Re Woolley (As Manager of the Baxter Immigration Detention Centre); Ex parte Applicants M276/2003 (by their next friend GS)

High Court of Australia

Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ

M276/2003

7 October 2004

[2004] HCA 49; (2004) 225 CLR 1; (2004) 80 ALD 1; (2004) 210 ALR 369; (2004) 79 ALJR 43; (2004) 32 Fam LR 180

Gleeson CJ.

[1] The applicants are four children, at the time of the proceedings aged 15, 13, 11 and seven respectively, of Afghani nationality, who were brought to Australia by their parents in 2001. Neither they nor their parents had permission to enter Australia. The members of the family were all treated as unlawful non-citizens within the meaning of that expression in the Migration Act 1958 (Cth) ("the Act"). Section 189 of the Act provides that if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain that person. Pursuant to that requirement, the applicants and their parents were taken into immigration detention. The issue in the case concerns the lawfulness of the detention of the applicants.

[2] Soon after the arrival of the family in Australia, the applicants' father applied for protection visas for himself and his family. A delegate of the second respondent refused the application. The Act makes provision for procedures of administrative review of such a decision, and for judicial review of administrative decisions. Such procedures, if they ultimately lead to an appeal to this Court, sometimes involve up to five levels of administrative and judicial decision-making. Years may pass while rights of review or appeal are pursued. The proceedings initiated by the applicants' father remain on foot. Their history to date is set out in the reasons of Callinan J. The applicants and their family were in Baxter Immigration Detention Centre at the time of the hearing of this matter.

[3] It is contended for the applicants that the provisions of the Act pursuant to which they are being detained, if and to the extent to which they apply to children, are invalid. The applicants seek, against the Manager of the Baxter Immigration Detention Centre, and the Minister for Immigration and Multicultural and Indigenous Affairs, orders for habeas corpus, prohibition and injunction.

The legislation

[4] The period of the detention required by s 189 of the Act is prescribed by s 196, which must be read together with s 198. Section 198 is in Div 8 of Pt 2, which deals with "Removal of unlawful non-citizens". So far as presently relevant, it provides that, if an unlawful non-citizen detainee has made an application for a visa, the grant of the visa has been refused, and the application has been finally determined, then an officer must remove the non-citizen from Australia as soon as reasonably practicable (s 198(6)). There is also a requirement to remove

as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be removed (s 198(1)). That additional requirement is relevant to an argument that will be considered below. Section 196, like s 189, is in Div 7 of Pt 2, dealing with "Detention of unlawful non-citizens". Section 196 relevantly provides that an unlawful non-citizen detained under s 189 must be kept in immigration detention until he or she is removed from Australia under s 198 or granted a visa.

[5] In brief, the provisions of the Act with which this case is concerned provide for mandatory detention, pending removal from Australia, of unlawful non-citizens. If an unlawful non-citizen applies for a visa, then he or she must be kept in immigration detention pending final determination of the application. If the final outcome is adverse to the non-citizen, he or she is to be removed from Australia as soon as reasonably practicable, and detained pending removal. If the outcome is the grant of a visa, detention comes to an end.

[6] The applicants and their family are being detained because the proceedings relating to the visa application made by the father are continuing. If his application is ultimately successful, the family will be released into the Australian community. If the application is ultimately unsuccessful, the family will be removed. It is not suggested there is any problem of the kind considered in Al-Kateb v Godwin1..

The meaning of the legislation

[7] The language of ss 189 and 196 does not distinguish between unlawful non-citizens who are above and those who are below the age of 18 years. Those who are below the age of 18 may range from infants of tender years, totally dependent upon their parents, to young people who have almost reached adulthood, and who may have arrived in this country, or who may be capable of living here, independently of their parents. In s 5 of the Act, "non-citizen" is defined as "a person who is not an Australian citizen". An "unlawful non-citizen" is "[a] non-citizen in the migration zone who is not a lawful non-citizen" (s 14). A lawful non-citizen is a non-citizen in the migration zone who holds a current visa (s 13). It is hardly likely that Parliament overlooked the fact that some of the persons covered by those definitions would be children. Human reproduction, and the existence of families, cannot have escaped notice. People who enter Australia without a visa sometimes bring children with them; and it is not unusual for people who originally held a visa, but whose visa has ceased to be effective, to be members of a family. The Convention on the Rights of the Child2., in its preamble, describes the family as "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children". The potential impact of any system of immigration detention, mandatory or discretionary, upon families, as well as individuals, is obvious. Conversely, some people who enter Australia as individuals, without permission, may be independent in a practical sense, even though under the age of 18.

[8] There is no doubt that the applicants, whether in or out of immigration detention, have the status of unlawful non-citizens. If, for some reason, the provisions of ss 189 and 196 did not apply to them, there would be a gap in the legislation in its application to an obvious and important group of non-citizens. Furthermore, the legislation would have a differential impact on family members. The parents, the primary carers, would be the subject of obligatory detention. Those under their care would be in a kind of legal limbo. In this respect, there is no ambiguity in s 189 or s 196. There is no basis in the text for reading the references to persons, or to unlawful non-citizens, as limited to persons who have attained the age of 18 years.

[9] Mandatory detention was introduced in 1992. The practical operation of a system of mandatory detention has consequences for families and children that, no doubt, are considered by some to be a reason to oppose the policy of the Act, but it is not for this Court

to set out to frustrate the legislation on the basis of such opposition. It may be added that, given that the Act imposes mandatory detention, it is not self-evident that, by construing ss 189 and 196 as limited to adult non-citizens, the result would be a significant improvement in the position of unlawful non-citizens under the age of 18. They would still be unlawful non-citizens. Those who, in a practical sense, are incapable of living separately from their parents may find themselves in immigration detention in any event. Presumably, those who remained unlawful non-citizens at the relevant time would be placed in detention when they turned 18. Whatever the policy arguments against mandatory detention by reason of its effect on children, reading ss 189 and 196 as applying only to persons of 18 years and over hardly provides a satisfactory solution. The problem of the situation of families and children is inherent in immigration detention itself.

[10] Just as it is impossible to interpret ss 189 and 196 as applying only to persons over the age of 18 years, so also it is impossible to read them down in some manner requiring individual assessment of particular unlawful non-citizens, so that in some cases detention would be mandatory, and in others discretionary. The Human Rights and Equal Opportunity Commission, in its submissions to the Court, acknowledged as much. To do so would directly contradict the clear legislative intention.

[11] If the scheme of the legislation, expressed in unambiguous language, were to be considered inconsistent with Australia's international obligations under the Convention on the Rights of the Child, that would not justify a refusal by the Court to give effect to the legislation. Of course, if the statutory language were ambiguous, and if it were possible to give it a fair interpretation consistent with those obligations, different considerations would apply. But that is not the case.

[12] The substantial question to be considered is whether the Constitution provides an impediment to the valid operation of the Act according to its terms.

Constitutional validity

[13] In 1992, a number of Cambodian nationals, who had arrived in Australian territorial waters without an entry permit, and who had subsequently made unsuccessful visa applications on the basis that they were refugees, were in immigration detention. They were affected by the Migration Amendment Act 1992 (Cth), which came into operation on 6 May 1992. That Act provided for the compulsory detention in custody of certain non-citizens who had arrived in Australia without permission. The Cambodian nationals immediately commenced proceedings in this Court challenging the constitutional validity of mandatory detention. Those proceedings were Chu Kheng Lim v Minister for Immigration3.. One ground of challenge to the legislation, which is presently irrelevant, concerned its effect upon pending litigation. Another ground of challenge, of direct present relevance, was based upon the contention that mandatory immigration detention was a form of punishment by the Executive, and was contrary to Ch III of the Constitution, and to the separation of powers which is a structural feature of the Constitution. A similar contention forms the basis of the argument for the applicants in the present case. In its application to the wider system of mandatory detention, the contention was rejected. In the present case the contention is repeated in a narrower form, with reference to the operation of the legislation in relation to children. Although it was never made quite clear, presumably the contention is directed to the operation of the scheme in relation to all children. This is a point of some importance. As was noted earlier, if children include all persons under the age of 18, then the expression covers a rather diverse class. They might be treated conveniently as a single group for some purposes, but for the purpose of deciding whether a system of immigration detention is "punitive" (itself a problematic concept) they are quite disparate. The class would include an infant who

could not reasonably be separated from a mother, whether in or out of immigration detention, and perhaps a 17-year-old who is herself a mother. It may be sufficient for the purposes of the applicants to argue that, if the system is punitive in relation to any children, then the very considerations that make it impossible to read down ss 189 and 196 result in invalidity of the entire system. If that were so, it may mean that the decision in Chu Kheng Lim was wrong, because an argument fatal to the validity of the legislation there in question had been overlooked. However, the idea that the legislation might operate punitively in relation to some children and not in relation to other children directs attention to the need to be clear about what is meant by punishment in this context. Furthermore, if the legislation is to be characterised as punitive in its operation in relation to some people, and not in its operation in relation to others, it is hard to see that a dividing line constituted by the age of 18 years would be appropriate. That would ignore the position of the ill, or the elderly, or others who might suffer as much hardship as some of the young.

[14] In Chu Kheng Lim, Brennan, Deane and Dawson JJ wrote a joint judgment, with which Mason CJ agreed. The views of those four members of the Court reflect the principles for which the case stands as authority. Those principles are fatal to the argument of the applicants in the present case.

[15] The reasoning in the joint judgment followed a pattern which is significant. Relevantly, it began by construing the grant of power, in s 51(xix) of the Constitution, by which Parliament, subject to the Constitution (and therefore subject to Ch III) was given power to make laws with respect to naturalization and aliens. It was pointed out that Nolan v Minister for Immigration and Ethnic Affairs4. recognized that the effect of Australia's emergence as a fully independent nation with its own distinct citizenship was that the word "alien" in s 51(xix) had become synonymous with "non-citizen". (Nolan was later, temporarily, in disfavour5., but its authority has since been restored6..) It was then said that the legislative power with respect to aliens prima facie encompasses laws with respect to non-citizens, such as non-citizens who have no visa7.. Those observations are of particular significance having regard to the present wording of the Act in relation to "unlawful non-citizens". Relating that to the legislation there before the Court, the joint judgment said that a law that required designated non-citizens to be kept in custody until they were either removed or given an entry permit was a law with respect to aliens8..

[16] The reference to the prima facie effect of s 51(xix) related to the qualification "subject to the Constitution", that is to say, subject to Ch III. The joint judgment then went on to consider Ch III. It stated a number of propositions which were all qualified by reference to the rights of Australian citizens. Subject to certain (or perhaps uncertain) qualifications, it was stated as a general proposition "that the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts."9. This was because, subject to qualifications, "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."10.

[17] The proposition that, ordinarily, the involuntary detention of a citizen by the State is penal or punitive in character was not based upon the idea that all hardship or distress inflicted upon a citizen by the State constitutes a form of punishment, although colloquially that is how it may sometimes be described. Taxes are sometimes said, in political rhetoric, to be punitive. That is a loose use of the term. Punishment, in the sense of the inflicting of involuntary hardship or detriment by the State, is not an exclusively judicial function. On the

other hand, the particular form of detriment constituted by the deprivation of liberty usually (although not always) follows adjudgment of criminal guilt, and the circumstances in which deprivation of liberty may be imposed upon a citizen by the State otherwise than by way of judicial punishment are limited. It is unnecessary, and perhaps undesirable, to seek an exhaustive definition of those circumstances. The joint judgment went on to demonstrate that mandatory detention of the kind there in question (which was not materially different from the kind presently in question) was not punishment but that, because of the legal characteristics of the persons upon whom it was imposed, and the purpose for which it was imposed, it bore a different character.

[18] The next step in the reasoning of Brennan, Deane and Dawson JJ was to deal with the exclusion, deportation and detention of aliens, that is, non-citizens11.. The joint judgment pointed out that aliens, unlike citizens, are subject to a power of exclusion or expulsion which is an incident of sovereignty over territory. The supreme power in a State has the right to refuse to permit an alien to enter, either absolutely or subject to conditions, and to expel or deport. The status of alienage, which was shared by all those subject to the system of administrative detention in question, was a key element in identifying the legal character of the power to detain. The power to make laws with respect to aliens, which includes a power to expel or deport, also includes a power to restrain an alien in custody to the extent necessary to make the deportation effective12.. It extends to a power to detain an alien in custody for the purpose and as an incident of the executive power to receive, investigate, and determine an application by the alien to be permitted to enter or remain in Australia. Their Honours said13.:

Such limited authority to detain an alien in custody can be conferred on the Executive without infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates. The reason why that is so is that, to that limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth. When conferred upon the Executive, it takes its character from the executive powers to exclude, admit and deport of which it is an incident.

(Footnote omitted)

[19] In a footnote to that passage, reference was made to cases in which it was said that the exclusion and deportation of an unwanted alien immigrant is not imposed as punishment for an offence but as a measure to prevent entry into the community of a person whom the State does not wish to accept as a member of the community14..

[20] Mason CJ, agreeing with Brennan, Deane and Dawson JJ said15.:

I agree with their Honours that the legislative power conferred by s 51(xix) of the Constitution extends to conferring upon the Executive authority to detain an alien in custody for the purposes of expulsion or deportation and that such authority constitutes an incident of executive power. I also agree that authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers and that such limited authority to detain an alien in custody can be conferred upon the Executive without contravening the investment of the judicial power of the Commonwealth in Ch III courts.

[21] When Brennan, Deane and Dawson JJ went on to apply the principles they had stated to the particular statutory provisions under consideration they repeated that "the … 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."16.

[22] The following points of relevance to the present case emerge from the above.

[23] First, where legislation confers upon the Executive authority to detain an alien in custody, if the exercise of such authority is properly characterised as an incident of executive power, rather than as an exercise of judicial power, it is a law with respect to aliens, and does not offend Ch III or the principle of the separation of powers.

[24] Secondly, the capacity of the State (in the international law sense) to exclude and to deport aliens means that the character of a law authorizing detention of an alien may be different from the character of a law authorizing detention of a citizen. Deprivation of liberty, when applied to a citizen, is ordinarily a form of punishment incidental to the exercise of judicial power. Detention of an alien for the purpose of exclusion, dealing with an application for permission to enter, or removal bears a different aspect.

[25] Thirdly, if a law is reasonably capable of being seen as necessary for the purpose of exclusion, dealing with an application for permission to enter, or removal, then ordinarily it will be proper to regard it as having the character of an incident of the executive power to receive, investigate and determine an application for an entry permit and, after determination, to admit or deport.

[26] Fourthly, Brennan, Deane and Dawson JJ referred to detention that was "necessary to enable an application for an entry permit to be made and considered". Plainly they 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 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.

[27] It was not suggested in Chu Kheng Lim, and would be inconsistent with the decision in that case, that the validity of mandatory administrative detention of aliens seeking visas, pending resolution of the application process, depends upon evidence, case by case, that the applicant is likely to abscond, or upon the individual hardship involved in detention. The legislation under challenge in Chu Kheng Lim dealt with what are now called unlawful non-citizens, who had entered the country without permission, as a class. The power of exclusion was held to extend to keeping them separate from the community, in administrative detention, while their visa applications were being investigated and considered. The possibility of delays in tribunal or court proceedings was acknowledged in the joint judgment17.. In the legislation there under consideration, there was a maximum period of detention following finalization of such proceedings. There is no such period in the present legislation. But, in this case, if there had been such a period, it would not yet have commenced to run.

[28] The context in which the power of detention was given, and the purpose for which it existed, was seen as definitive of its character as an incident of executive power. A vital aspect of that context was that it was given in relation to non-citizens, and that the exclusion of non-citizens is an aspect of territorial sovereignty.

[29] Nowhere was it suggested, in the reasoning of Brennan, Deane and Dawson JJ, or Mason CJ, or any member of the Court, that the power of detention conferred by the legislation in that case would take on a different character if, in its application to some particular detainees, or some class of detainees, it was capable of causing particular hardship. One of the most obvious features of the system of mandatory detention considered in Chu Kheng Lim, as of the system with which this case is concerned, is that it does not address the particular circumstances of individual detainees. That is the difference between mandatory and discretionary detention. If the possibility of the severity of the operation of mandatory detention in a particular case or class of case altered the character of the power of detention from an incident of executive power to extra-judicial and unconstitutional punishment, then the system of mandatory detention would have been found unconstitutional. Furthermore, it is impossible to identify the criterion by which severity of application would be measured. There is no reason why it would be limited to children, or to some children. Children might constitute a class whose members would include specially vulnerable people, but so would the elderly, the infirm, and perhaps others.

[30] It was not argued that Chu Kheng Lim was wrongly decided, and we were not invited to re-open that decision. An attempt was made to distinguish the case, but that attempt was unconvincing. It was pointed out that, in the joint judgment, some significance was placed upon a feature of the legislation, which remains in the Act in its present form, which permitted a detainee to bring an end to his or her detention by requiring removal from Australia if the detainee requested it18.. That was regarded as bearing upon the character of the power. It was seen as part of the legislative context in which the power was conferred. Unlawful non-citizens are dealt with as a class, and, considered as a class, they have a power to bring their detention to an end by requesting removal. Nevertheless, it is argued, that is not a power available to some detainees. The legal incapacity of children was referred to. Two points may be made. First, not all persons under the age of 18 would lack the legal capacity to make an effective request for removal. In Gillick v West Norfolk AHA19., Lord Scarman pointed out that, subject to any statutory provision, "a minor's capacity to make his or her own decision depends upon the minor having sufficient understanding and intelligence to make the decision and is not to be determined by reference to any judicially fixed age limit." That principle was applied by this Court in Marion's Case20.. Some children would have the legal capacity to make (independently of their parents) a request for removal from Australia, and others would not. Secondly, the character of the power conferred by ss 189 and 196 does not vary according to whether a particular unlawful non-citizen in detention has the legal capacity to request removal from Australia. The power takes its character from its legislative context, and it retains that character even if, in the circumstances of an individual case, one of a number of factors relevant to that general context does not apply.

[31] The special concern of the law for families and children, as evidenced by the Convention on the Rights of the Child and the parens patriae jurisdiction of courts, was invoked in argument. This is unquestionably an important consideration of legislative policy, but it does not lead to any legally relevant conclusion as to the meaning of the Act, or the character for constitutional purposes of immigration detention.

Conclusion

[32] The application should be dismissed.

McHugh J.

[33] Two questions arise in this application for a writ of habeas corpus against the first respondent and, against the second respondent, a writ of prohibition or, alternatively, an injunction. First, do ss 189 and 196 of the Migration Act 1958 (Cth) ("the Act") apply to alien children in Australia pending the determination of whether they are entitled to visas under that Act? Second, if they do, are they invalid because they constitute a conferral of the judicial power of the Commonwealth otherwise than in accordance with Ch III of the Constitution?

[34] In my opinion, on their correct construction, ss 189 and 196 apply to alien children in Australia and they are valid enactments of the Parliament of the Commonwealth.

Statement of facts

[35] The applicants are children who at the time of the hearing before this Court were aged 15, 13, 11 and seven years old. They are citizens of Afghanistan. They arrived with their parents in Australia in January 2001. Shortly after, officers of the Department of Immigration and Multicultural and Indigenous Affairs took all members of the family to an immigration detention centre at Woomera in South Australia. In February 2001, the applicants' father applied for a protection visa. He included the applicants in the application. The applicants were detained at Woomera until January 2003 when they were taken to the Baxter immigration detention facility in South Australia. After the hearing before this Court, the applicants were granted temporary protection visas and released from detention. The Commonwealth contends that the applicants were lawfully detained because of ss 189 and 196 of the Act.

Legislative framework

[36] Division 7 of Pt 2 of the Act establishes the statutory scheme under which the applicants were detained. Section 189 both authorises and requires the detention of "unlawful non-citizens". Section 196 requires that an unlawful non-citizen detained under s 189 be kept in immigration detention until he or she is:

(a)

removed from Australia under s 198 or s 199; or

(b)

deported under s 200; or

(c)

granted a visa.

[37] Section 5(1) of the Act defines "detain" to mean:

(a)

take into immigration detention; or

(b)

keep, or cause to be kept, in immigration detention.

"Immigration detention" is defined in s 5(1) to mean, among other things:

(b)

being held by, or on behalf of, an officer:

(i)

in a detention centre established under this Act; or

(ii)

in a prison or remand centre of the Commonwealth, a State or a Territory; or

…

(v)

in another place approved by the Minister in writing.

