



HIGH COURT OF AUSTRALIA

10 June 2026

ABDEL-HADY v COMMONWEALTH OF AUSTRALIA [2026] HCA 17

Today, the High Court answered a single question of law to the effect that officers of the Commonwealth do not have a common law defence to negative liability for the tort of false imprisonment with respect to the immigration detention of the plaintiff in a period during which his detention was unlawful.

In November 2023, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, the High Court reopened and overruled the constitutional holding in *Al-Kateb v Godwin* (2004) 219 CLR 562. In *NZYQ*, the High Court held, contrary to *Al-Kateb*, that ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) are inconsistent with Ch III of the *Constitution*, and are therefore invalid, in their application to an unlawful non-citizen whose removal from Australia under s 198 of that Act has no real prospect of becoming practicable in the reasonably foreseeable future. The result of the constitutional holding in *NZYQ* is that ss 189(1) and 196(1) were always invalid in that application.

The plaintiff is a citizen of Austria who suffers from thrombophilia, being an extreme tendency to the formation of blood clots within arterial or venous blood vessels. Having first arrived in Australia in 1997, he held various visas until 31 March 2017 when his then-current visa was cancelled under the *Migration Act*, following which he was located and on 22 August 2017 detained under s 189(1) of that Act. On 13 February 2024, the plaintiff was released from immigration detention. That occurred because the Commonwealth accepted, having regard to medical assessments then available, that from 28 July 2022 the plaintiff's thrombophilia had rendered him medically unfit to travel by any commercial aeroplane and, consequently, there was no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future.

By a proceeding commenced in the original jurisdiction of the High Court against the Commonwealth, the plaintiff claimed damages for false imprisonment for the period of his detention that was not authorised by ss 189(1) and 196(1) of the *Migration Act*. The Commonwealth admitted that detention of the plaintiff by the detaining officer from 28 July 2022 was unlawful and that the Commonwealth is vicariously liable for any liability that the detaining officer has for the tort of false imprisonment. However, the Commonwealth propounded a novel defence to negative the liability of the detaining officer and itself with respect to the period from there first being no real prospect of removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future on 28 July 2022 to the making of orders in *NZYQ* on 8 November 2023. The propounded defence distilled to three elements: (1) the detaining officer acted in the purported performance of a statutory duty to detain under ss 189(1) and 196(1) of the *Migration Act*; (2) the detaining officer so acted in conformity with the law as declared in a prior decision of the High Court, being *Al-Kateb*; and (3) the detaining officer was under an independent legal duty to obey the law as declared by the High Court.

The High Court held that the novel common law defence should not be recognised to negative the common law liability of the detaining officer for the tort of false imprisonment.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.