subject to s 3A of the *Migration Act 1958* (Cth).

Question 2: If so, are those provisions beyond the legislative power of the Commonwealth insofar as they applied to the plaintiff as at 30 May 2023?

Answer: Yes.

Question 3: On their proper construction, do ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) authorise the current detention of the plaintiff?

Answer: Yes, subject to s 3A of the *Migration Act 1958* (Cth).

76 Section 3A of the Migration Act.

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Question 4: If so, are those provisions beyond the legislative power of the Commonwealth insofar as they currently apply to the plaintiff?

Answer: Yes.

Question 5: What, if any, relief should be granted to the plaintiff?

Answer: The following orders should be made:

1. It is declared that, by reason of there having been and continuing to be no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future:
 - (a) the plaintiff's detention was unlawful as at 30 May 2023; and
 - (b) the plaintiff's continued detention is unlawful and has been since 30 May 2023.
2. A writ of habeas corpus issue requiring the defendants to release the plaintiff forthwith.

Question 6: Who should pay the costs of the further amended special case?

Answer: The defendants.