[38] Section 13 of the Act declares that a non-citizen in the "migration zone" (essentially, the States and Territories) who holds a visa that is in effect is a lawful non-citizen21.. Section 14 deems any non-citizen who is in the migration zone who is not a "lawful non-citizen" to be an "unlawful non-citizen". By operation of ss 13 and 14, an "unlawful non-citizen" is a person who is in the migration zone who is not an Australian citizen22. and who does not hold a valid visa.

[39] Section 189(1) states:

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

[40] Section 196 provides:

(1)

An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

(a)

removed from Australia under section 198 or 199; or

(b)

deported under section 200; or

(c)

granted a visa.

(2)

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

(3)

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

(4)

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

(4A)

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

(5)

To avoid doubt, subs (4) or (4A) applies:

(a)

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

(b)

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

(5A)

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

(6)

This section has effect despite any other law.

(7)

In this section:

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

[41] Section 198 of the Act requires an officer "as soon as reasonably practicable" to remove an unlawful non-citizen who requests removal or who has not applied for a visa or whose application for a visa has been refused and the application has been finally determined. Section 199 relevantly provides for the removal of a spouse or dependent child of an unlawful non-citizen at the request of the unlawful non-citizen, where the officer removes or is about to remove that unlawful non-citizen. Section 200 provides for the deportation of non-citizens who have been convicted of crimes or on security grounds.

Aliens

[42] The applicants concede that they are aliens for the purpose of s 51(xix) of the Constitution, which provides that the Parliament of the Commonwealth may "make laws … with respect to … aliens". However, they claim that upon its true construction the Act does not authorise their detention pending the determination of their application for visas. If it does, they contend that the Act is invalid because the power conferred by s 51(xix) does not authorise such a law. Alternatively, they contend that if ss 189 and 196 are laws with respect to aliens, Ch III of the Constitution prevents the Parliament from enacting those sections.

[43] The power of the Federal Parliament to make laws with respect to aliens is, subject to the Constitution, limited only by the description of the subject matter23.. Parliament can make laws imposing burdens on aliens that cannot be imposed on Australian citizens. If a law can be characterised as a law "with respect to … aliens", it is constitutionally valid unless it infringes an express or implied prohibition of the Constitution.

[44] This Court has consistently recognised that the power to make laws with respect to aliens extends to authorising the Executive to detain an alien in custody to the extent necessary to make the deportation or expulsion of that alien effective24.. In Chu Kheng Lim

v Minister for Immigration, Brennan, Deane and Dawson JJ said that the power of the Executive to detain an alien in custody pending the determination of his or her application for entry is an incident of the Executive powers of detention for the purposes of removal or deportation25.:

[T]he legislative power conferred by s 51(xix) of the Constitution encompasses the conferral upon the Executive of authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation. Such authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of that executive power. By analogy, authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers.

(emphasis added)

[45] Similarly, in the same case, Mason CJ said26.:

[T]he legislative power conferred by s 51(xix) of the Constitution extends to conferring upon the Executive authority to detain an alien in custody for the purposes of expulsion or deportation and … such authority constitutes an incident of executive power. … [The] authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers.

(emphasis added)

[46] The applicants assert that ss 189 and 196 do not apply to children who are aliens. However, nothing in those sections or the Act suggests that they are not intended to apply to alien children who are unlawful non-citizens. Nothing in the Act provides any ground for reading down the general terms of those sections to exclude children from their operation. Several provisions of the Act refer expressly to children, including children who have been detained. For example, ss 252A and 252B, which are concerned with the "strip search of a detainee", provide for the strip search of detained children. Under s 199, an unlawful non-citizen who is about to be removed may request the removal of a dependent child or children. The irresistible conclusion is that the Act is intended to apply to alien children, including children who are unlawful non-citizens. Sections 189 and 196 confirm what is apparent from the general terms of many provisions of the Act: children who are unlawful non-citizens are among those who must be detained in immigration detention.

[47] The applicants' contention that the Act does not authorise the detention of children who are unlawful non-citizens cannot be sustained. The first question must be answered in the affirmative: the challenged provisions apply to alien children who are unlawful non-citizens.

Judicial power

[48] The second question posed by the application is whether, though textually laws with respect to aliens, ss 189 and 196 of the Act are not laws "with respect to" the power conferred by s 51(xix) because they infringe the requirements of Ch III of the Constitution. This question raises for determination the central issue in this case, namely, whether, by enacting ss 189 and 196 of the Act and directing members of the Executive to detain unlawful non-citizens, the Parliament has impermissibly exercised, or has impermissibly authorised the Executive to exercise, the judicial power of the Commonwealth.

[49] Section 71 of the Constitution, the first section in Ch III, confers the judicial power of the Commonwealth on this Court, courts created by the Parliament of the Commonwealth and courts invested with federal jurisdiction under s 77 of the Constitution. Section 1, the first section in Ch I of the Constitution, confers the legislative power of the Commonwealth on the Federal Parliament. Section 61, the first section in Ch II of the Constitution, confers the executive power of the Commonwealth on the Queen. It declares that the executive power is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. This Court and the Privy Council have long held that these sections and this arrangement of Chs I, II and III of the Constitution prescribe the doctrine of the separation of legislative, executive and judicial powers as a constitutional requirement27.. In Lim, Brennan, Deane and Dawson JJ said28.:

The Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers. Chapter III gives effect to that doctrine in so far as the vesting of judicial power is concerned. Its provisions constitute 'an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested … No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Ch III'. Thus, it is well settled that the grants of legislative power contained in s 51 of the Constitution, which are expressly 'subject to' the provisions of the Constitution as a whole, do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth.

(footnote omitted)

[50] Under the doctrine of the separation of powers, federal judicial power is exercisable only by the judiciary. Consequently, neither the legislature nor the Executive may exercise the judicial power of the Commonwealth29.. The doctrine is subject to a number of exceptions, which include the power of a military tribunal to punish for breach of military discipline and the power of the Federal Parliament to punish for contempt30.. The power of the Parliament to hear and determine charges of contempt of Parliament and to punish contemnors is an exception that is more apparent than real. That power is directly authorised by s 49 of the Constitution. Moreover31.:

[T]hroughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection.

The investing of judicial power in military tribunals is, however, a true exception that can be explained only on historical grounds.

[51] Judicial power is difficult to define: it resists a definition that is both exhaustive and exclusive32.. As I pointed out in Lim33.:

The line between judicial power and executive power in particular is very blurred. Prescriptively separating the three powers has proved impossible. The classification of the exercise of a power as legislative, executive or judicial frequently depends upon a value judgment as to whether the particular power, having regard to the circumstances which call for its exercise, falls into one category rather than another. The application of analytical tests and descriptions does not always determine the correct classification. Historical practice plays an important, sometimes decisive, part in determining whether the exercise of a particular power is legislative, executive or judicial in character.

(footnote omitted)

[52] Four Justices of this Court observed in Brandy v Human Rights and Equal Opportunity Commission34. that, in attempting to define judicial power:

It is traditional to start with the definition advanced by Griffith CJ in Huddart, Parker & Co Pty Ltd v Moorehead35. in which he spoke of the concept of judicial power in terms of the binding and authoritative decision of controversies between subjects or between subjects and the Crown made by a tribunal which is called upon to take action. However, it is not every binding and authoritative decision made in the determination of a dispute which constitutes the exercise of judicial power. A legislative or administrative decision may answer that description. Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion.

Characterisation of the power to detain

[53] A proceeding that requires the determination of the guilt or innocence of a person and the imposition of punishment following such a determination is a traditional exercise of judicial power. Such a proceeding determines a controversy between the Crown and a subject by reference to "rights or obligations arising from the operation of law upon past events or conduct."36.

[54] In their joint judgment in Lim, Brennan, Deane and Dawson JJ recognised that the adjudgment and punishment of criminal guilt under a law of the Commonwealth is not only a function which has become essentially and exclusively judicial in character, but also that it is the most important function that is entrusted to Ch III courts. Their Honours said37.:

The most important of [the functions which have become established as essentially and exclusively judicial in character] is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and 'could not be excluded from' the judicial power of the Commonwealth. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the subsections of s 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive.

(footnotes omitted)

[55] Their Honours also acknowledged38. that the question whether a law of the Commonwealth purports to confer the function of the adjudgment and punishment of criminal guilt is a question of substance and not mere form. Accordingly, they said39. that it would be beyond the legislative power of the Parliament to invest the Executive with an 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. Their Honours justified this premise on the basis that40.:

[P]utting to one side the exceptional cases … , 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.

[56] From this premise, their Honours drew the conclusion that, apart from some exceptional cases, there exists, for citizens, "at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth."41.

[57] With great respect, the reason given by their Honours does not support their premise. If no more appears, a law which authorises the Executive to detain a person should be classified as "penal or punitive in character" and a breach of the separation of powers doctrine. But it is going too far to say that, subject to specified exceptions, detention by the Executive is always penal or punitive and can only be achieved as the result of the exercise of judicial power. Accordingly, their Honours' conclusion that in times of peace, citizens enjoy a constitutional immunity from being imprisoned by Commonwealth authority except under an order by a court in the exercise of the judicial power of the Commonwealth cannot stand.

[58] Whether detention is penal or punitive must depend on all the circumstances of the case. Logically, the fact that courts punish persons by making orders for detention by the Executive cannot lead to the conclusion — subject to exceptions or otherwise — that detention by the Executive is necessarily penal or punitive. In Lim, Brennan, Deane and Dawson JJ identified as exceptions to the "constitutional immunity" detention in custody without bail pending the determination of a criminal charge and detention because of infectious disease or mental illness42.. Detention imposed in these cases has never been and could not be characterised as punitive or penal. Their Honours also recognised cases of contempt of Parliament and imprisonment by military tribunals as exceptions to the rule that only courts could order detention by the Executive43.. And their Honours expressly held that detention pending the investigation and determination of an application for a visa is not an exercise of the "judicial power of the Commonwealth"44.. Although their Honours found it unnecessary to consider the issue, where the nation is at war even a citizen may be detained by the Executive, acting under Parliamentary authority, if, in the opinion of the Executive, the citizen is disloyal or acts in any manner prejudicial to the safety or defence of the Commonwealth45.. Moreover, from time to time, even courts make orders for the detention of persons by the Executive that cannot possibly be characterised as penal or punitive. An order committing a person to an institution after acquittal of a criminal charge on the ground of insanity or mental illness is a notable example. Another example is an order committing a person to be detained without bail pending trial. At different times, courts have also been given power to order the detention of persons who were adjudged mentally ill46. or who were debtors47..

[59] In Lim, Gaudron J said that she was48.:

not presently persuaded that legislation authorizing detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Ch III.

Her Honour expressed herself even more strongly in Kruger v The Commonwealth49.. She said50. that "it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power." In Al-Kateb v Godwin51., Hayne J, with whose judgment Heydon J agreed on this point, referred to the judgment of Gaudron J in Kruger and was clearly of the same opinion as her Honour. In my opinion, the statement of her Honour in Kruger was correct and the dictum of Brennan, Deane and Dawson JJ in Lim to the contrary should not be followed.

[60] That persons are ordinarily detained by the Executive only as the result of an order made in judicial proceedings is by itself an indication that a law that authorises detention without a judicial order is, as a matter of substance, punitive in nature. However, the object for which the law authorises or requires the detention of a person is an even stronger indication of whether the detention is penal or punitive in nature. If no more appears than that the law authorises or requires detention, the correct inference to be drawn from its enactment is likely to be that, for some unidentified reason, the legislature wishes to punish or penalise those liable to detention without the safeguards of a judicial hearing. It would nevertheless be a rare

case where nothing more appears to throw light on whether the law is punitive or penal in nature. The 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. As Callinan J made plain in Al-Kateb52., it is the purpose of the law that authorises detention that is the "yardstick" for determining whether the law is punitive in nature. Hence, the issue of whether the law is punitive or non-punitive in nature must ultimately be determined by the law's purpose, not an a priori proposition that detention by the Executive other than by judicial order is, subject to recognised or clear exceptions, always punitive or penal in nature. Indeed, leaving aside the cases of punishment for contempt of Parliament or breach of military law, the so-called exceptions to the "constitutional immunity" rule can be explained only by the fact that the purpose of the detention in those "exceptional" cases is not punitive or penal in nature.

[61] The most obvious example of a non-punitive law that authorises detention is one enacted solely for a protective purpose. Thus, detention may be necessary to protect the detainee (as in the case of mental illness), to protect others (as in the case of infectious disease) or to protect the community (as in the case of those suspected of being disloyal during wartime). A power will not be regarded as purely protective, however, if one of its principal objects or purposes is punitive. The dividing line between a law whose purpose is protective and one whose purpose is punitive is often difficult to draw. This is particularly so where a protective law has acknowledged consequences that, standing alone, would make the law punitive in nature. Protective laws, for example, may also have some deterrent aspect which the legislature intended. However, the law will not be characterised as punitive in nature unless deterrence is one of the principal objects of the law and the detention can be regarded as punishment to deter others. Deterrence that is an intended consequence of an otherwise protective law will not make the law punitive in nature unless the deterrent aspect itself is intended to be punitive.

[62] Accordingly, it cannot be said that detention by the Executive in circumstances involving no breach of the criminal law is necessarily penal or punitive in nature, and therefore involves an exercise of judicial power. Nor does it follow that at least in times of peace, citizens enjoy a constitutional immunity from being imprisoned by Commonwealth authority except under an order made by a court in the exercise of the judicial power of the Commonwealth. Rather, it is necessary to characterise the law that authorises or requires detention and to consider all the circumstances of the case. In particular, the purpose of a law that authorises or requires the detention of a person by the Executive is determinative. If the purpose of such a law is purely protective, detention by the Executive under that law will not be regarded as penal or punitive in nature.

The scope of Commonwealth legislative power with respect to the detention of aliens

[63] The foregoing discussion has assumed that, but for Ch III of the Constitution, a federal law that authorises the Executive to detain a person without a judicial order would be a valid law. In many — probably most — cases of federal laws that authorise Executive detention without a judicial order, however, a Ch III question does not arise. That is because most heads of federal legislative power do not authorise the making of such laws. The Federal Parliament has no general power to make laws with respect to imprisonment or detention. Furthermore, with the exception of the powers relating to naturalisation and aliens, race, marriage, divorce, bankruptcy and the influx of criminals, the subject matters with respect to which the Parliament may make laws do not intrinsically refer to human beings. Consequently, in most cases, a federal law that authorises or requires detention without a judicial order can be supported only if the detention is incidental to the subject matter of the

grant of federal legislative power. Given the doctrines of the separation of powers and the rule of law and the decisions in Australian Communist Party v The Commonwealth53. and Nationwide News Pty Ltd v Wills54., justifying such laws as being incidental to a s 51 grant of power will prove difficult. The defence and quarantine powers are probably exceptions. As a result, most heads of federal legislative power do not seem expansive enough to justify a law that authorises or requires detention divorced from a breach of law. In Kruger, Gaudron J said, correctly in my opinion, that the immunity from involuntary detention does not derive from Ch III, but rather that55.:

subject to certain exceptions, a law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers legislative power. The defence power may be an exception to that proposition. And the proposition does not extend to laws with respect to quarantine or laws with respect to aliens and the influx of criminals. It may be that an exception should also be acknowledged with respect to the race power.

(footnotes omitted)

[64] The applicants acknowledge that the aliens power in s 51(xix) extends to the making of laws that authorise the Executive to detain an alien for the purposes of excluding, admitting or removing that alien. However, the applicants argue that this power is subject to certain limits implied by the separation of judicial power from legislative and executive power. They contend that, if a law authorises detention by the Executive beyond that which is reasonably capable of being regarded as necessary to effect the purposes of exclusion, admission or removal of an alien56. or to enable an application for an entry permit to be made and considered57., the law is punitive and therefore unconstitutional.

[65] In Lim, five Justices of this Court expressed the view that the power to detain aliens, although authorised by s 51(xix) of the Constitution, is not at large. They held that, despite the scope of the aliens power, the detention of aliens must comply with the limitations imposed by Ch III. Brennan, Deane and Dawson JJ said58.:

Such limited authority to detain an alien in custody can be conferred on the Executive without infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates. The reason why that is so is that, to that limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth. When conferred upon the Executive, it takes its character from the executive powers to exclude, admit and deport of which it is an incident.

(footnote omitted)

Mason CJ said that59.:

[S]uch limited authority to detain an alien in custody can be conferred upon the Executive without contravening the investment of the judicial power of the Commonwealth in Ch III courts.

I said60.:

Although detention under a law of the Parliament is ordinarily characterized as punitive in character, it cannot be so characterized if the purpose of the imprisonment is to achieve some legitimate non-punitive object. Thus, imprisonment while awaiting trial on a criminal charge is not punitive in nature because the purpose of the imprisonment is to ensure that the accused person will come before the courts to be dealt with according to law. Similarly, imprisonment of a person who is the subject of a deportation order is not ordinarily punitive in nature because the purpose of the imprisonment is to ensure that the deportee is excluded from the

community pending his or her removal from the country61.. Likewise, the lawful imprisonment of an alien while that person's application for entry is being determined is not punitive in character because the purpose of the imprisonment is to prevent the alien from entering into the community until the determination is made. But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.

The test for assessing the validity of legislation authorising Executive detention of aliens

[66] What, then, is the appropriate test or principle for determining whether a law of the Parliament infringes Ch III of the Constitution when it authorises the Executive to detain an alien — or for that matter a citizen — without an order made in the exercise of judicial power? The applicants contend that the test for assessing the validity of a law that authorises the Executive to detain an alien requires a two-stage process:

1.

identify a legitimate non-punitive objective to which the law is directed; and

2.

if such an objective can be identified, determine whether the law that authorises detention is "reasonably necessary" or "reasonably capable of being seen as necessary" or "appropriate and adapted" to achieve that purpose or objective.

They argue that this test involves considerations of proportionality.

[67] Dicta in cases such as Lim and Kruger suggested that the test for validity was whether the impugned provisions are "reasonably necessary" for or "reasonably capable of being seen as necessary" for the achievement of a non-punitive purpose. In Lim, Brennan, Deane and Dawson JJ held that a law that authorises the detention of an alien is valid62.:

if the detention which [the law] require[s] and authorize[s] 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.

(emphasis added)

[68] I applied a "reasonably necessary" test, finding that "if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character."63. As I have indicated, Gaudron J thought that the validity of a detention law did not depend on Ch III but on whether it could be characterised as a law with respect to a s 51 power. In that context, her Honour applied a form of an "appropriate and adapted" test, saying64.:

[A] law imposing special obligations or special disabilities on aliens, whether generally or otherwise, which are unconnected with their entitlement to remain in Australia and which are not appropriate and adapted to regulating entry or facilitating departure as and when required, is not, in my view, a valid law under s 51(xix) of the Constitution.

(emphasis added)

[69] In Kruger, when considering the Executive's power of detention generally, Gummow J used the "reasonably capable of being seen as necessary" test in the following passage65.:

The question whether a power to detain persons or to take them into custody is to be characterised as punitive in nature, so as to attract the operation of Ch III, depends upon whether those activities are reasonably capable of being seen as necessary for a legitimate non-punitive objective66..

(emphasis added)

His Honour held that the executive power to detain was not punitive in nature if it was "reasonably capable of being seen as necessary for a legitimate non-punitive objective", adding that the categories of non-punitive, involuntary detention were not closed67..

[70] None of the other Justices who considered the point in Kruger used the "reasonably capable of being seen as necessary" test68..

[71] Until the decison of the Court in Al-Kateb, the weight of judicial dicta, therefore, favoured the "reasonably capable of being seen as necessary" test. In Al-Kateb, the Court had to determine whether ss 189 and 196 of the Act infringed Ch III of the Constitution by requiring the continued detention of an alien who could not be deported in the reasonably foreseeable future. A majority of Justices held that, although the sections required the detention of Mr Al-Kateb until he could be deported, they were valid because they had the non-punitive purposes of facilitating his deportation and segregating him from the Australian community69.. None of the Justices in the majority in that case applied the "reasonably capable of being seen as necessary" test as the determinative test for ascertaining whether the purpose of the detention was punitive. I said that "[a]s 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."70. Because the purpose of the provisions authorising detention was to prevent Mr Al-Kateb from entering the Australian community until he could be deported, they did not infringe Ch III of the Constitution.

[72] Hayne J also agreed that ss 189 and 196 did not infringe Ch III. Central to his Honour's reasoning was that "nothing about the decision making that must precede detention … bespeaks an exercise of the judicial power."71. His Honour said that72.:

[T]o ask whether the law is limited to what is reasonably capable of being seen as necessary for particular purposes may be thought to be a test more apposite to the identification of whether the law is a law with respect to aliens or with respect to immigration.

Furthermore, his Honour said that he would not identify the relevant power in quite so confined a manner as is implicit in the joint reasons in Lim73.. Hayne J pointed out that the "aliens" and "immigration" powers extend to preventing aliens from entering or remaining in Australia74.. On that hypothesis, they "extend to permitting exclusion from the Australian community — by prevention of entry, by removal from Australia, and by segregation from the community by detention in the meantime."75. His Honour went on to say76.:

That is why I do not consider that the Ch III question which is said now to arise can be answered by asking whether the law in question is 'appropriate and adapted' or 'reasonably necessary' or 'reasonably capable of being seen as necessary' to the purpose of processing and removal of an unlawful non-citizen.

[73] His Honour found that ss 189 and 196 did not impose punishment because77.:

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

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

[74] Heydon J agreed with this part of his Honour's judgment78..

[75] Callinan J referred to the joint judgment in Lim79.. But nothing in his Honour's judgment suggests that he took the view that the validity of a law that authorises detention depends on whether the law is "reasonably capable of being seen as necessary" to achieve a legitimate non-punitive end. His Honour said80.:

In their joint judgment in Lim, Brennan, Deane and Dawson JJ acknowledged the breadth of the aliens power as well as the lawfulness of detention for purposes other than punitive ones. In particular it was accepted there that the Parliament might make laws reasonably capable of being seen as necessary for the purposes of deportation. The yardstick, and with respect rightly so, was 'purpose', the existence, that is the continuing existence of the relevant purpose of deportation.

(footnotes omitted)

[76] This statement and other passages in his Honour's judgment81. indicate that, like Hayne J and Heydon J and myself, he saw the validity of the detention authorised by ss 189 and 196 as depending simply on whether its purpose was to impose punishment on the detainee.

[77] The reasoning in Al-Kateb is therefore inconsistent with the applicants' argument that the issue of punitive purpose must be determined by reference to whether the law itself is "reasonably necessary" for or "reasonably capable of being seen as necessary" for the achievement of a non-punitive purpose. A law that authorises detention will not offend the separation of powers doctrine as long as its purpose is non-punitive. As I indicated in Lim82.:

[T]he lawful imprisonment of an alien while that person's application for entry is being determined is not punitive in character because the purpose of the imprisonment is to prevent the alien from entering into the community until the determination is made. But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.

[78] Thus, if a law that authorises the imprisonment of an asylum seeker also has the purpose of keeping the detainee in solitary confinement without justification or otherwise has a purpose of subjecting the detainee to cruel and unusual punishment, it would go beyond what was necessary to achieve its non-punitive object. It would have a punitive purpose. It would go beyond what is necessary to prevent the detainee from entering the Australian community while his or her application for a visa is being determined. As questions of proportionality do not arise in the Ch III context, tests such as whether the impugned law is "reasonably necessary" for or "reasonably capable of being seen as necessary" for the achievement of a non-punitive purpose have no application when assessing whether the law infringes Ch III.

Proportionality

[79] Once it is accepted that the test of punitive purpose is not whether the law is "reasonably necessary" for or "reasonably capable of being seen as necessary" for the achievement of a non-punitive purpose, questions of proportionality do not arise. Proportionality may often be an appropriate concept where there is a constitutional limitation on legislative power, for example, the implied constitutional freedom of political communication83.. In Cunliffe v The Commonwealth and Leask v The Commonwealth, Brennan CJ held that proportionality is relevant where legislative power is restricted by a constitutional limitation84.. His Honour described the concept of proportionality as85.:

a condition of, if not a synonym for, the criterion of 'appropriate and adapted' which is employed to ascertain whether the means adopted by a law achieve a validating purpose or object, that is to say, a purpose or object that is reasonably connected to a head of power.

In Leask, Dawson and Toohey JJ also accepted that proportionality is relevant where a legislative power is subject to a constitutional limitation86.. Thus, when assessing the validity of a law where the relevant head of legislative power is subject to a constitutional limitation, the Court may inquire into the proportionality of the means adopted by the law to achieve the object of the law87..

[80] In such cases, the question for resolution is whether a law that directly or in effect conflicts with the constitutional limitation is nevertheless valid because its operation is proportionate to some legitimate end compatible with the limitation. The separation of judicial power and the prohibition on the legislature conferring judicial power on any body other than a Ch III court are constitutional limitations on legislative power. But questions of proportionality cannot arise in the context of Ch III. 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. The judicial power of the Commonwealth can be exercised only by courts that conform with the requirements of Ch III. It cannot be invested in non-judicial tribunals even if such investiture would be a reasonable and appropriate or proportionate means of achieving an end that is compatible with Ch III.

Purpose of the ss 189 and 196 detention regime

[81] The respondents contend that the detention regime authorised by ss 189 and 196 serves several legitimate non-punitive purposes:

1.

The regime has the purpose of excluding unlawful non-citizens from the community (for the purposes of investigating and determining visa applications). Detention in these circumstances is "for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport"88..

2.

The purpose of the imprisonment of an alien while that person's application for entry is being determined "is to prevent the alien from entering into the community until the determination is made."89.

3.

As a sovereign nation, Australia has the capacity to decide which aliens shall become members of the community90.. As a corollary, the Commonwealth is entitled (under the aliens power) to determine that people who have not been accepted for entry into Australia should not be allowed to live in the Australian community (and become absorbed into the community) pending the grant or refusal of permission to enter.

4.

The regime has the purpose of ensuring that unlawful non-citizens are available for prompt location and removal from Australia if their applications are unsuccessful. The need promptly to be able to locate and remove an unlawful non-citizen arises because in some instances there is only a short window of opportunity for the removal of that person.

[82] The Act certainly has these purposes or objects. However, that is not conclusive. If ss 189 and 196 have or either of them has a punitive purpose as well as a non-punitive purpose, those sections or that section will almost certainly infringe Ch III. A law may infringe that Chapter even if the punitive or penal sanction is not imposed for breach of the law or the existence of the fact or reason for the punishment is not transparent. If the purpose of the law is to punish or penalise the detainee without identifying the fact, reason or thing which gives rise to the punishment or penalty, then, as a matter of substance it gives rise to the strong inference that it is a disguised exercise of judicial power. Chapter III looks to the substance of the matter and cannot be evaded by formal cloaks. If an Act has a punitive purpose but the reason for the punishment cannot be identified, it should ordinarily be regarded as an exercise of judicial power. It should be seen as imposing a punishment or penalty because of who the person punished or penalised is or what that person has done. On that hypothesis, it is an exercise of judicial power in the classical sense of the term. Nevertheless, it is important to recognise the distinction for Ch III purposes between purpose and effect. This distinction is a matter of substance, not form. It is not enough that the effect of the law is no different from the infliction of punishment. If the effect of the law is not readily distinguishable from the effect of inflicting punishment, a rebuttable inference will arise that the purpose of the law is to inflict punishment. But, in determining whether a law authorises or requires punishment to be inflicted in breach of Ch III of the Constitution, it is the purpose of the law that is decisive.

[83] The applicants contend that the detention provisions do indeed have a punitive purpose. They claim that the regime is punitive because it is indefinite. There is no fixed or definite time when the detention comes to an end. There is no prescribed maximum period of detention. The claim of the applicants is supported by two writers, who argue that the provisions of the Act do not have the legitimate objectives of facilitating the consideration and determination of entry applications because the Act imposes no time limit on the processing of visa applications and permits detention to continue notwithstanding any suspension in the processing of applications91..

[84] The applicants contend that the provisions of the Act that allow detainees to request voluntary removal do not prevent the characterisation of the impugned provisions as arbitrary, in light of the principles of non-refoulement under the Convention relating to the Status of Refugees92. and at customary international law.

[85] The applicants argue that, so far as children are concerned, the detention regime is punitive because infant children may not have the competence to request removal from Australia. In addition, the applicants contend that the regime is punitive because the Act does not confer any discretionary power (whether administrative or judicial) to release an unlawful non-citizen whose detention is required by s 196. The two writers also contend that the detention provisions are punitive because the option to end detention voluntarily is illusory93.. The writers observe that in many cases unlawful non-citizens cannot be returned to their country of origin94..

[86] Some of these arguments can be easily dismissed. The issue of judicial power is not determined by asking whether the option to end detention is illusory or whether the provisions that authorise detention can be characterised as arbitrary. At best, such matters are indications that the detention is punitive. But they are not decisive. It is the purpose of the provisions which is decisive.

Indefinite detention

[87] The Act contains no time limit on the processing of visa applications. There is also no fixed or definite time when detention must come to an end. Hence, there is no prescribed

maximum period of detention. In Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri95., the Full Federal Court (Black CJ, Sundberg and Weinberg JJ) held that the continued detention of an unlawful non-citizen was unlawful in circumstances where that person had requested removal, but there was no real likelihood or prospect of that person's removal in the reasonably foreseeable future. However, that decision was overruled by this Court's decision in Al-Kateb.

[88] 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 applications96.. However, in light of the surrounding circumstances, the Court did not regard this element as determinative97.. Indeed, I thought that the length of detention in light of the administrative burden on the Department to investigate and determine entry applications was relevant. I said that, while the detention might be "inordinately long" in that case, this did not make it punitive98.. 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.

[89] In my opinion, it is only a half-truth to say that the provisions of the Act authorise indefinite detention. The regime requires detention to end on the occurrence of any of the following events:

1.

the non-citizen is granted a visa;

2.

the non-citizen requests removal;

3.

the non-citizen does not apply for a visa; or

4.

the non-citizen's visa application fails and the application is "finally determined".

[90] When any of the second, third or fourth events occurs, the non-citizen must be removed from Australia as soon as reasonably practicable. Thus, although the date when the detention of any particular detainee will end cannot be predicted when the detention commences, the Act specifies the conditions upon which such detention must end.

[91] As the Full Federal Court found in Luu v Minister for Immigration and Multicultural Affairs99. and quoted with approval in NAMU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs100., the fact of continued detention "does not, of itself, indicate anything about the respondent's purpose … in retaining [the appellant] in immigration detention". In upholding the validity of s 196(1) in NAMU101., the Court effectively endorsed the comments of Beaumont ACJ at first instance, who found that s 196102.:

should not, by virtue of its language, construed in context, be interpreted as a provision imposing punishment or having any other penal aspect. … [I]t is a law which provides for the

custody or detention of an alien pending the processing of a visa application or deportation. As such, it is a valid law of the Commonwealth.

[92] Emmett J in NAGA v Minister for Immigration and Multicultural and Indigenous Affairs103. considered the constitutionality of ss 196 and 198. His Honour read s 196 with s 198 and concluded that s 196(1) "does not provide for indefinite detention, in the sense of detention unconstrained by any purpose."104. This was because the events upon which detention is to terminate105.:

can still occur at some time in the future, albeit that the occurrence might be in the remote future. The position might be different if circumstances arose such that none of the events referred to in s 196(1) could ever occur. In those circumstances, if the true construction of s 196(1) was to authorise continued detention even after the events became impossible of occurrence, there may be some constitutional invalidity.

[93] NAMU and NAGA were decided before the Full Federal Court handed down its decision in Al Masri. In so far as there is conflict between these decisions and Al Masri on this point, this Court's decision in Al-Kateb indicates that the approach in the two earlier decisions is the correct one. Nevertheless, even in Al Masri, the Full Federal Court observed that the absence of a specific time limit on the detention of unlawful non-citizens was "perhaps not critical" in relation to the constitutional validity of the regime106..

[94] It is true that the Act does not specify any time limits in respect of the various steps involved in processing a visa application. But I see no difficulty in construing the Act as requiring those steps to be processed within a "reasonable time", as the United States Supreme Court did in Zadvydas v Davis107. (in the different context of detention pending removal). In cases where the Minister or a delegate or an officer or a tribunal fails to comply with the implied obligation to carry out a particular step within a reasonable time, the remedies afforded by s 75(v) of the Constitution are open to the detainee.

[95] The lack of a prescribed maximum period of detention does not affect the characterisation of the scheme. The impugned provisions permit detainees to request removal. The fact that detainees may request removal is important to, if not determinative of, a conclusion that the detention authorised by the provisions is not punitive.

[96] Like Beaumont ACJ in NAMU108., I think that s 196 "should not, by virtue of its language, construed in context, be interpreted as a provision imposing punishment or having any other penal aspect." When the Act is read as a whole, the object of ss 189 and 196 is to detain unlawful non-citizens in immigration detention so as to prevent them from entering the Australian community until one of the conditions specified in s 196 is satisfied.

Children lack the capacity to request removal

[97] The applicants contend that the detention prescribed by ss 189 and 196 is punitive in the case of children because a child may not have the capacity to bring about the end of his or her detention by requesting removal from Australia. In Lim, the Court regarded the ability of a detainee to bring about the end of his or her detention by requesting removal to be a critical element with respect to the constitutionality of the detention regime109.. One issue for determination, therefore, is whether the age of a detainee is a relevant constitutional fact for the purposes of determining the constitutionality of ss 189 and 196.

[98] The respondents contend that, in determining the constitutionality of ss 189 and 196, regard should only be had to the purpose of those provisions, and not to their effect. On this approach, the issue of constitutional validity does not depend on circumstances that are personal to a particular applicant, as these matters are not constitutional facts to be taken into

account in determining the validity of the impugned provisions110.. Childhood is one such circumstance. As the Full Federal Court in NAMU observed, any punitive purpose is discovered from the legislative structure of the regime for detention, rather than from the consequences of the detention on individual detainees111..

[99] Section 196(1) generally serves the non-punitive purpose of ensuring that unlawful non-citizens can be supervised and controlled pending the determination of their applications for entry112.. Once that is accepted, such a legitimate purpose is not displaced by the fact that children may be among the unlawful non-citizens detained under that provision. In Lim, one of the 36 plaintiffs was an infant child. The Court did not treat the child differently from the adult plaintiffs. Brennan, Deane and Dawson JJ noted that no separate argument was advanced in relation to the child or his status113.. The Court did not consider whether the fact that an infant child may lack the requisite capacity to request removal would operate to render the detention punitive and thus unconstitutional.

[100] The applicants argue that s 196 is punitive in relation to children because of the special status and vulnerability of children, and the duties of protection owed by the Crown. The applicants contend that:

1.

detention extends far beyond what is necessary to verify identity, perform health and other checks, and to ensure that the child is available for removal should an obligation to remove arise;

2.

detention of children is not reasonably necessary in order to enable the determination of their or their parents' visa applications;

3.

detention is not for the welfare or protection of children, unlike in Kruger, as detention is likely to have a significant adverse psychological and physical impact on a child's development and well-being; and

4.

children may not have the legal or practical capacity to request their own removal.

[101] However, as I have indicated, detention serves the legitimate purposes of enabling unlawful non-citizens to be located at any time, and preventing such persons from entering or disappearing into the Australian community pending the determination of their entry applications. The parens patriae jurisdiction of the courts cannot be invoked to read down the legislative direction that children who are unlawful non-citizens must be detained in immigration custody. The infancy of the present applicants can be a relevant constitutional fact for the purposes of assessing the validity of the impugned provisions if such a fact indicates that the purpose of the Act is to require their detention so as to punish them or their parents.

[102] However, nothing in the Act or in the surrounding circumstances indicates that the purpose of detaining children is punitive. Although infant children may lack the capacity to request removal, this lack of capacity is not itself sufficient to render the detention authorised by ss 189 and 196 punitive and therefore unconstitutional. Legal capacity is usually determined on the basis of the ability of the individual to understand the nature and consequences of a particular situation. Children are presumed to be incompetent at birth and gradually to acquire legal competence for various purposes at different stages of their

development until they reach the age of majority (18), in which case they are presumed to have full legal capacity. The capacity of the child varies according to the gravity of the particular matter and the maturity and understanding of that child.

[103] Parents in their capacity as guardians of an infant child have the power under the common law to make decisions on behalf of the child, provided that the child does not have the competence to make the decision114.. Thus, where a child lacks capacity, the ordinary rules of the common law authorise the parent or guardian of the child to act on the child's behalf115.. Parental authority diminishes as the child's legal competence emerges. The parent's authority is at an end when the child has sufficient intellectual and emotional maturity to make an informed choice116..

[104] Thus, for the purposes of making immigration decisions, where the child lacks the capacity to make a decision, the discretion is vested in the parents or legal guardian of that infant child117.. The Act and the Migration Regulations 1994 (Cth)118.:

do not provide a cohesive and comprehensive scheme which makes clear the position of children and infants … to apply for protection visas in their own right or be added to an application of a parent and the position of the child at the various stages of administrative decision-making and review.

Nevertheless, in Lim, the Court did not treat the infant plaintiff any differently from the adult plaintiffs, and appeared to accept that the infant's parents were entitled to bring the claim on the child's behalf. In addition, as Gummow J points out in his judgment119., this Court has accepted that parents of infant unlawful non-citizens may exercise immigration decisions on behalf of the infant. Accordingly, the impugned provisions do not authorise "punitive" detention simply because an infant child may lack the capacity to request removal. If the child lacks capacity, the child's parents or guardian may make such a request on the child's behalf120..

[105] Infant children as a class do not pose a flight risk or security danger to the community. Young children are not generally capable of disappearing into the community by themselves and would also be unlikely to pose a security danger to the community121.. Indeed, in its report on children in immigration detention, the Human Rights and Equal Opportunity Commission accepted evidence that families with children are the least likely to be a flight or security risk122.. The Commission found that123.:

As genuine applicants have less incentive to abscond, it would seem that unauthorised arrival children are less likely to disappear. Thus the justification for the detention of all unauthorised arrival children on the grounds that they will not otherwise be available for processing is unconvincing.

But these factors do not mean that ss 189 and 196 cannot validly apply to children. Even though the likelihood that unauthorised arrival children will abscond or pose a security danger to the community may be very low, it is nonetheless possible that such children may abscond. As Gummow J points out in his judgment124., someone else may attempt to conceal such children and they may be difficult to locate because their appearance changes more rapidly than an adult's and they have fewer ties to a place than adults. It may be easier to give a child a "new" identity than it is to give a new identity to an adult because a child generally leaves fewer documented traces of his or her identity than most adults.

[106] Although it may be accepted that children who are unlawful non-citizens do not pose a flight risk and are not a danger to the community, the Parliament, acting constitutionally, is entitled to prevent any unlawful non-citizen, including a child, from entering the Australian community while that person continues to have that status. That the Parliament might have

achieved its object in other ways does not establish that the purpose of the Act is punitive. Nor do the facts that children are not a flight risk or a danger to the community establish that the purpose of the Act is to punish them or their parents.

International jurisprudence on the detention of asylum seekers and aliens

[107] The applicants rely on the Convention on the Rights of the Child125. to support their submissions that the detention of infant unlawful non-citizens authorised by ss 189 and 196 of the Act is punitive and therefore infringes Ch III of the Constitution. The treatment of child asylum seekers and refugees is the subject of a number of international conventions to which Australia is a party, including the Refugees Convention, the International Covenant on Civil and Political Rights126. and the Convention on the Rights of the Child. In addition, there is an increasing body of international jurisprudence on the human rights obligations of states in relation to the situation of asylum seekers in detention127.. This body of international jurisprudence favours the argument that the mandatory detention of infant asylum seekers is arbitrary.

[108] As a result, Australia's mandatory detention regime has been the subject of widespread criticism both domestically128. and internationally129., on the grounds that the regime is in breach of international conventions and customary international law130.. The United Nations Human Rights Committee has found the regime (at the time of the decision in Lim) to be arbitrary within the meaning of Art 9 of the ICCPR. In A v Australia131., the Committee found that the detention of the author, one of the plaintiffs in Lim, was arbitrary within the meaning of Art 9(1) of the ICCPR and was also in breach of Art 9(4) of the ICCPR for the reasons that the detention authorised by the Act was indefinite, prolonged, not open to review and not proportionate to the end being sought.

[109] In Bakhtiyari v Australia132., the Committee found that the detention of Mrs Bakhtiyari and her children (until the release of the children by interim order of the Family Court of Australia) constituted violations of Arts 9(1) and (4) and 24(1) of the ICCPR. In addition, the Committee found that the removal of Mrs Bakhtiyari and her children without awaiting final determination of separate proceedings brought by Mr Bakhtiyari would constitute a violation of Arts 17(1) and 23(1) of the ICCPR. In particular, the Committee found that the "extended period" of detention of the children for two years and eight months was not justified, and that Australia failed to demonstrate133.:

that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances.

After observing that the Act did not allow for judicial review of the justification for the detention of Mrs Bakhtiyari and her children in substantive terms, the Committee concluded that the unavailability of judicial review to challenge a detention that was, or had become, contrary to Art 9(1) of the ICCPR constituted a violation of Art 9(4)134.. On the other hand, the Committee considered that the ability of a court to order a child's release if it is considered in the child's best interests to do so135. is sufficient review of the substantive justification for detention to satisfy the requirements of Art 9(4) of the ICCPR136..

[110] Immigration laws in Canada, the United States, the United Kingdom and New Zealand permit the detention of non-citizens under the Immigration and Refugee Protection Act, RSC 2001, c 27, the Immigration and Nationality Act, 8 USC (1988), the Immigration Act 1971 (UK) and the Nationality, Immigration and Asylum Act 2002 (UK) and the Immigration Act 1987 (NZ) respectively. These detention regimes do not appear to provide for mandatory

detention. The Canadian and New Zealand regimes deal expressly with the detention of minors.

[111] In Canada, detention of a foreign national is permissible under the Immigration and Refugee Protection Act in order to check identity or where there are reasonable grounds to believe that the person is inadmissible, poses a danger to the public or constitutes a flight risk137.. The detaining officer has a discretion to release the person if the reasons for detention no longer exist138.. The Canadian Act provides for regular administrative review of detention (at least every 30 days)139.. Continued detention is permissible only if the person is a danger to the public or a flight risk, the Minister is inquiring into a reasonable suspicion that the person is inadmissible on security grounds or for violating human or international rights, or that the Minister is making reasonable efforts to establish the person's identity140.. The Immigration and Refugee Protection Regulations, SOR/2002–227 contain a list of factors that must be taken into account when assessing whether a person is a danger to the public, a flight risk or the person's identity has not been established, and before a decision is made whether to release that person from detention141.. The Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations provide that the detention of foreign national minors is "a measure of last resort"142. which may occur only after the best interests of the child and the following considerations are taken into account143.:

(a)

the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children;

(b)

the anticipated length of detention;

(c)

the risk of continued control by the human smugglers or traffickers who brought the children to Canada;

(d)

the type of detention facility envisaged and the conditions of detention;

(e)

the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and

(f)

the availability of services in the detention facility, including education, counselling and recreation.

[112] Section 128 of the Immigration Act 1987 (NZ) permits the detention of non-citizens on arrival in New Zealand, while s 60 of that Act permits the detention of non-citizens after a removal order has been served on them. In the case of minors, s 141D of the Act requires that the minor be given the opportunity to express his or her views on the matter (whether personally or through a responsible adult), and that due weight be given to those views, having regard to the age and level of maturity and understanding of the minor.

[113] In the United States, the detention regime for aliens (including alien minors) has not been held to be unconstitutional144.. However, United States courts have found that the

continued detention of an alien may be unlawful in a number of circumstances, for example, where an alien is detained for eight years145. and where an alien subject to a deportation order is detained indefinitely without reasonable prospects of removal146..

[114] The decisions of the United Nations Human Rights Committee in A v Australia, C v Australia147. and Bakhtiyari v Australia, the deliberations of the United Nations Working Group on Arbitrary Detention148. and the detention regimes in the United States, Canada, the United Kingdom and New Zealand indicate that a regime which authorises the mandatory detention of unlawful non-citizens may be arbitrary notwithstanding that the regime may allow for the detainee to request removal at any time. They suggest that something more is required if the regime is not to be found to breach the Refugees Convention, the ICCPR or the Convention on the Rights of the Child, or to be otherwise contrary to international law. Something more may include periodic judicial review of the need for detention, some kind of defined period of detention and the absence of less restrictive means of achieving the purpose served by detention of unlawful non-citizens.

[115] However, the issue in this Court is not whether the detention of the present applicants is arbitrary according to international jurisprudence, whether it constitutes a breach of various Conventions to which Australia is a party or whether it is contrary to the practice of other states. It is whether Parliament has the purpose of punishing children who are detainees so that, for the purpose of the Constitution, the Parliament has exercised or authorised the Executive to exercise the judicial power of the Commonwealth. On that very different issue, the international jurisprudence and the practice of other states do not assist. That is because the purpose of ss 189 and 196 is a protective purpose — to prevent unlawful non-citizens, including children, from entering the Australian community until one of the conditions in s 196(1) is satisfied. If that is the purpose of the provisions, as I think it is, the Parliament has not exercised, nor authorised the Executive to exercise, the judicial power of the Commonwealth. Whether or not Australia may be in breach of its international obligations cannot affect that constitutional question.

[116] For the reasons that I have given, ss 189 and 196 are valid enactments and apply to children who are unlawful non-citizens.

Order

[117] The application must be dismissed.

Gummow J.

[118] The question posed by this application in the original jurisdiction for prohibition, habeas corpus and injunctive relief is whether ss 189 and 196 of the Migration Act 1958 (Cth) ("the Act"), which require the detention of "unlawful non-citizens", are invalid insofar as, upon their proper construction, they require the detention of "unlawful non-citizens" who are children. By "children", the parties mean those under the age of 18 years. The question of the lawfulness of their detention has two elements. The first concerns statutory construction; the second, assuming a construction adverse to the applicants, concerns validity.

[119] The applicants are children and nationals of Afghanistan. They are unlawful non-citizens and at the institution and hearing of this application were detained in South Australia at the Baxter Immigration Detention Facility ("Baxter"). The proceeding is brought by their father acting as next friend. The first respondent is the manager of Baxter, and the second respondent is the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister").

[120] The Human Rights and Equal Opportunity Commission ("the Commission") sought, and was granted, leave to intervene in these proceedings by way of oral and written submissions. The Commission referred the Court to a number of articles and reports by other bodies dealing with the mental health effects of long-term immigration detention on children. These studies were based on psychological assessments of children in immigration detention in Australia. They give some support to the Commission's submission that immigration detention poses a risk to the health and welfare of children, even where, or perhaps particularly where, they are detained with distressed adults, including their parents. However, the bulk of this material is anecdotal in nature, has not been tested and is not specific to the situation of the individual applicants.

[121] The applicants seek an order absolute for a writ of habeas corpus against the first respondent. Against the second respondent, the Minister, they seek an order absolute for a writ of prohibition or an injunction prohibiting or restraining the Minister from detaining the applicants in immigration detention. By order of a Justice, this application was referred for consideration on motion by the Full Court. In order to avoid any dispute as to whether the children were competent to seek the relevant orders themselves, the children's father, GS, was added as an alternative prosecutor.

[122] At the time of the hearing, the applicants were aged seven, 11, 13 and 15 years respectively. They arrived in Australia on 15 January 2001 with their elder brother and parents. The elder brother is over 18 years of age and is not one of the applicants. No family member held a valid visa to travel to, enter or remain in Australia, and each of them was thereby an "unlawful non-citizen" within the meaning of s 14 of the Act. Upon arrival in Australia, the applicants and the other members of their family were detained in immigration detention; first, at the Woomera Immigration Reception and Processing Centre, and later at Baxter.

[123] The applicants' father lodged an application for a protection visa on 21 February 2001. That application included the applicants as dependants. On 20 April 2001, the Minister's delegate refused the application by the applicants' father. That decision has subsequently been the subject of a series of proceedings in the Refugee Review Tribunal, the Federal Magistrates Court and the Federal Court. It is sufficient for present purposes to note that the applicants' father has instituted an appeal in the Federal Court against a decision of the Federal Magistrates Court.

The decision in Lim

[124] The submissions for each side referred extensively to Chu Kheng Lim v Minister for Immigration149.. The plaintiffs in Lim were Cambodian nationals who had arrived in Australia without visas, and who had been detained in custody since their arrival150.. One of the plaintiffs was an infant child who had been born after his mother's arrival in Australia. However, no separate argument was advanced in Lim relating to children or to their status151.. It should not be assumed that Lim addresses the specific question now before the Court.

The detention regime

[125] The provisions of the Act at issue in this case are the same provisions that were considered in Al-Kateb v Godwin152. and Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji153.. Judgment in those matters had been reserved before the hearing of this case. The relevant provisions are set out in Pt 2 Div 7 of the Act (ss 188–197). The legislation is similar to that considered in Lim, with some differences discussed below.

[126] Section 189(1) provides:

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

The other subsections of s 189 apply in similar terms to unlawful non-citizens seeking to enter the migration zone (subs (2)), and to unlawful non-citizens who are either in, or seeking to enter, an "excised offshore place" (subss (3) and (4)).

[127] The period of detention authorised by s 189 is stipulated by s 196. The critical provisions are subss (1)-(3), which state:

(1)

An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

(a)

removed from Australia under section 198 or 199; or

(b)

deported under section 200; or

(c)

granted a visa.

(2)

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

(3)

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

The balance of s 196 reads:

(4)

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

(4A)

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

(5)

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

(a)

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

(b)

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

(5A)

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

(6)

This section has effect despite any other law.

(7)

In this section:

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

[128] As was the case in Al-Kateb, the applicants in this case are neither detained as a result of a visa cancellation under s 501, nor are they being detained pending deportation under s 200. As a result, subss (4)-(5A) have no operation with respect to the applicants.

Detention of children — statutory construction and validity

[129] That the detention regime is intended to apply to children is clear from other provisions in the Act. Section 252A(1) states:

A strip search of a detainee … may be conducted by an authorised officer, without warrant, to find out whether there is hidden on the detainee, in his or her clothing or in a thing in his or her possession a weapon, or other thing, capable of being used:

(a)

to inflict bodily injury; or

(b)

to help the detainee, or any other detainee, to escape from immigration detention.

A "detainee" is defined as a "person detained" in immigration detention (s 5(1)). That some "detainees" will be children is clear from s 252A(3) which relevantly provides:

A strip search of a detainee may be conducted by an authorised officer only if:

…

(c)

the strip search is authorised as follows:

(i)

if the detainee is at least 18 — the Secretary, or an SES Band 3 employee in the Department … authorises the strip search because he or she is satisfied that there are reasonable grounds for those suspicions;

(ii)

if the detainee is at least 10 but under 18 — a magistrate orders the strip search because he or she is satisfied that there are reasonable grounds for those suspicions.

(emphasis added)

Similarly, s 252B(1)(g) requires the attendance of a child's parent or guardian, or a person capable of representing the child's interests, where a strip search is conducted of a person

between the ages of 10 and 18. These sections, while not expanding the definition of "detainee" in s 5(1), demonstrate that the legislature contemplated that the detention regime authorised by the Act would provide for the detention of children.

[130] The applicants' case thus cannot succeed upon the first ground urged, namely the proper construction of the Act. That brings one to the second ground, invalidity, and to the applicability of Lim. It will be recalled that, in the event, the validity of the legislation challenged in Lim was upheld, although there was detailed consideration of criteria the application of which to legislation otherwise expressed might lead to invalidity. The applicants submit that the present legislation is of that different character and so is invalid. In particular, they submit that it violates the constitutional norm because it extends what is reasonably capable of being seen as necessary to facilitate the reception, investigation, admission or expulsion of aliens154..

[131] The applicants advance two bases upon which this case may be distinguished from the legislation upheld in Lim. First, they submit that, unlike that legislation, the present legislation which authorises their detention is not subject to any maximum time limit and thereby authorises indefinite detention. Secondly, they submit that their detention involves a greater constraint on liberty than that considered in Lim because some children will lack the capacity to choose to end their detention by requesting removal from Australia. The combined effect of these considerations is said to be that the applicants' detention is invalid because it exceeds what is reasonably capable of being seen as necessary to facilitate the reception, investigation, admission or expulsion of aliens. The consequence, the applicants contend, is that the legislation is invalid for the considerations detailed in Lim. That contention by the applicants, were it otherwise to be made good, is not foreclosed by the holdings in Al-Kateb and Al Khafaji.

Indefinite detention?

[132] Turning to the first of these claims, the applicants submit that the legislation considered in Lim was materially different to that here before the Court because the Act no longer stipulates a maximum limit on the period of detention. At the time Lim was decided, the Act included s 54Q which effectively limited the maximum period of detention to 273 days from the date of the detainee's entry application. However, this limitation was qualified, and time did not run during the period in which court or tribunal proceedings relating to a detainee's application had been commenced but not yet finalised (s 54Q(3)). This qualification was significant because it meant that detainees could be detained for periods in excess of 273 days where their claims were the subject of judicial or administrative review proceedings. Indeed, even if the present legislation contained an equivalent to s 54Q, time would not yet have commenced to run for the purposes of the section in respect of the applicants.

[133] In their joint judgment in Lim, Brennan, Deane and Dawson JJ, with whom Gaudron J agreed on this point155., indicated that the time limitation imposed by s 54Q was a factor in ensuring that the administrative detention provisions were constitutional156.:

In the context of [a] power of a designated person to bring his or her detention in custody under Div 4B to an end at any time, the time limitations imposed by other provisions of the Division suffice, in our view, to preclude a conclusion that the powers of detention which are conferred upon the Executive exceed what is reasonably capable of being seen as necessary for the purposes of deportation or for the making and consideration of an entry application.

The applicants rely on this statement to argue that, absent such time limitations, the mandatory detention regime considered in Lim would have been invalid as it would have effectively provided for indefinite detention.

[134] Given the reasoning I adopted in Al-Kateb and Al Khafaji and to which I adhere, that submission is to be rejected. Section 189 does not authorise indefinite detention; the period of detention under s 196 is limited to that during which removal under s 198 is "reasonably practicable". Thus, the Act does not authorise the continuing detention of an unlawful non-citizen where that person has requested removal under s 198(1) and where such removal is unlikely as a matter of reasonable practicability157.. It is therefore not correct that the Act contains no temporal limitations on the duration of detention. Indeed, in some cases, the limit imposed by what is reasonably practicable may be significantly shorter than the limit imposed by s 54Q as it stood at the time Lim was decided.

Exclusion from the "Australian community"

[135] Were a contrary view to that above be taken on the matter of construction, then serious questions respecting validity could have arisen. In Al-Kateb, I referred to the use of the term "Australian community" in constitutional discourse, particularly with respect to the aliens power. However, something more needs to be said.

[136] The legal system has adopted various criteria as sufficient connecting factors for the attachment both by the general law and by statute of rights and obligations. The connecting factors include domicile (notably in family and succession laws and to determine matters of status), residence (both in the Constitution itself (ss 34(i), 75(iv), 117) and in revenue laws), personal presence (particularly for the criminal law), and citizenship and nationality (particularly in migration laws and for some matters of status).

[137] The notion of "membership of the community" has multiple references and lacks the legal specificity of the above connecting factors. To speak then of "exclusion" from a "community" therefore also involves multiple references. The reference to "exclusion" may also be an Orwellian euphemism.

[138] The term "community" has a special history in constitutional, social and political discourse. At the time of the establishment of the Constitution, and at the most general level, the term "community" might be used as a concept said by Griffith CJ in Potter v Minahan158. to be "anterior" to the doctrines of nationality and domicile, being "an elementary part of the concept of human society, namely, the division of human beings into communities".

[139] More specifically, a community might be those persons in a particular area of territory bound by a common legal system. This is at the root of the term "the common law". Covering cl 5 of the Constitution reads in part:

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.

The "people" referred to are bound into a new community by their common subjection to the operation of the Constitution and laws made by the Parliament. That community and those "people" cannot, for example, have been confined to those (probably no more than half the adult population) who were the electors then spoken of in the Constitution. Nor can the term have excluded those non-enemy aliens resident in Australia159.. Nor those segregated from the population at large by their incarceration.

[140] On the other hand, the new community did not extend to all those in Australia who were British subjects. Thus, the protection of s 117 of the Constitution was limited to those subjects of the Queen who were residents. Moreover, the immigration power might be used to restrict entry of certain British subjects, denying them the opportunity of becoming residents. As Evatt J was later to acknowledge160., one of the main purposes behind the introduction of the dictation test161. was "to enable the Executive to exclude British subjects of Asiatic race".

[141] The new community, as the Court put it in Attorney-General for the Commonwealth v Ah Sheung162., was not defined by an Australian nationality as distinguished from a British nationality. Given the then state of Imperial affairs, it would, in Griffith CJ's expression163., have been a "novel doctrine" if a form of what might be called de facto Australian citizenship had been adopted. Had the common law rules as to domicile been called into service, the result would have been counter-productive. Some racially undesirable persons with a close connection to Australia might have qualified for admission, whilst those of British descent but an Australian domicile of origin might lose their connection by acquiring another domicile of choice or of dependence164..

[142] However, the term "immigration" in s 51(xxvii) was, as mentioned above, construed as supporting laws restricting the entry even of British subjects. That construction was advanced, particularly by O'Connor J, by reference to the term "community" as employed in the rhetoric of Imperial relations to describe the consequences of the development of representative and responsible government throughout the Empire. Membership of such a "community" was an acceptable alternative to the construction of a distinct nationality.

[143] In Robtelmes v Brenan165., O'Connor J said that "one of the most important attributes of self-government" was "the right to determine who shall and who shall not become members of the community". In the same vein, O'Connor J spoke in Potter v Minahan166. of the subdivision of the British Empire into "many communities, some of them endowed by Imperial Statute with wide powers of self government".

[144] In his address to the first meeting of the Imperial Conference of 1911, Prime Minister Asquith said167. that a special and dominating characteristic of the British Empire was the inclusion of "communities" which had attained complete self-government. Thereafter, Art 1 of the Articles of Agreement for a Treaty between Great Britain and Ireland, dated 6 December 1921, specified the "constitutional status" of the Irish Free State "in the Community of Nations known as the British Empire"168.. Hence, the statement by Gleeson CJ, Gummow and Hayne JJ in Shaw v Minister for Immigration and Multicultural Affairs169.:

The development of the 'autonomous Communities' recognised by the Imperial Conference of 1926170. proceeded by steps and over periods which had different consequences for the reading of various provisions of the Constitution.

[145] One of those consequences, as Shaw itself demonstrated, is that the occasion has well passed for reliance upon the notion of self-governing communities within the British Empire as a criterion to construe the reach of the immigration power. In the events that have happened since 1901, the distinct Australian nationality, seen as an impossibility by the Court in Ah Sheung, has come into existence.

[146] Here is a political idea whose time has come and gone. Still less is it sound constitutional doctrine to construe the aliens power by reference to notions of "protection" of the "Australian community" by excluding aliens from "membership" of that community.

[147] It is true that the notion of absorption into the Australian community has been used in established constitutional discourse. This has been to set the outer limits of the immigration power. However, that "very vague conception"171. has no part to play by its translation to a conceptually (and textually) distinct head of legislative power.

[148] Alienage is a status which cannot be changed by "absorption". The Pacific Islands labourer, whose deportation (by judicial process under s 8(1) of the Pacific Islands Labourers Act 1901 (Cth)) was appealed to this Court in Robtelmes, appears172. to have worked in Queensland for at least five years and he may be said to have become part of the community. But he retained his alien status.

Aliens and Ch III

[149] A law imposing disabilities upon aliens, including their segregation from other persons at large in Australia, will be a law with respect to aliens. But such a law will be valid only if it survives its subjection by the opening words of s 51 to the other provisions of the Constitution, particularly Ch III.

[150] Lim is authority at least for the proposition that, putting the defence power to one side, a law cannot be upheld under the aliens power if it provides for the segregation by incarceration of aliens, without their commission of any offence requiring adjudication, and for a purpose which, in the conclusive opinion of the executive branch, is sufficiently connected with the entry, investigation, admission and deportation of aliens. Still less can the purpose of the incarceration, which is identified in such a law and determined in each case by the opinion of the Executive, be unconnected with any of the above matters and rather be concerned solely with the prevention of aliens becoming "de facto citizens" or members of the "Australian community".

[151] Conclusions contrary to those expressed above would be at odds with two aspects of basic constitutional doctrine. The first concerns the constraint placed by Ch III upon the reach of the aliens power; the second the allocation by the Constitution to the judicial power of the determination of disputes concerning the operation of that constraint upon a particular law173..

Decision-making incapacity

[152] It is convenient to turn now to the second basis upon which the applicants seek to distinguish their detention from that considered in Lim. Even if on its proper construction the legislation does not authorise indefinite detention, the applicants rely upon the consideration that children, unlike adults, may lack the capacity to end their detention by requesting return to their country of origin. Under s 198(1) of the Act, an officer must, as soon as reasonably practicable, remove an unlawful non-citizen who has asked the Minister for such removal in writing. The submission is that, applying the ordinary principles relating to the capacity of children discussed in Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)174., a child who lacks sufficient understanding or intelligence to understand fully the consequences of a request under s 198(1) will be incapable of making such a request. The applicants contend that this constitutes a relevant distinction between the detention under the Act of adults and that of children. The detention of adults was said to be "three-walled" detention only, as there were no barriers to returning to the country of origin. By contrast, it was argued that the incapacity of children to request removal under s 198(1) acts as a "fourth wall" that locks them into detention.

[153] These submissions involve a gloss on the true state of the applicants' position and should be rejected. If a child lacks capacity to request removal under s 198(1), the ordinary rules of common law would authorise the parent or guardian of the child to make such a

request on the child's behalf175.. While it is true that the child cannot, as a matter of personal choice, request removal, the discretion or power to request removal still exists and is vested in the parent or guardian. The so-called "fourth wall" of the child's detention is controlled by the decision of the parent or guardian.

[154] What is meant here by the expression "lacks capacity"? In Marion's Case176., it was held that the capacity of a child who is not yet aged 18 years to give informed consent to acts which require consent as a condition of their legality does not depend upon any fixed age rule; capacity turns upon the attainment of the child of sufficient understanding and intelligence to understand fully what is proposed. In this way, pending the attainment of legal majority, the legal capacity of a particular child will vary according to the gravity of the particular matter and the maturity and understanding of that child. These principles are to be applied to the making of requests for removal under s 198(1).

[155] There is nothing unusual in the circumstance that in many instances the discretion to exercise immigration decisions in relation to infant children will be vested in their parents. So much is clear from Chen Shi Hai v Minister for Immigration and Multicultural Affairs177.. In that case, the appellant was a three and half year old Chinese national who was born while his parents were in immigration detention in Australia. The appellant's parents made an application for a protection visa on his behalf under s 36(2) of the Act on the grounds that he was a "refugee" as that term is defined in the Convention relating to the Status of Refugees178. ("the Convention"). The appellant could only bring himself within the Convention definition of "refugee" if he could demonstrate that he was a person who "owing to well-founded fear of being persecuted for reasons of … membership of a particular social group … is outside the country of his nationality and … owing to such fear, is unwilling to avail himself of the protection of that country"179.. While it was clear that, by reason of his infancy, the appellant, himself, was unlikely to have the fear necessary to bring him within the Convention, Gleeson CJ, Gaudron, Gummow and Hayne JJ observed that it was "accepted" that "his parents' fears on his behalf [were] sufficient"180.. This "imputed 'fear'"181. may be seen as sufficient only if it is first accepted that parents ordinarily have authority to make immigration decisions for their children where those children lack capacity to make such decisions themselves.

[156] This is evident also from the decision of this Court in Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S 134/2002182.. That case concerned the application by a mother for a protection visa in respect of both herself and her five children. The mother claimed that she was a refugee for the purposes of the Convention and was therefore entitled to a protection visa under s 36(2) of the Act (as it then stood). However, the children's claim to protection visas proceeded on a different basis. Their claim relied upon Regulations made under the Act which authorised the Minister to grant protection visas to members of "the same family unit" as a person who had made specific claims under the Convention and who had been granted a protection visa183.. While the Court noted that the children's putative entitlement to a visa was of a different nature to, and distinct from, that asserted by the mother, there was no suggestion that the mother was not competent to raise the children's claim on their behalf184.. Rather, the Court implicitly accepted that, in addition to her own claim under s 36(2), the mother could seek to enforce the children's alleged right to a protection visa where those children lacked capacity to seek enforcement themselves.

[157] It should be added that the subjection of a child to the control of his or her parent or guardian generally has not been seen as depriving that child of liberty. The starting point is the proposition that, at common law, a right of a parent or parents to custody of children who had not reached the age of discretion (14 for boys and 16 for girls)185. incorporates a "right

to possession" of the child which includes the right to exercise physical control over that child186.. The nature of this "right" was explained by Sachs LJ in Hewer v Bryant187.:

[A]mong the various meanings of the word 'custody' there are two in common use in relation to infants which are relevant and need to be carefully distinguished. One is wide — the word being used in practice as almost equivalent of guardianship: the other is limited and refers to the power physically to control the infant's movements.

In its limited meaning it has that connotation of an ability to restrict the liberty of the person concerned … This power of physical control over an infant by a father in his own right qua guardian by nature … was and is recognised at common law; but that strict power (which may be termed his 'personal power') in practice ceases upon the infant reaching the years of discretion.

(original emphasis)

In this way, the law contemplates that the control of a parent or guardian over a child will necessarily incorporate a restriction to some degree of the liberty of that child.

[158] Notwithstanding this, the common law generally has assumed that a child who is within the control of his or her parents or guardian is at liberty within the sense of the authorities concerned with habeas corpus. In R v Maria Clarke188., the surviving parent (the mother) obtained habeas corpus to deliver a 10 year old child, against the wishes of the child, from a particular school where she was being raised as an Anglican so that she might be raised as a Roman Catholic. Lord Campbell CJ observed that189.:

[A] child under guardianship for nurture … is supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian; and when delivered to him the child is supposed to be set at liberty.

His Lordship went on to give an example which was counter-factual190.:

[S]uppose that a Protestant mother, guardian for nurture of a daughter seven years of age, sends her to a boarding school professing to be a Protestant seminary; in a short time she finds that attempts have been successfully made by teachers there to convert the girl to the Roman Catholic faith; the girl refuses to come home … Are we to examine [the girl], and, finding her of quick parts and professing to be a sincere convert to the Roman Catholic faith, to tell her that, in spite of the wishes of her mother, she is at liberty to return to the school where she has been converted[?] Such a doctrine seems wholly inconsistent with parental authority.

[159] In more recent times, the animating principle in Chancery, the paramount importance of the best interests of the child, has suffused much of the legal system191.. (However, McLachlin CJ recently emphasised in KLB v British Columbia192. that, while the "best interests" of the child forms a guiding objective in family law, this does not provide a legal or justiciable standard for assigning liability in negligence or for breach of fiduciary duty.) Parental rights now are seen as deriving from parental duty, so that they exist for the protection of the person and property of the child, and they diminish as the child matures193.. Nevertheless, leaving aside situations of abuse and neglect and any appropriate statutory regimes, the principle that children will not be taken to have been deprived of their liberty merely because they are within the control of their parent or guardian remains correct.

[160] This being so, where, in accordance with the principles discussed above with reference to Marion's Case, a power or discretion to request removal under s 198(1) of the Act in respect of a child rests with the parent or guardian, that child is not to any greater extent

deprived of his or her liberty than is a person of majority who is able personally to exercise that power or discretion. This aspect of the applicants' case also fails.

[161] Nothing here needs be said about the scope of the Immigration (Guardianship of Children) Act 1946 (Cth) and the position of children below the age of capacity whose guardian is said to be the Minister under the provisions of that statute194..

Special status of children

[162] One further matter requires consideration. The applicants and the Commission submit that domestic and international law have long recognised that children enjoy a "special status" and have "distinctive interests and vulnerabilities". This is said to distinguish children from the general population, so that a non-curial detention regime that provides for their detention must take account of their unique status or else it will fail the criteria stated in Lim and be invalid. Numerous examples were provided in submissions to demonstrate the various ways in which in the past the law has treated children in a special fashion. These included laws relating to capacity, criminal responsibility, the operation of limitation periods and the nature of the parens patriae jurisdiction. It was not suggested that the obligation to consider the special status of children arises by implication from this legal history but rather that the obligation is "self-evident" once the peculiar status of children is recognised.

[163] This submission wrongly fixes upon the nature of the person detained, absent a consideration of the purpose for which detention is authorised. If it could be shown that the detention regime authorised by the Act applies to a class of persons, significant in number, in relation to whom detention is not "reasonably capable of being seen as necessary"195. to achieve the relevant purpose, there may arise a question of invalidity of the legislation with respect to that class of persons. That is not to say that the Parliament must ensure that detention is reasonably capable of being seen as necessary in each individual case. Rather, a question of validity may arise where the class of persons detained is significantly over-inclusive because it authorises the detention of many more people than is reasonably capable of being seen as necessary.

[164] Nevertheless, as a class, alien children do possess characteristics that make their detention reasonably necessary for the purposes of reception, investigation, admission or deportation. While it is true to say of a young child that he or she cannot, of his or her own volition, disappear into the community, such children may be easier to conceal than would be an adult. In general, children may have less ties to a particular place or occupation than adults, and be without financial or business obligations. As they mature, their appearance may change more rapidly than that of adults. As a result, an alien child who is not detained may well vanish into the body of the population and thereby not readily be available for deportation. The detention of alien children is reasonably capable of being seen as necessary for the purposes of reception, investigation, admission and deportation.

[165] Once it is accepted that administrative detention of alien children is reasonably capable of being seen as necessary for a permitted purpose, the circumstance that such detention may have serious or injurious effects on those children does not necessarily constrain the scope of the aliens power. The effects of detention will be relevant only to the extent that they are indicative of the purpose for which detention is authorised.

[166] This reflects the approach taken by the Supreme Court of the United States where a facially non-discriminatory law is alleged to discriminate on racial grounds in contravention of the Equal Protection clause of the Fourteenth Amendment196.. The cases establish that the circumstance that a law has significant discriminatory impacts may assist in establishing that such a purpose exists but that the discriminatory effects of a statute themselves are not a

sufficient basis for impugning a law in the absence of some impermissible purpose. Professor Chemerinksy notes197.:

Cases such as Washington v Davis198., Mobile v Bolden199., and McCleskey v Kemp200. clearly establish that proof of a discriminatory impact is not sufficient to prove an equal protection violation; there also must be proof of a discriminatory purpose. It should be noted that civil rights statutes can, and often do, allow violations to be proved based on discriminatory impact without evidence of a discriminatory purpose. For example, Title VII of the 1964 Civil Rights Act allows employment discrimination to be established by proof of discriminatory impact, and the 1982 Amendments to the Voting Rights Act of 1965 permit proof of discriminatory impact, to establish a violation of that law. But the Court has said that under the Constitution, proof of discriminatory impact is insufficient, by itself, to establish a denial of equal protection.

(footnotes omitted)

In general, the evidence the United States cases require of the complainant must be "evidence specific to his own case"201..

[167] Similarly, it may be that, if it could be demonstrated that a federal law authorised or mandated detention of those individuals seeking their release from what in their case were harsh, inhumane and degrading conditions, this would indicate that the purpose of that detention went beyond the range of purposes that are permissible, consistently with Ch III. Nevertheless, the criterion of validity would remain the purpose for which the detention is authorised, not its effect on the individual. No case of the kind just indicated has been advanced here.

Parens patriae jurisdiction

[168] The parens patriae jurisdiction, as developed in England by the Court of Chancery, was referred to in the submissions for the applicants as an example of the special fashion in which the law has treated children. However, the applicants did not take that reference further. They did not contend that a federal law otherwise within the legislative competence of the Commonwealth was constrained by any inhibition perceived in Ch III from authorising an outcome in the exercise of federal jurisdiction which differed from that which would have obtained in Chancery. The upshot is that there is no occasion here to enter upon that issue. This silence, however, is not to be taken as offering any encouragement to such an argument.

Order

[169] The application should be dismissed.

Kirby J.

[170] This case involves the Migration Act 1958 (Cth) ("the Act"). It concerns the validity of the detention of the four applicants under ss 189 and 196 of the Act.

[171] The applicants are nationals of Afghanistan. They are children between the ages of 7 and 15 years. They entered Australia in January 2001 with their elder sibling, accompanied by their parents. None of the members of the family had a valid visa to travel to, enter or remain in, Australia. For the purposes of the Australian Constitution, they were "aliens"202.. For the purposes of the Act, they were "unlawful non-citizens" in Australia203.. In accordance with the Act, the applicants were detained in immigration detention upon their entry into Australia's "migration zone"204..

[172] Given the width of the power to make laws with respect to "aliens" and other related matters205., conferred on the Australian Parliament by the Constitution, at first impression,

the sections of the Act providing for the detention of the applicants appear to be constitutionally unassailable, so far as Australia's municipal law is concerned.

[173] Under the Constitution, all valid laws made by the Australian Parliament are binding "on the courts, judges, and people of every State and of every part of the Commonwealth"206.. For an Australian court, a refusal to apply, and to give effect to, provisions of a valid federal act is not an available option. Fundamental to the Australian Constitution is respect for the rule of law207.. If the law is clear and constitutionally valid, it is the duty of Australian courts to apply its terms. This is so whatever judges or others may think about the content and effect of the law. Under our constitutional arrangements, changes to the content of such laws normally depend upon the political process, particularly the regular election of representatives to legislatures of Australia: federal, State and Territory.

[174] The complaint of the applicants concerning the prolonged detention of "unlawful non-citizens" who are children like themselves, restrained for long periods in immigration detention centres, has been the subject of substantial expert and political debate and much commentary within Australia208.. It is in these ways that such issues are normally resolved, if at all, in the Australian Commonwealth209..

[175] Properly, the applicants accepted that it was no part of the function of this Court to decide whether the power to detain persons like them was actually, or in fact, necessary to achieve the stated purpose. On the other hand, the applicants also asserted, correctly, that the decision by the Australian Parliament that detention was appropriate or necessary to achieve an available national policy was not the end of the matter. It remains for this Court to decide, in the light of the Constitution and the evidence, whether, in the particular case, the statute permits detention of the kind proved in the evidence and, if it does, whether it is valid as falling within a constitutional grant of legislative power, undiminished by any limitations and implications expressed or implied in the Constitution.

The facts, legislation and issues

[176] The background to the arrival of the applicants in Australia from Afghanistan with their parents is explained in other reasons210.. The history of the litigation by which the applicants' father pursued a claim on his own behalf, and on behalf of the applicants, their elder sibling and their mother, is also set out there211.. It concerned rights, allegedly enjoyed by the applicants, pursued on their behalf during their infancy by their father. The applicants were granted temporary protection visas in July 2004. They are no longer in detention.

[177] A little more than three years passed after the father first applied for protection visas, and until the applicants were released from detention. Three years is a long time for those, especially children, who are physically detained. Such detention would necessarily take a toll on all members of the applicants' family, but especially on the children212.. The majority of facts relevant to this application were agreed between the parties. The Minister contested the relevance of certain evidence, referred to by the applicants, concerning the conditions at the relevant immigration detention centres. The Minister also contested a submission for the applicants that immigration detention was "likely to have a significant adverse psychological and physical impact on a child's development and well-being". This was not therefore an agreed fact before this Court. However, whilst it is true that the consequences of such detention would depend upon features individual to a particular child and his or her family, as well as the precise residential, educational and environmental conditions provided, it is inescapable that the lengthy detention of a child, necessarily in a state of personal development, impinges adversely on the physical, intellectual and emotional advancement of the child to some degree. No doubt this is why international and regional statements of

human rights contain specific limitations upon such detention. It is therefore no more than common sense, applied to the agreed facts, that allows this Court to infer the deleterious impact of detention — and especially prolonged detention — on the applicants.

[178] Nevertheless, the duration of such detention is neither permanent nor indefinite. It has a clear and discoverable terminus213.. Relevantly, this is either the grant of visas or removal or deportation from Australia, in accordance with the Act214.. In practical terms, the terminus would be reached when:

•

The litigation was successful, resulting in reconsideration of the application and the grant of visas to the applicants;

•

The Minister, exceptionally, provided visas in the applicants' case215.;

•

The applicants requested immediate voluntary removal to Afghanistan216.; or

•

The applicants were removed from Australia involuntarily after the final expiry of all of their rights to challenge the rejection of the application on their behalf for refugee status217..

[179] The Australian Constitution, unlike most others, contains no general Bill of Rights to which persons such as the applicants may appeal in order to support a challenge to the validity of the provisions of the Act imposing mandatory requirements for the detention of children218.. However, the Constitution, in granting to the Parliament the heads of legislative power to make laws with respect to "aliens" (and other matters) expressly subjects such grants of power to the other provisions of the Constitution219.. This includes the provisions of Ch III. That Chapter contains the sections of the Constitution providing for the integrated judicature of the nation. No lawmaking powers enjoyed by the Parliament may be exercised in a way that is inconsistent with, or repugnant to, the role and functions of that independent judicature. So far as federal laws are concerned (such as the Act) no provision will be valid that purports to confer on a body that is not a federal court any part of the judicial power of the Commonwealth220..

Chapter III and the validity of ss 189 and 196 of the Act

[180] It was from this foundation of constitutional principle that the applicants argued their primary constitutional objection to the provisions of ss 189 and 196 of the Act under which the officers of the Commonwealth who had detained them derived their powers to do so.

[181] They submitted that the very length of the detentions in their cases, as children, transformed the quality of their loss of liberty from administrative detention into punishment. This Court has repeatedly held that the imposition of punishment is a judicial function, not an administrative one. In the case of federal laws such as the Act, punishment is reserved to the exercise of the judicial power of the Commonwealth. It is thus incapable of being exercised without judicial authority by officials of the Executive Government, such as those who had detained the applicants221..

[182] Detention to uphold a legislative policy to control the entry of aliens into Australia is one of the exceptions to the normal enjoyment to liberty that has been treated by this Court as compatible with the implication of the Constitution that Executive derogation from liberty is ordinarily regarded as punitive and thus as part of the judicial function which, when exercised

under federal law, is reserved to the courts222.. I support the interpretation of the Constitution as expressed in Chu Kheng Lim v Minister for Immigration223.. It has been affirmed by this Court. The present case is not an occasion to reconsider what was said there and I would certainly not decline to follow it224..

[183] On the face of things, therefore, at least up to the time they were released, unless there was some exceptional feature to the detention of the applicants, it fell within a recognised category of administrative detention which this Court has upheld as compatible with Ch III. Moreover, this Court has done so repeatedly. It has done so in the case of children, as well as of adults225..

[184] The determination of the character of a federal law, judged by the criterion of whether it is punitive or not, cannot rest on the purpose of the law alone; still less its asserted purpose. It always remains for a court to decide, in case of a contest, whether the character of the law is one that prescribes conduct that is, or may become, punitive. In making that assessment, a court will have regard not only to the claimed or apparent purposes of the law but also the objective effects of the law and its practical operation226..

[185] The applicants contended that the special feature that converted their detention into punishment was its prolonged duration; their status as children; and their incapacity as such (separately from their parents) to elect for removal that would terminate immediately the "punishment" they were suffering.

[186] I accept that in some cases of proved harsh conditions (unsanitary, violent, inhumane or unhealthy), or inordinately prolonged duration, the conversion of conduct from a classification as "detention" to classification as "punishment" might be upheld. In such a case, questions would arise as to whether the deprivation of liberty described in the evidence answered to the conditions authorised by the Act227.. Alternatively, the question would be presented as to whether, because the detention had become punitive, it could any longer be sustained in constitutional terms on the basis of administrative, as distinct from judicial, authority.

[187] It is evident that Parliament contemplated the precise conditions in which the applicant children were held, when it enacted the provisions of the Act obliging a universal policy of detention of "unlawful non-citizens" with application to children as well as adults228..

[188] In Minister for Immigration and Multicultural and Indigenous Affairs v B229., I traced the series of parliamentary and other official reports by which, over the past decade, the Australian Parliament has been made aware of official concerns about the requirements of mandatory detention of unlawful arrivals in general, and the detention of vulnerable people, such as children and unaccompanied minors, in particular. Notwithstanding these reports, and several recommendations for alteration of the system of mandatory detention, including in the case of children, the system has been maintained unchanged. The Act has not been amended in any relevant respect. On the contrary, the procedures have been continued despite an intervening change of federal government and considerable public debate on the subject. It cannot be said that the policy, including as it relates to the detention of children, is the result of oversight, ignorance, inattention or mistake. It is the product of a deliberate decision of successive governments and the Australian Parliament, enacted and maintained in force under the broad scope of the "aliens" power granted by the Constitution.

[189] The evidence to which I have referred230., going to the negative impacts of detention upon children, is of a general nature. It does not relate to these particular applicants. An argument based upon detention as "inhumane" (and therefore as "punishment") must be proved by reference to the impact on, and consequences for, the particular parties. Without in

any way minimising the complaints of the applicants as to the conditions of their former detention and its duration and its effect on their intellectual, social and emotional development as children, the evidence presented in the proceedings, because of its limitations, falls short of sustaining the legal foundation upon which this Court was invited to intervene on this basis.

[190] In these circumstances, and in the conditions proved in the limited evidence received in this case as to the nature and effects of the applicants' former immigration detention, there is no sufficient foundation for the Court's intervention on the basis that the applicants' detention exceeded the Act or offended Ch III of the Constitution.

The parens patriae claim

[191] The applicants also appealed to what they said were the parens patriae powers of this Court, exercising its original jurisdiction under the Constitution.

[192] The Royal Courts of England, and equivalent courts of general jurisdiction in Australia, have been accepted as partaking of the parens patriae powers and obligations of the Crown in relation to children231.. However, any such powers, deriving as they originally do from the royal prerogative or the common law, are subject to being overridden by inconsistent provisions in valid legislation.

[193] Unless the parens patriae powers, propounded for the applicants, could be rooted in the Constitution itself, the answer to the invocation of such powers in these proceedings (like the answer to the invocation of the child welfare provisions of the Family Law Act 1975 (Cth)232., in a case of children in immigration detention) is that such powers are excluded by the express provisions, and comprehensive scheme, of the Act. That Act is specific, particular and clear so far as its requirement for universal mandatory detention is concerned, including in relation to children. Such requirements prevail over any otherwise existing general powers enjoyed by federal courts, including this Court, whether under jurisdiction of the parens patriae kind or welfare jurisdiction under the Family Law Act233..

[194] The particularity of the law obliging detention, including the detention of children, ousts the generality of other laws, written and unwritten, for the welfare of children234.. In every relevant respect, the provisions of the Act are clear. Assuming, therefore, without deciding, that this Court partakes, in some respect, of the traditional parens patriae powers of the Crown, implied from the Court's creation by the Constitution as a "court" or from the general definition of its powers in the Constitution and in legislation235., any such jurisdiction is excluded by clear and valid laws to the contrary. In this respect, the Act is clear and valid. Accordingly, upon the assumption that such a jurisdiction exists, the applicants' appeal to a parens patriae jurisdiction fails.

Statutory construction and human rights

[195] Statutory construction: This leaves only the issue of whether, upon the assumption that the Act is constitutionally valid, this Court might read the Act so as to exclude the applicants — treating them as unexpressed exceptions to the operation of the mandatory detention provisions. The hypothesis of this argument is the general principle of Australian law that statutes are read so as not to offend international law236., and not to derogate from fundamental rights237., unless the words of the statute are clear.

[196] This argument also fails. Having regard to the language of the Act, there is no foothold for a contention differentiating between adults and children the application of the policy of mandatory detention expressed in the Act. The definition of "non-citizen" in the Act is simply "a person who is not an Australian citizen"238.. An "unlawful" non-citizen is a non-citizen

who does not hold a valid visa239.. A "detainee" is a "person detained"240.. A child is necessarily a "person". If, as in the applicants' case, the children are not Australian citizens, they are "non-citizens", as defined by the Act. Until they received their visas, they were "unlawful" non-citizens. And until that time, in accordance with s 189(1) of the Act, if in the Australian "migration zone" (as they were) children such as the applicants were required to be detained under the Act by specified officers. True, there are differentiated provisions in the Act relating to adults and children241.. However, those provisions do not apply to this case. They merely underline the universality of the application of other provisions of the Act requiring compulsory detention, including in the case of children.

[197] If it is suggested that this Court should infer that, had the Parliament intended to apply a policy of mandatory detention to children, whilst their parents' claims to relevant visas were being processed, it would have said so expressly in the Act, an answer is readily available. In this case, the Parliament has had the issue called to its notice by repeated parliamentary and official reports242.. In those reports, special concern was addressed to undesirable features, in law and fact, of the prolonged detention of children243.. Such reports notwithstanding, the Act has remained unchanged.

[198] In the light of this history and on the face of the public record of the Parliament, the suggestion that there has been some oversight, mistake or a failure to consider the immigration detention of children in Australia is fanciful. Detention is the deliberate policy of the Australian Parliament, repeatedly affirmed244.. In default of a constitutional basis for invalidating it, it is the duty of this Court to give effect to the Act, whatever views might be urged about the wisdom, humanity and justice of that policy245..

[199] Human rights requirements: International human rights treaties to which Australia is a party contain provisions relevant to the detention of children. Such provisions apply to conditions of restraint such as "immigration detention". The requirements of such treaties were considered in B246.. The most specific and important of such provisions appears in Art 37 of the United Nations Convention on the Rights of the Child247. ("UNCROC"). More general provisions are contained in Arts 2.1, 3.1, 3.2, 7.1, 9.1, 18.1 and 19 of the International Covenant on Civil and Political Rights248. ("ICCPR").

[200] Australia has signed the First Optional Protocol to the ICCPR249.. Pursuant to the accession to that treaty, a communication was taken to the United Nations Human Rights Committee ("UNHRC"), complaining that the provisions of the Act, specifically as they relate to children, contravene the obligations accepted by Australia under international law in consequence of its ratification of the ICCPR. The UNHRC upheld that complaint. It did so over the contrary arguments made on behalf of Australia250.. Other international bodies have also criticised Australia in respect of the provisions of the Act obliging universal mandatory detention251..

[201] However that may be, assuming that there is a breach of international law established by the failure of the Act, and the administration of the Act, to comply with the treaties binding Australia252., such a breach does not, as such, affect the validity of the provisions of the Act or the duty of this Court to give effect to those provisions as part of a valid law of this nation. In construing any ambiguities in such law, it is legitimate for a court to interpret the law, so far as its language permits, to avoid departures from Australia's international obligations253.. However, where, as here, the law is relevantly clear and valid (and is the result of a deliberately devised and deliberately maintained policy of the Parliament) a national court, such as this, is bound to give it effect according to its terms. It has no authority to do otherwise254..

[202] Differences from other cases: It remains only to say that this case differs materially from two other cases in which I recently favoured orders upholding the challenges of persons in immigration detention against decisions reached in courts below.

[203] In Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs255., the issue was essentially one concerned with the practice and procedure of the courts. It involved a question whether a detainee enjoyed the right, in law, to attempt to establish a "defence" to a prosecution brought against him under s 197A of the Act for escape from "immigration detention". It was my view that the courts, ruling on the "defence", had erred in denying the detainee the opportunity to adduce evidence as to the extreme conditions of his "detention". My opinion was that such evidence might, if proved, result in a conclusion that the detainee's place of restraint fell outside the provisions for "immigration detention" appearing in the Act or extended beyond the constitutional powers of the Parliament.

[204] The issue decided in Behrooz was thus quite different from that raised in the present case. I would have given exactly the same response if any attempt had been made to prevent the applicants from adducing evidence in these proceedings to show that the extreme conditions of their "detention" as children took their detention outside the character of the "immigration detention" for which the Act provided or which the Constitution supported. There was no such interference in this case. Indeed, the relevant facts were agreed between the parties, but deleting at the Minister's insistence the propounded fact as to the deleterious effects of the detention on these children. No attempt was made to prove that fact otherwise.

[205] At all events, my opinion in Behrooz was a minority one. As Callinan J points out256., the reasoning of the majority in that appeal supports the Minister's argument that the "detention" of the applicants in this case is valid and lawful.

[206] In Al-Kateb v Godwin257., a different issue arose concerning a stateless person. In that case, I agreed in the reasons of Gummow J that, in its terms, the Act258. did not apply. Gleeson CJ reached a similar conclusion259.. Upon the evidence, it was the view of these members of the Court that it was impossible to return the detained person, at the exhaustion of local remedies, to his country of nationality. He had no such country. The case therefore attracted the rule expressed long ago by Coke CJ in the maxim: cessante ratione legis cessat ipse lex260.. Such reasoning would extend to a person who requested to be removed from Australia where there was no real prospect of that person being removed in the reasonably foreseeable future261..

[207] In the present case, the applicants are not stateless persons. Nor, before they were granted temporary protection visas, did they request to be removed in circumstances where that removal had no real prospect of being effected. They are nationals of Afghanistan. There may well be practical difficulties in returning them, involuntarily, to that country262.. However, such practical difficulties quite often present in the compulsory return to the country of nationality of persons who have failed to secure refugee status in Australia.

[208] The Al-Kateb exception may apply where there is a complete breakdown of law in the person's country of nationality, so that it is a state of nationality in name only. At one stage, not so long ago, that may have been the case in Afghanistan. For all this Court knows, evidence might establish that it has become the case again. However, the evidence in the present case does not show that it is so at this time. A number of persons in the position of the applicants and their parents, have been returned voluntarily to Afghanistan. This has happened under the scheme agreed between Australia and that country263.. It was therefore

impossible to develop the principle in Al-Kateb, by analogy, to apply it to persons in the applicants' situation.

[209] No argument was advanced in this case that, under the Immigration (Guardianship of Children) Act 1946 (Cth), s 6, the Minister's statutory status as "guardian" of every non-citizen child who arrives in Australia, imposed on the Minister fiduciary obligations to act in respect of the applicants in the manner conventionally required by law of an infant's legal guardian264.. On the face of things, the status of statutory guardian would appear to impose duties of individual decision-making giving explicit attention to the special needs of each particular child. Such a duty might be specially applicable to a Minister of the Commonwealth as "guardian", given the ancient functions of the Crown, as predecessor to the Minister, as parens patriae in respect of vulnerable children.

[210] The issue of the reconciliation of the Act and the foregoing provisions of the 1946 Act has been raised in argument in another appeal265.. Because no evidentiary basis was established in the present case for consideration of this point in the present proceedings, it must be ignored.

Conclusions and order

[211] It follows that, before they were granted visas authorising their release, the applicants were lawfully detained in immigration detention under the Act. The Act, in so providing, is valid under the powers afforded to the Parliament by the Constitution to make laws with respect to "aliens". There are other relevant heads of constitutional power, and it is unnecessary to elaborate them. In the evidence available to this Court, there was no offence in the applicants' detention to the implications in Ch III reserving "punishment", as provided under federal law, to the order of a court. Immigration detention for migration control is a recognised exception to the restriction to the valid orders of courts of official involuntary deprivation of liberty. Any parens patriae jurisdiction which this Court enjoys, as an implication from its status as a court or otherwise, is subject to clear and valid provisions of the Act.

[212] The provisions of the Act that required the detention of the applicants until they were granted visas are clear and valid under Australian law. There is no scope for implying a derogation for children, either under assumptions of the common law or of the Australian Constitution or so as to avoid inconsistency with any obligations accepted by Australia under international law. The scheme of universal mandatory detention is a deliberately chosen, and repeatedly reaffirmed, decision of the Australian Parliament, acting within its constitutional powers. As such, it is the duty of this Court to uphold it. At least it must do so in the circumstances proved by the evidence in this case.

[213] No other decision of this Court suggests that another course is available. On the contrary, recent authority of this Court repeatedly confirms the lawfulness and validity of the applicants' detention. It does so notwithstanding the extended duration of the detention, the status of the respondents as children, the arguable breach of international obligations and the unfortunate consequences that I would be prepared to assume such prolonged detention of children occasions.

[214] I therefore agree that the application must be dismissed.

Hayne J.

[215] The applicants are four children aged 15, 13, 11 and 7 years old respectively. On 15 January 2001, they arrived in Australia with their parents and an older brother. None of the

applicants, and no other member of the family, had a valid visa permitting travel to, entry to, or remaining in Australia. Each of the applicants is a national of Afghanistan.

[216] On arrival in Australia, the applicants (and the other members of their family) were taken into immigration detention. They remained in immigration detention until after this matter was heard.

[217] In February 2001, the applicants' father applied for protection visas for himself and for other members of his family. That application was refused. Subsequent applications for review of that decision have not led to the grant of protection visas, but processes of appeal against the failure of those review proceedings have not yet been exhausted.

[218] The applicants contend that their detention is unlawful. They contend that ss 189 and 196 of the Migration Act 1958 (Cth) ("the Act"), in so far as they authorise the detention of children in immigration detention, are invalid. The text of those sections is set out in the reasons of other members of the Court.

[219] The applicants applied for an order nisi calling on the first respondent, who is the Manager of the Immigration Detention Centre where they were being held, and on the Minister for Immigration and Multicultural and Indigenous Affairs to show cause why habeas corpus should not issue and prohibition or injunction not go to prevent the Minister taking any steps to detain or continue to detain them. Upon that application coming on they were directed266. to make the application to a Full Court. It is that application which now falls for determination. It should be dismissed. Sections 189 and 196 of the Act, in so far as they authorise and require the detention of the applicants in immigration detention, are valid.

[220] The issues which arise in this matter are closely connected with, and in substantial respects are identical to, issues considered by the Court in Al-Kateb v Godwin267. and Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji268..

[221] In the present matter, emphasis was given to the fact that the applicants are children. It was said that "[t]he prolonged and indefinite detention of children until removal or grant of a visa (in so far as it is purportedly authorised by ss 189 and 196 [of the Act]) is punitive in nature". Children, the applicants submitted, have always been recognised by the common law and by the courts of equity as having a "special position" and "have long been treated as being in a position of vulnerability". In addition, so the argument continued, the special status of children is recognised in numerous treaties, most notably the Convention on the Rights of the Child, 1989, the International Covenant on Civil and Political Rights, 1996, and the International Covenant on Economic, Social and Cultural Rights, 1966.

[222] These considerations do not lead to the conclusion that the impugned provisions are invalid in so far as they authorise and require the detention of the applicants in immigration detention. As I said in Al-Kateb269., the aliens and immigration powers (ss 51(xix) and (xxvii)) give power to the Parliament to make laws with respect to the exclusion of persons from Australia and the Australian community. In that operation, the laws do not infringe the limitations on power which follow from the separation of judicial power from the executive and legislative powers. Further270., immigration detention is not detention for an offence but it excludes the person who has entered Australia from the community which he or she sought to enter. It excludes that person from the community by segregating him or her from it though, of course, while segregated that person is not beyond that community's law. He or she is subject to and has the benefit of applicable federal, State or Territory laws, written and unwritten.

[223] The reference to exclusion from the "Australian community" is intended as a description of the consequence of the law in question, not an invocation of references to the

separate communities that evolved in the British Empire during the later part of the 19th and early part of the 20th centuries. Nor does it seek to invoke the concept of absorption into the community that has developed in connection with the immigration power. Rather, it is used to describe the consequences visited by the Act upon aliens who do not have permission to enter and remain in Australia. The Act requires that such persons be detained in immigration detention. The consequence of that detention is that they are excluded from the community they have sought to enter and it is their status of alienage which provides the critical connection with constitutional power, not the description of the consequences flowing from the legislation whose validity is impugned.

[224] As I sought to explain in Al-Kateb271., there is nothing about the decision-making that must precede detention which bespeaks an exercise of judicial power. If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person272.. But continued detention does not depend upon the holding of that suspicion. Continued detention under s 196 is predicated upon the person being an unlawful non-citizen. It does not depend upon the formation of any opinion of the Executive. In particular, it does not depend upon the formation of any opinion of the Executive about whether detention is necessary or desirable whether for purposes of investigation or any other purpose. That judgment has been made by the legislature. The Act provides that the detention of an unlawful non-citizen must continue until the detainee is removed or deported or granted a visa273. and removal must occur "as soon as reasonably practicable"274. after the occurrence of events which the Act identifies.

[225] The applicants' contentions, which emphasised their status according to Australian domestic law as persons not of full age and capacity, were ultimately directed to characterising the impugned sections as "punitive in nature". (Whether some or all of the applicants would have that status according to the law of their domicile was not explored in evidence or in argument.) Both the undoubted "vulnerability" of children and the attribution, by the law or international instruments, of a special status or position to children were said to lead to, or reinforce, the conclusion that the sections are punitive. Thus, it was said that "by reason of their special position and vulnerability, any law that purports administratively to deprive children of their liberty for anything but the most strictly limited time will be punitive in character" (emphasis added).

[226] In part, the argument proceeded from a premise that children of the applicants' ages could not choose, for themselves, whether to ask to be returned to the country of their nationality. This meant, so the argument proceeded, that they could not choose to bring their detention to an end by asking to be removed under s 198(1) of the Act. Even accepting that the applicants are too young to make a choice about returning to their country of nationality, the corollary would be that the decision to attempt to stay or to return would be a decision for their parents or guardians. The parents or guardians could, therefore, bring the detention to an end. If the children cannot do so, that is not significant in deciding whether the impugned provisions are invalid. Rather, attention must be directed to the applicants' central contention that the impugned provisions are punitive.

[227] My reasons in Al-Kateb sought to demonstrate275. that the line between detention which, because it is "penal or punitive in character"276., can be imposed only in the exercise of the judicial power, and detention which is not of that character, is difficult to draw277.. For present purposes, it is important to recognise that Chu Kheng Lim v Minister for Immigration278. decided that mandatory detention of unlawful non-citizens can validly be provided without contravention of Ch III. It follows that unlawful non-citizens have no unqualified immunity from detention and attention must then be focused upon the purpose of

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

[228] For these reasons, and the reasons I gave in Al-Kateb, the challenge to the validity of ss 189 and 196 of the Act fails. The application should be dismissed.

Callinan J.

[229] The applicants are children who, at the time of hearing, were living at the Baxter Immigration Detention Facility ("Baxter") with both of their parents. They were subsequently granted temporary protection visas on 5 July 2004 and released from detention. The issues which they seek to raise in these proceedings which are brought by their father as next friend are whether ss 189 and 196 of the Migration Act 1958 (Cth) ("the Act"), under which they are detained, are valid in so far as those provisions relate to them as children.

Facts and previous proceedings

[230] The applicants, aged 15, 13, 11 and 7 years respectively, are Afghan nationals. Their parents and they entered Australia unlawfully279. on 15 January 2001. Upon their arrival they were detained pursuant to ss 189 and 196 of the Act. The family was first detained at the Woomera Immigration Reception and Processing Centre. On 2 January 2003 they were transferred to Baxter.

[231] The first respondent is the manager of Baxter. The second respondent is the Minister for Immigration and Multicultural and Indigenous Affairs.

[232] The relief sought is a writ of habeas corpus directed to the first respondent requiring the applicants' release from immigration detention, and a writ of prohibition, or alternatively an injunction, prohibiting or restraining the second respondent from detaining or continuing to detain the applicants.

[233] The applicants' family has, since their arrival in Australia, been involved in several proceedings designed to secure for its members Australian residence. On 21 February 2001 the applicants' father applied for a protection visa on behalf of the family. The application was refused on 20 April 2001 by a delegate of the second respondent.

[234] Review of the delegate's decision was sought, and on 23 July 2001 the decision was affirmed by the Refugee Review Tribunal. The applicants' father applied to the Federal Court for judicial review of the Tribunal's decision on 14 August 2001. On 8 February 2002, the Federal Court made orders by consent setting aside the Tribunal's decision and remitting the matter for reconsideration. On 28 June 2002, the Tribunal again affirmed the delegate's decision to refuse to grant protection visas to the applicants' family.

[235] The applicants' father applied to the Federal Magistrates Court for judicial review of the Tribunal's June 2002 decision. The application was dismissed by Driver FM on 20 September 2002. An appeal against the magistrate's decision was commenced in the Federal Court. On 14 February 2003 Mansfield J allowed the appeal and remitted the matter for re-hearing by Driver FM.

[236] On 28 May 2003, Driver FM again dismissed the application for review. The applicants' father has appealed against that decision to the Federal Court. The appeal is pending.

[237] On 16 May 2002, a Memorandum of Understanding was entered into between Australia and the Afghan Interim Government. The Understanding provides a framework for the return of those Afghan citizens to Afghanistan who seek voluntary repatriation.

[238] On 3 June 2003 the applicants' family was invited by the second respondent to return to Afghanistan pursuant to the Understanding. The invitation included an offer of financial assistance of as much as $10,000, counselling, assistance in obtaining passports, arrangement of air travel to Kabul, reception upon arrival, accommodation in Kabul for up to a week if required, assistance with transport from Kabul to other destinations within Afghanistan, the provision of vocational training in Kabul, and accommodation there for the duration of training if required.

[239] Afghans in immigration detention may voluntarily return to Afghanistan at any time. The second respondent will pay all costs associated with their return, including transportation, travel documents, and the cost of transport of personal effects.

[240] By 29 October 2003, 60 persons had been repatriated to Afghanistan from Australia under the Understanding. Removal from Australia to Afghanistan was effected within 56 days of a person's signification of willingness to return. It is the second respondent's expectation that in the event of the family's agreeing to return to Afghanistan, removal could be effected within about 30 days of the provision of travel documents from the Embassy of Afghanistan. The time for the provision of these documents would depend on the family's cooperation in providing information to assist the relevant authorities in Afghanistan to establish their identity.

[241] There is currently no agreement between the governments of Australia and Afghanistan for the involuntary return of Afghan nationals to Afghanistan.

[242] If the applicants' father's appeal fails, and if he continues to resist the second respondent's offer of repatriation to Afghanistan, and no agreement be made with Afghanistan for the involuntary return of Afghans whose applications for the status of refugees have failed, the applicants will continue to be detained until such time as other arrangements can be made for their removal elsewhere from Australia. There is no suggestion here that the second respondent would in these circumstances detain the family otherwise than for their deportation when that can be effected.

[243] Because the applicants' submissions claim that the detention is punitive, not only because of its uncertainty as to duration but also by its very nature, including its particular nature here, something needs to be said with respect to the actual circumstances of the detention, the evidence as to which is uncontradicted and which I will quote:

The … children attended school whilst the family were located at the Woomera [detention centre], initially on-site and from November 2001, at the vacant premises of St Michael's school in the township of Woomera.

Following the family's relocation to Baxter, the … children commenced school at the Baxter Education Centre within Baxter on 28 January 2003.

At the time, the … children attended the school on-site at Baxter, the school employed an equivalent of six full time teachers. The school also employed one educational coordinator and two recreational/activities officers fulltime, as well as a teacher of dance, drama and music.

Baxter's education centre makes provision for a kindergarten, as well as primary and secondary education to children resident in the facility. Education … is delivered by qualified teaching staff contracted through East Gippsland College of TAFE and is well resourced with

books, stationery and computers. Children are taught in English appropriate to their individual levels and follow the South Australian curriculum.

Children aged from six to seven years attend Junior School from 9 am to 3 pm. Children aged between 8 and 12 attend primary school from 9.00 am to 3.15 pm, and High School is available for children aged between 12 and 18 from 9 am to 3.15 pm.

Special education programmes are also available at Baxter, including Information Technology Certificates 1, 2 and 3.

In addition to the school curriculum, during the normal school term there is an activity program operating seven days per week including ball sports, pottery and games.

The [second respondent's] policy is that all children should be given the opportunity to participate in an external school environment subject to satisfaction of three requirements regarding health, education level (so that their educational levels in English are taken into account) and behaviour. To this end the [second respondent] is working with both the state education authorities and on site staff at Baxter to achieve this outcome. It is also the [second respondent's] policy that the children who attend these schools are to participate fully in the extra-curricular activities offered by the school such as after-school sport and school camps.

On 31 March 2003, [two of the applicants] commenced at Willsden Primary School in Baxter township, with [another of the children] commencing at that school on 16 May 2003.

On 16 September 2003, [one of the children] commenced at the Seaview Campus of Port Augusta Secondary School.

Relevant legislative provisions

[244] It is convenient at this point to set out the relevant provisions of the Act. Section 4 should be noted first:

Object of Act

(1)

The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

(2)

To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.

(3)

To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.

(4)

To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.

[245] Section 5 defines what it means to "detain" a person:

detain means:

(a)

take into immigration detention; or

(b)

keep, or cause to be kept, in immigration detention;

…

[246] The same section defines "immigration detention" as follows:

immigration detention means:

…

(b)

being held by, or on behalf of, an officer:

(i)

in a detention centre established under this Act; or

…

(v)

in another place approved by the Minister in writing;

…

[247] Section 176 refers to detention, but not to detention under Div 7 of the Act and therefore need not be set out. Section 182, which refers to periods of detention, has no application to these applicants.

[248] Section 189 in Div 7 of the Act is expressed in mandatory language:

Detention of unlawful non-citizens

(1)

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

(2)

If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a)

is seeking to enter the migration zone (other than an excised offshore place); and

(b)

would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3)

If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

(4)

If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a)

is seeking to enter an excised offshore place; and

(b)

would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5)

In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, officer means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

[249] Section 196 is as follows:

Duration of detention

(1)

An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

(a)

removed from Australia under section 198 or 199; or

(b)

deported under section 200; or

(c)

granted a visa.

(2)

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

(3)

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

(4)

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

(4A)

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

(5)

To avoid doubt, subs (4) or (4A) applies:

(a)

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

(b)

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

(5A)

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

(6)

This section has effect despite any other law.

(7)

In this section:

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

[250] Section 198 is comprehensively expressed and provides for the mandatory removal of unlawful non-citizens, a statutory appellation applicable to the applicants, "as soon as reasonably practicable". It need not be set out here.

The applicants' argument

[251] The applicants put their argument in different ways. First, it was said that the Commonwealth Parliament has no power to enact a law that provides for the prolonged administrative detention of alien children: that in particular, indefiniteness as to its duration is of itself plainly punitive. In the result, ss 189 and 196 of the Act or any other sections of it purporting to authorise the detention of the applicants are invalid.

[252] A number of arguments are urged in support of the proposition that the Commonwealth lacks legislative power to detain alien children indefinitely: that detention of children in any circumstances is not reasonably capable of being seen as necessary for the purposes of processing, deportation or removal of unlawful non-citizens; that such detention is not an incident of the executive power to exclude, admit and deport, or remove them; and, that, because the detention is punitive in nature, it is an impermissible exercise by the executive of the judicial power of the Commonwealth. The detention was said to be punitive not only because it inhibited the applicants' freedom, but also because it was not reasonably necessary to achieve, or was not reasonably adapted to the removal of the applicants especially as they were only children.

[253] The applicants' sought to invoke a parens patriae jurisdiction exercisable by the Court as a Commonwealth Court. The special vulnerabilities of children were repeatedly pressed as reasons why the prolonged detention of children should be seen as punitive. The fact that a child may not have the capacity to bring about the end of his or her detention, by requesting removal from Australia, also gives a child's detention a punitive complexion.

[254] The applicants' submission, although dwelling on the special vulnerabilities of children, failed unfortunately to deal adequately with the hard and inescapable reality that their vulnerability could well be greater if they were to be separated from their parents, a result which the applicants' application invites. Nor did the applicants' submissions grapple with another practical reality, that children's lives are constrained by their parents' wishes and control over them: indeed it was this very circumstance that brought the applicants to this country as aliens who have been unable to establish an entitlement to the status of refugees to

whom obligations of protection are owed; and further, that now the applicants' father could bring their detention to an end by accepting the second respondent's offer of repatriation280..

The respondents' arguments

[255] The respondents and the Attorney-General of the Commonwealth as intervener, argued that the proper approach is to ask whether the impugned provisions provide for detention as punishment in fact, or for some legitimate non-punitive purpose. It was accepted that if the former were the case, the relevant provisions would be seen as purporting to confer a judicial power on the executive arm of government, and are likely to be invalid. If the latter be the case however, the provisions do not purport to confer judicial power, and will therefore be valid provided they are supported by a Constitutional head of power. A test of that kind is consistent with the reasoning and decisions of this Court in Chu Kheng Lim v Minister for Immigration281. and Kruger v The Commonwealth282..

[256] The respondents submitted that the relevant provisions of the Act clearly serve the legitimate non-punitive purpose of facilitating the orderly determination of visa applications, and the removal of persons who are denied visas from Australia.

[257] The respondents argued that there is no relevant distinction between children who are unlawful non-citizens and adults who are unlawful non-citizens. The test remains, of the purpose for which the detention is effected. A purpose will be a valid purpose if the relevant provisions are reasonably capable of being seen as necessary for a non-punitive constitutional purpose, here, of regulating the entry and presence of aliens, and immigration under s 51(xix) and (xxvii) of the Constitution. The fact that the applicants are children has nothing to do with these questions. If relevant at all, it could only go to the wisdom and desirability of the provisions which are not questions for this Court.

[258] The respondents also contended that the argument that a child may not be able to bring about an end to his or her detention does not assist the applicants. In any event, older children may well have the capacity to understand the nature and consequences of their actions and be able to request removal. The truth is that many, indeed most children have little say over events concerning them as they are within the control of their parents.

[259] As to the suggestion that the parens patriae jurisdiction of the Court may apply to the applicants, it was submitted by the respondents that the jurisdiction has always been subject to legislative interventions and argument: if ss 189 and 196 of the Act are provisions which the community think unpalatable, then their reversal or re-adjustment is for the Parliament and not the courts. The Act here provides a clear indication of Parliament's intention with regard to unlawful non-citizens, including children, and the exercise of whatever parens patriae jurisdiction exists or remains in the Court should not interfere with the implementation of that intention.

The validity of ss 189 and 196 of the Act

[260] There is no doubt that the detention to which these applicants are subject, despite the measures undertaken by the second respondent with respect to their education and otherwise, involves some significant restraints on their freedom. Its character for constitutional purposes however, is not to be determined by reference simply to that. The relevant question is whether the restraint as mandated or authorized by the governing legislation is reasonably capable of being seen as necessary for a valid non-punitive purpose, here of removing aliens who have no right to reside in Australia, from the country. So far as adults are concerned, that question has recently been affirmatively answered by this Court in Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs283., and any distinction

between adults and children in these circumstances is not easy to discern. But first some general principles should be restated.

[261] Detention for purposes other than punitive ones has traditionally been constitutionally acceptable. Chu Kheng Lim v Minister for Immigration284., which is relied upon by the applicants, acknowledges that, as does, more recently, Al-Kateb v Godwin285.. Examples are arrest and detention pending trial, detention of the mentally ill or infectiously diseased, and for the welfare and protection of persons endangered for various reasons.

[262] Detention of aliens, certainly for the purpose of determining rights of entry into, or arranging deportation from, Australia, equally falls within an exception traditionally and rightly recognised as being detention otherwise than of a punitive kind286.. As I pointed out in Al-Kateb287., it would only be if the respondents formally and unequivocally abandoned that purpose that the detention could be regarded as being no longer for that purpose. And as to that, here it should be kept in mind that the status of these applicants as aliens or refugees remains to be finally determined because that depends on the outcome of an appeal instituted by their father. It may even be therefore, that the correct view is that the time for the effecting of the purpose has not yet arrived, let alone reached anything like a point of possible abandonment, actual or inferable.

[263] Does it make a relevant legal difference that the applicants are children? The answer, as I have foreshadowed, is "no". The purpose of the detention remains the deciding factor. Arguments to the contrary dissolve ultimately into questions about the wisdom of the policy behind the detention of children, or perhaps the nature of it. These are difficult questions involving matters of social, humanitarian and migration policy and are ones to which the courts cannot provide the answers.

[264] As I noted in Al-Kateb288., for reasons which need not be fully restated, it may be that detention for some other purpose under the aliens or indeed the immigration power would be constitutionally permissible. It may be the case that detention for the purpose, not only of preventing aliens from entering the general community, working, or otherwise enjoying the benefits that Australian citizens enjoy, but also for the purpose in the case of children, of detaining them so as not to fragment an alien family before removal, is constitutionally acceptable. Alien children have legal rights just as do alien adults289.. But those rights, so far as removal from this country and detention for that purpose is concerned, are no different from the rights of adults which are governed by those sections of the Act to which I have referred, including ss 189 and 196.

[265] The applicants' contention that the potential term of their detention and the fact that they may lack the capacity to bring it to an end takes their detention outside what may be regarded as a non-punitive purpose must also be rejected.

[266] The issue of a child's capacity to act, even if it were relevant, would only be determinable on a case by case basis. The level of capacity of the child can however have no relevance to the question whether detention can be characterized as punitive. Recognition of a parent's practical right to make decisions on behalf of a child or otherwise has nothing to say about the purpose of detaining unlawful non-citizen children.

[267] Some further observations about the applicants' argument as to the invocation of the court's parens patriae jurisdiction should be made. It is open to question whether the Commonwealth or its courts, in particular this one, have a parens patriae jurisdiction, except in the case of children of a marriage290., or perhaps as an incident of, or because of a relationship with another head of Commonwealth power such as, for example, external affairs. For present purposes let me however assume such a jurisdiction. The applicants did

not submit that the Parliament lacks all power to enact provisions for the administrative detention of non-citizen children, but rather that by reason of their special position and vulnerability, any law that purports administratively to deprive children of their liberty for anything but the most strictly limited time will be punitive in character, and will offend exclusivity of the exercise by the courts of judicial power derived from Ch III of the Constitution. Accordingly, it was put, any legislative scheme for the detention of children must give due recognition to their special status and vulnerability. If the applicants' submission were correct, it would mean that the court would have a supervisory power over, for example, the details of the conditions and duration of detention of minors for quarantine purposes pursuant to s 51(ix) of the Constitution enabling it to order their release because, in its opinion, the conditions do not in some way pay proper deference to the special status and vulnerability of children. I cannot accept that there is any Constitutional justification for the contention that a parens patriae jurisdiction may limit the legislative power of the Commonwealth. The content of the jurisdiction has conventionally always been seen as capable of legislative control291..

[268] The nature and details of that content are for Parliament not the courts. Sections 189 and 196 of the Act are valid in their application to the applicants. Their detention, being as it is, for the purpose of their removal from Australia is not unlawful.

[269] The application should be refused.

Heydon J.

[270] Subject to reserving any decision about whether s 196 of the Migration Act 1958 (Cth) should be interpreted in a manner consistent with treaties to which Australia is a party but which have not been incorporated into Australian law by statutory enactment, I agree with the reasons stated by Hayne J for his conclusion that the continued detention of the applicants is not unlawful and for the orders he proposes.

Order

Application dismissed.

Counsel for the prosecutors: G Griffith QC with C J Horan and C M Harris

Counsel for the respondents and intervening on behalf of the Attorney-General of the Commonwealth: D M J Bennett QC, Solicitor-General of the Commonwealth, with G R Kennett

Solicitors for the prosecutors: Vadarlis & Associates

Solicitors for the respondents and intervening on behalf of the Attorney-General of the Commonwealth: Australian Government Solicitor

1. (2004) 78 ALJR 1099; 208 ALR 124.

2. Opened for signature 20 November 1989, 1577 United Nations Treaty Series 3, ratified by Australia 17 December 1990.

3. (1992) 176 CLR 1.

4. (1988) 165 CLR 178.

5. Re Patterson; Ex parte Taylor (2001) 207 CLR 391.

6. Shaw v Minister for Immigration and Multicultural Affairs (2003) 78 ALJR 203; 203 ALR 143.

7. Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 25.

8. (1992) 176 CLR 1 at 26.

9. (1992) 176 CLR 1 at 28.

10. (1992) 176 CLR 1 at 27.

11. (1992) 176 CLR 1 at 29–32.

12. Koon Wing Lau v Calwell (1949) 80 CLR 533.

13. (1992) 176 CLR 1 at 32.

14. Ex parte Walsh and Johnson; Re Yates (1925) 37 CLR 36 at 60–61 , 96; O'Keefe v Calwell (1949) 77 CLR 261 at 278; Koon Wing Lau v Calwell (1949) 80 CLR 533 at 555.

15. (1992) 176 CLR 1 at 10.

16. (1992) 176 CLR 1 at 33.

17. (1992) 176 CLR 1 at 33.

18. (1992) 176 CLR 1 at 34.

19. [1986] AC 112 at 188.

20. Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218.

21. A visa is a permission granted to a non-citizen by the Minister to travel to and enter Australia and/or to remain in Australia: s 29.

22. This Court held by majority in Shaw v Minister for Immigration and Multicultural Affairs that all non-citizens are aliens for the purposes of s 51(xix) of the Constitution: (2003) 78 ALJR 203; 203 ALR 143. Gleeson CJ, Gummow and Hayne JJ held that all persons who entered Australia after 26 January 1949, who were born out of Australia of parents who were not Australian citizens and who had not been naturalised were "aliens" for constitutional purposes: Shaw (2003) 78 ALJR 203 at 210 [32]; 203 ALR 143 at 151. In Singh v The Commonwealth, a majority of this Court held that for constitutional purposes the Parliament could treat as an alien any person born in Australia after 20 August 1986 if neither parent was, at the time of the person's birth, an Australian citizen or a permanent resident, and the person had not been ordinarily resident in Australia for 10 years since his or her date of birth: [2004] HCA 43.

23. Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 64 per McHugh J.

24. Lim (1992) 176 CLR 1 at 30–31 per Brennan, Deane and Dawson JJ (Mason CJ agreeing), citing Koon Wing Lau v Calwell (1949) 80 CLR 533; Attorney-General (Canada) v Cain [1906] AC 542 at 546; Chu Shao Hung v R (1953) 87 CLR 575 at 589 per Kitto J; Znaty v Minister for Immigration (1972) 126 CLR 1 at 9–10 per Walsh J.

25. (1992) 176 CLR 1 at 32.

26. Lim (1992) 176 CLR 1 at 10.

27. See R v Kirby; Ex parte Boilermakers' Society of Australia ("the Boilermakers' Case") (1956) 94 CLR 254; Attorney-General (Cth) v R (1957) 95 CLR 529.

28. (1992) 176 CLR 1 at 26–27, citing Boilermakers' Case (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

29. A law that purports to confer judicial power on a person or body other than a Ch III court is invalid. For example, the imposition of punishment for breaches of the law is an exclusively judicial power. An attempt to confer such power on the Executive would be invalid as an infringement of Ch III. See Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330 at 355 per Griffith CJ; Boilermakers' Case (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

30. See Lim (1992) 176 CLR 1 at 28 per Brennan, Deane and Dawson JJ.

31. R v Richards; Ex parte Fitzpatrick and Browne (1955) 92 CLR 157 at 167.

32. See my consideration of judicial attempts to define judicial power in Lim (1992) 176 CLR 1 at 66–67.

33. (1992) 176 CLR 1 at 67.

34. (1995) 183 CLR 245 at 267–268 per Deane, Dawson, Gaudron and McHugh JJ.

35. (1909) 8 CLR 330 at 357.

36. R v Gallagher; Ex parte Aberdare Collieries Pty Ltd (1963) 37 ALJR 40 at 43 per Kitto J.

37. Lim (1992) 176 CLR 1 at 27.

38. Lim (1992) 176 CLR 1 at 27.

39. Lim (1992) 176 CLR 1 at 27.

40. Lim (1992) 176 CLR 1 at 27.

41. Lim (1992) 176 CLR 1 at 28–29 (emphasis added).

42. (1992) 176 CLR 1 at 28.

43. Lim (1992) 176 CLR 1 at 28.

44. Lim (1992) 176 CLR 1 at 32.

45. Lloyd v Wallach (1915) 20 CLR 299; Ex parte Walsh [1942] ALR 359; Little v The Commonwealth (1947) 75 CLR 94. See also Al-Kateb v Godwin (2004) 78 ALJR 1099 at 1111–1112 [55]-[61] per McHugh J; 208 ALR 124 at 139–140.

46. See, eg, Williamson v Brown (1914) 18 CLR 433.

47. See, eg, R v Wallace; Ex parte O'Keefe [1918] VLR 285; Newmarch v Atkinson (1918) 25 CLR 381; Commissioner for Motor Transport v Train (1972) 127 CLR 396; Storey v Lane (1981) 147 CLR 549.

48. (1992) 176 CLR 1 at 55.

49. (1997) 190 CLR 1.

50. Kruger (1997) 190 CLR 1 at 110.

51. (2004) 78 ALJR 1099 at 1146–1149 [257]-[269] per Hayne J, 1155 [303] per Heydon J; 208 ALR 124 at 188–191, 200.

52. (2004) 78 ALJR 1099 at 1153 [294]; 208 ALR 124 at 198.

53. (1951) 83 CLR 1.

54. (1992) 177 CLR 1.

55. (1997) 190 CLR 1 at 111.

56. Lim (1992) 176 CLR 1 at 65–66 per McHugh J.

57. Lim (1992) 176 CLR 1 at 33 per Brennan, Deane and Dawson JJ.

58. Lim (1992) 176 CLR 1 at 32.

59. Lim (1992) 176 CLR 1 at 10.

60. Lim (1992) 176 CLR 1 at 71.

61. Ex parte Walsh and Johnson; Re Yates (1925) 37 CLR 36; Shaughnessy v United States ex rel Mezei 345 US 206 (1953); Jean v Nelson 727 F 2d 957 (1984).

62. (1992) 176 CLR 1 at 33. Although Mason CJ agreed with Brennan, Deane and Dawson JJ with respect to the scope of legislative power, his Honour did not identify an applicable test.

63. Lim (1992) 176 CLR 1 at 71 (emphasis added).

64. Lim (1992) 176 CLR 1 at 57.

65. (1997) 190 CLR 1 at 162.

66. Lim (1992) 176 CLR 1 at 33 per Brennan, Deane and Dawson JJ, 46 per Toohey J, 58 per Gaudron J, 65, 71 per McHugh J.

67. Kruger (1997) 190 CLR 1 at 162.

68. Dawson J considered whether the actions in that case "may legitimately be seen as non-punitive": Kruger (1997) 190 CLR 1 at 62, McHugh J agreeing at 141–142. Toohey J did not express a test. Gaudron J repeated the view she expressed in Lim: at 110–111.

69. Al-Kateb (2004) 78 ALJR 1099 at 1110 [49] per McHugh J, 1148 [268] per Hayne J, 1152 [289] per Callinan J, 1155 [303] per Heydon J; 208 ALR 124 at 137, 190–191, 196, 200.

70. Al-Kateb (2004) 78 ALJR 1099 at 1109 [45]; 208 ALR 124 at 136 (emphasis added).

71. Al-Kateb (2004) 78 ALJR 1099 at 1146 [254]; 208 ALR 124 at 188.

72. Al-Kateb (2004) 78 ALJR 1099 at 1146 [253]; 208 ALR 124 at 187–188.

73. Al-Kateb (2004) 78 ALJR 1099 at 1146 [255]; 208 ALR 124 at 188.

74. Al-Kateb (2004) 78 ALJR 1099 at 1146 [255]; 208 ALR 124 at 188.

75. Al-Kateb (2004) 78 ALJR 1099 at 1146 [255] per Hayne J; 208 ALR 124 at 188 (original emphasis).

76. Al-Kateb (2004) 78 ALJR 1099 at 1146 [256]; 208 ALR 124 at 188.

77. Al-Kateb (2004) 78 ALJR 1099 at 1148 [267]; 208 ALR 124 at 190.

78. Al-Kateb (2004) 78 ALJR 1099 at 1155 [303]; 208 ALR 124 at 200.

79. Al-Kateb (2004) 78 ALJR 1099 at 1152–1153 [286]-[287], [290], [294]; 208 ALR 124 at 195, 196, 198.

80. Al-Kateb (2004) 78 ALJR 1099 at 1153 [294]; 208 ALR 124 at 174.

81. See, eg, Al-Kateb (2004) 78 ALJR 1099 at 1152–1154 [290]-[291], [295]; 208 ALR 124 at 196–198.

82. (1992) 176 CLR 1 at 71.

83. Cunliffe v The Commonwealth (1994) 182 CLR 272 at 296–298 per Mason CJ, 323–325 per Brennan J, 350–357 per Dawson J; Leask v The Commonwealth (1996) 187 CLR 579 at 593–595 per Brennan CJ, 606 per Dawson J, 614 per Toohey J. Dawson and Gummow JJ in Leask admitted to having some difficulties with the abovementioned passage of Mason CJ's judgment in Cunliffe: (1996) 187 CLR 579 at 603–605 per Dawson J, 624 per Gummow J.

84. Cunliffe (1994) 182 CLR 272 at 323–325 per Brennan J; Leask (1996) 187 CLR 579 at 593–595 per Brennan CJ.

85. Cunliffe (1994) 182 CLR 272 at 321.

86. (1996) 187 CLR 579 at 606 per Dawson J, 614 per Toohey J.

87. Cunliffe (1994) 182 CLR 272 at 324–325 per Brennan J.

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

89. Lim (1992) 176 CLR 1 at 71 per McHugh J (emphasis added).

90. See, eg, Robtelmes v Brenan (1906) 4 CLR 395 at 400 , 404 per Griffith CJ, 415 per Barton J; Pochi v Macphee (1982) 151 CLR 101 at 106 per Gibbs CJ; Lim (1992) 176 CLR 1 at 29 per Brennan, Deane and Dawson JJ; Re Minister for Immigration and Multicultural Affairs; Ex parte Te (2002) 212 CLR 162 at 170 [21] per Gleeson CJ, 192–193 [110]-[111] per Gummow J, cf 217–218 [200] per Kirby J, 229 [229] per Callinan J.

91. Dunn and Howard, "Reaching Behind Iron Bars: Challenges to the Detention of Asylum Seekers", (2003) 4 The Drawing Board: An Australian Review of Public Affairs 45 at 51, 56, 62.

92. Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ("the Refugees Convention").

93. Dunn and Howard, "Reaching Behind Iron Bars: Challenges to the Detention of Asylum Seekers", (2003) 4 The Drawing Board: An Australian Review of Public Affairs 45 at 61–62.

94. Dunn and Howard, "Reaching Behind Iron Bars: Challenges to the Detention of Asylum Seekers", (2003) 4 The Drawing Board: An Australian Review of Public Affairs 45 at 60–61.

95. (2003) 126 FCR 54.

96. (1992) 176 CLR 1 at 34.

97. Lim (1992) 176 CLR 1 at 34 per Brennan, Deane and Dawson JJ, 58 per Gaudron J, 72 per McHugh J.

98. Lim (1992) 176 CLR 1 at 71–72.

99. (2002) 127 FCR 24 at 48.

100. (2002) 124 FCR 589 at 597.

101. (2002) 124 FCR 589 at 597.

102. NAMU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 907 at [18].

103. [2003] FCA 224.

104. NAGA [2003] FCA 224 at [54].

105. NAGA [2003] FCA 224 at [59] per Emmett J.

106. (2003) 126 FCR 54 at 73.

107. 533 US 678 (2001).

108. [2002] FCA 907 at [18].

109. (1992) 176 CLR 1 at 33–34 per Brennan, Deane and Dawson JJ, 72 per McHugh J.

110. See NAMU [2002] FCA 907 at [12] per Beaumont ACJ; aff'd on appeal in NAMU (2002) 124 FCR 589. The Full Court in NAMU considered only the effects of immigration detention on the mental health of the detained children: (2002) 124 FCR 589 at 597. The Court was not asked to consider whether the fact that an infant child may not have the capacity to bring about the end of his or her detention by requesting removal from Australia would operate to render unconstitutional ss 189 and 196.

111. (2002) 124 FCR 589 at 597.

112. NAMU (2002) 124 FCR 589 at 597.

113. Lim (1992) 176 CLR 1 at 15.

114. Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218 at 235–236 per Mason CJ, Dawson, Toohey and Gaudron JJ, 278 per Brennan J, 289, 293–294 per Deane J, 315 per McHugh J.

115. Marion's Case (1992) 175 CLR 218 at 237–238 per Mason CJ, Dawson, Toohey and Gaudron JJ.

116. Marion's Case (1992) 175 CLR 218 at 237–239 per Mason CJ, Dawson, Toohey and Gaudron JJ, 293–294 per Deane J, 316 per McHugh J.

117. See Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293.

118. Jaffari v Minister for Immigration and Multicultural Affairs (2001) 113 FCR 10 at 15 per French J, citing Al Raied v Minister for Immigration and Multicultural Affairs [2001] FCA 313 at [39].

119. At [155], citing Chen Shi Hai (2000) 201 CLR 293; Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S 134/2002 (2003) 211 CLR 441 at 456–457 [28]-[31] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ.

120. It is unnecessary for the purposes of this application to consider the situation of unaccompanied minors.

121. Human Rights and Equal Opportunity Commission, A Last Resort? National Inquiry into Children in Immigration Detention, (2004) at 882–883.

122. Human Rights and Equal Opportunity Commission, A Last Resort? National Inquiry into Children in Immigration Detention, (2004) at 882, citing Milbur Consulting, Improving Outcomes and Reducing Costs for Asylum Seekers, Report commissioned by Justice for Asylum Seekers, (2003).

123. Human Rights and Equal Opportunity Commission, A Last Resort? National Inquiry into Children in Immigration Detention, (2004) at 882–883.

124. At [164].

125. Opened for signature 20 November 1989 [1991] ATS 4 (entered into force 2 September 1990; entered into force for Australia 16 January 1991).

126. Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976; entered into force for Australia 13 November 1980) ("the ICCPR").

127. See, eg, Executive Committee, United Nations High Commissioner for Refugees, Detention of Refugees and Asylum-Seekers, No 44, (XXXVII) (1986); Executive Committee, United Nations High Commissioner for Refugees, Conclusion on International Protection, No 85, (XLIX) (1998); United Nations High Commissioner for Refugees, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, (1999); United Nations Economic and Social Council, Commission on Human Rights, Civil and Political Rights, Including Questions of: Torture and Detention, Report of the Working Group on Arbitrary Detention, UN Doc E/CN4/2000/4, (1999) Annex 2; Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention, and Protection", in Feller, Türk and Nicholson (eds), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, (2003) 185.

128. See Human Rights and Equal Opportunity Commission, Those Who've Come Across the Seas: Detention of Unauthorised Arrivals, (1998); Ozdowski, A Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001, (2002); Human Rights and Equal Opportunity Commission, A Last Resort? National Inquiry into Children in Immigration Detention, (2004).

129. United Nations, Human Rights and Immigration Detention: Report of Justice P N Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights: Mission to Australia 24 May to 2 June 2002, (2002).

130. North and Decle, "Courts and Immigration Detention: 'Once a Jolly Swagman Camped by a Billabong'", (2002) 10 Australian Journal of Administrative Law 5 at 24. See also Human Rights and Equal Opportunity Commission, A Last Resort? National Inquiry into Children in Immigration Detention, (2004) at 214, 849–855.

131. United Nations Human Rights Committee, UNHCR Communication No 560/1993, CCPR/C/59/D/560/1993, 3 April 1997 at [9.4]-[9.5].

132. United Nations Human Rights Committee, UNHCR Communication No 1069/2002, CCPR/C/79/D/1069/2002, 29 October 2003.

133. Bakhtiyari v Australia, United Nations Human Rights Committee, UNHCR Communication No 1069/2002, CCPR/C/79/D/1069/2002, 29 October 2003 at [9.3].

134. Bakhtiyari v Australia, United Nations Human Rights Committee, UNHCR Communication No 1069/2002, CCPR/C/79/D/1069/2002, 29 October 2003 at [9.4]. The three findings of the Committee in relation to the length of detention, the absence of alternatives to detention and the unavailability of "substantive" judicial review to challenge detention are consistent with its decision in C v Australia, United Nations Human Rights Committee, UNHCR Communication No 900/1999, CCPR/C/76/D/900/1999, 28 October 2002 at [8.2]-[8.3], [9].

135. In this context the Committee considered that under Art 24(1) of the ICCPR, the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State: Bakhtiyari v Australia, United Nations Human Rights Committee, UNHCR Communication No 1069/2002, CCPR/C/79/D/1069/2002, 29 October 2003 at [9.7].

136. Bakhtiyari v Australia, United Nations Human Rights Committee, UNHCR Communication No 1069/2002, CCPR/C/79/D/1069/2002, 29 October 2003 at [9.5].

137. Section 55(2).

138. Immigration and Refugee Protection Act, s 56.

139. Section 57.

140. Immigration and Refugee Protection Act, s 58.

141. Part 14.

142. Immigration and Refugee Protection Act, s 60.

143. Immigration and Refugee Protection Regulations, reg 249.

144. See, eg, Reno v Flores 507 US 292 (1993).

145. Barrera-Echavarria v Rison 21 F 3d 314 at 317 per Browning and Noonan JJ (1984).

146. See, eg, Zadvydas 533 US 678 (2001). In Zadvydas, the Supreme Court construed legislation that authorised the further detention of an alien who was the subject of a removal order, but whose removal had not been secured within the prescribed 90 day removal period, in circumstances where no other country would accept that alien. The issue before the Court was whether the statute authorised the Attorney General to detain indefinitely such an alien. The Supreme Court held that such an alien cannot be detained indefinitely without a realistic prospect of another country accepting that alien, except in instances where release would harm the national security or the safety of the community. The Court construed the statute, read in light of the constitutional demands of the due process clause of the Fifth Amendment, as containing a "reasonable time" limitation. The post-removal-period detention statute implicitly limited the detention of an alien to a period "reasonably necessary to bring about that alien's removal from the United States": at 689. This period was subject to judicial review: at 699. The statute did not, therefore, permit indefinite detention: at 682–689.

147. United Nations Human Rights Committee, UNHCR Communication No 900/1999, CCPR/C/76/D/900/1990, 28 October 2002.

148. United Nations Economic and Social Council, Commission on Human Rights, Civil and Political Rights, Including Questions of: Torture and Detention, Report of the Working Group on Arbitrary Detention, UN Doc E/CN4/2000/4, (1999) Annex 2. In its Deliberation No 5, the Working Group proposes a number of principles concerning the detention of asylum seekers, including Principle 7, which requires that detention should be for a defined period "set by law" and "may in no case be unlimited or of excessive length": at Annex 2, 30.

149. (1992) 176 CLR 1.

150. (1992) 176 CLR 1 at 15.

151. (1992) 176 CLR 1 at 15.

152. (2004) 78 ALJR 1099; 208 ALR 124.

153. (2004) 78 ALJR 1156; 208 ALR 201.

154. See Al-Kateb v Godwin (2004) 78 ALJR 1099 at 1126 [140]; 208 ALR 124 at 160.

155. (1992) 176 CLR 1 at 58.

156. (1992) 176 CLR 1 at 34.

157. Al-Kateb v Godwin (2004) 78 ALJR 1099; 208 ALR 124.

158. (1908) 7 CLR 277 at 288–289.

159. Re Minister for Immigration and Multicultural Affairs; Ex parte Te (2002) 212 CLR 162 at 197 [124].

160. R v Davey; Ex parte Freer (1936) 56 CLR 381 at 387.

161. Prescribed by s 3 of the Immigration Restriction Act 1901 (Cth).

162. (1906) 4 CLR (Pt 1) 949.

163. (1906) 4 CLR (Pt 1) 949 at 951.

164. See Potter v Minahan (1908) 7 CLR 277.

165. (1906) 4 CLR (Pt 1) 395 at 417.

166. (1908) 7 CLR 277 at 305.

167. Keith (ed), Speeches and Documents on British Colonial Policy 1763–1917, (1961), Pt 2 at 242.

168. Irish Free State Constitution Act 1922 (Imp), Sch 2.

169. (2003) 78 ALJR 203 at 208 [24]; 203 ALR 143 at 149.

170. Harrison Moore, "The Crown as Corporation", (1904) 20 Law Quarterly Review 351 at 359.

171. Re Patterson; Ex parte Taylor (2001) 207 CLR 391 at 444–445 [160].

172. See (1906) 4 CLR (Pt 1) 395 at 396.

173. Al-Kateb v Godwin (2004) 78 ALJR 1099 at 1126 [140], 1127 [146], 1127–1128 [149]; 208 ALR 124 at 160, 161, 162.

174. (1992) 175 CLR 218.

175. Marion's Case (1992) 175 CLR 218 at 239.

176. (1992) 175 CLR 218 at 237–238 , 293 , 315.

177. (2000) 201 CLR 293.

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

179. (2000) 201 CLR 293 at 296–297 [3].

180. (2000) 201 CLR 293 at 297 [4]; See also at 318 [75] per Kirby J.

181. (2000) 201 CLR 293 at 318 [75].

182. (2003) 211 CLR 441.

183. This is now provided for in s 36(2)(b).

184. (2003) 211 CLR 441 at 456–457 [28].

185. Hewer v Bryant [1970] 1 QB 357 at 372.

186. See Eekelaar, "What are Parental Rights?", (1973) 89 Law Quarterly Review 210 at 214–218; Cretney and Masson, Principles of Family Law, 6th ed (1997) at 580.

187. [1970] 1 QB 357 at 372.

188. (1857) 7 El & Bl 186 [119 ER 1217].

189. (1857) 7 El & Bl 186 at 193–194 [119 ER 1217 at 1220].

190. (1857) 7 El & Bl 186 at 195 [119 ER 1217 at 1220]

191. See, in particular, the Family Law Act 1975 (Cth), Pt VII, Div 10 (ss 68D-68M), which is headed "The best interests of children and the representation of children".

192. [2003] 2 SCR 403 at 431. McLachlin CJ delivered the judgment of herself, Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ.

193. Marion's Case (1992) 175 CLR 218 at 237–238.

194. cf Odhiambo v Minister for Immigration and Multicultural Affairs (2002) 122 FCR 29 at 46–48; X v Minister for Immigration and Multicultural Affairs (1999) 92 FCR 524 at 537–538. See also WACB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] HCA 50 at [41]-[42].

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

196. This reads: "[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws".

197. Constitutional Law: Principles and Policies, 2nd ed (2002) at 684.

198. 426 US 229 (1976).

199. 446 US 55 (1980).

200. 481 US 279 (1987).

201. McCleskey v Kemp 481 US 279 at 292 (1987).

202. Constitution, s 51(xix) ("naturalization and aliens"). See Pochi v Macphee (1982) 151 CLR 101 at 109–110; Singh v The Commonwealth [2004] HCA 43 at [190], [200]-[205].

203. On 5 July 2004, after the hearing of this matter, each applicant was granted a temporary protection visa. Consequently, they are now "lawful non-citizens". See the Act, ss 5(1), 13, 14.

204. The Act, ss 189, 196. Due to the grant of the temporary protection visas, the applicants are no longer in detention.

205. Constitution, s 51(xxvii) ("immigration and emigration"); s 51(xxxix) ("matters incidental"). See eg Singh [2004] HCA 43 at [4], [46]-[47], [194], [256].

206. Constitution, covering cl 5.

207. Australian Communist Party v The Commonwealth (1951) 83 CLR 1 at 193 per Dixon J. See Dicey, Introduction to the Study of the Law of the Constitution, 10th ed (1959) at 202.

208. See, for example, Crock, "'You have to be stronger than razor wire': Legal issues relating to the detention of Refugees and asylum seekers", (2002) 10 Australian Journal of Administrative Law 33; Nicholas, "Protecting refugees: alternatives to a policy of mandatory detention", (2002) 8 Australian Journal of Human Rights 69.

209. See Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399 at 432 [77]; Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations (1986) 7 NSWLR 372 at 404–406.

210. Reasons of Gummow J at [119], [122], reasons of Callinan J at [230].

211. Reasons of Callinan J at [233]-[236].

212. See, for example, Silove et al, "Risk of Retraumatisation of Asylum-Seekers in Australia", (1993) 27 Australian and New Zealand Journal of Psychiatry 606 at 609–610; Sultan and O'Sullivan, "Psychological disturbances in asylum seekers held in long term

detention: a participant-observer account", (2001) 175 Medical Journal of Australia 593; Mares et al, "Seeking refuge, losing hope: parents and children in immigration detention", (2002) 10 Australian Psychiatry 91; Zwi et al, "A child in detention: dilemmas faced by health professionals", (2003) 179 Medical Journal of Australia 319; McEntee, "The Failure of Domestic and International Mechanisms to Redress the Harmful Effects of Australian Immigration Detention", (2003) 12 Pacific Rim Law & Policy Journal 263 at 267–269.

213. See the reasons of Gummow J at [134].

214. The Act, s 196(1). See reasons of Callinan J at [249]. See also s 198.

215. The Minister has the power to grant bridging visas in certain circumstances. See the Act, ss 72–76 and Migration Regulations 1994 (Cth), reg 2.20. There is no suggestion or evidence that such visas are generally granted to children.

216. The Act, s 198(1).

217. This is explained in the reasons of Callinan J at [249].

218. eg see Canadian Foundation for Children, Youth and the Law v Canada (Attorney General) [2004] SCC 4 at [10] applying the provisions of the Canadian Charter of Rights and Freedoms, Constitution Act 1982 (Can).

219. See the opening words of the Constitution, s 51: "The Parliament shall, subject to this Constitution, have power to make laws … with respect to … " (emphasis added).

220. See Constitution, s 71; R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254 at 270.

221. Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 33–34; Kruger v The Commonwealth (1997) 190 CLR 1 at 110–111 per Gaudron J (diss).

222. Lim (1992) 176 CLR 1 at 28. See Re Minister for Immigration and Multicultural Affairs; Ex parte Te (2002) 212 CLR 162 at 170 [21], 192–193 [110], see further at 217–218 [200], 229 [229]. The other exceptions include remand pending trial; involuntary detention for mental illness or infectious disease; punishment by Parliament of contempt; and by military tribunals for breach of military discipline. The categories are not closed: Kruger (1997) 190 CLR 1 at 162.

223. (1992) 176 CLR 1 at 19.

224. See reasons of McHugh J at [59].

225. See eg Chen Shi Hai v Minister for Immigration and Multicultural Affairs (2000) 201 CLR 293 at 318–320 [75]-[81]; Minister for Immigration and Multicultural and Indigenous Affairs v B (2004) 78 ALJR 737; 206 ALR 130.

226. See Cole v Whitfield (1988) 165 CLR 360 at 407–409.

227. Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs (2004) 78 ALJR 1056 at 1068 [62], 1077–1078 [116], 1078–1079 [120]-[124]; 208 ALR 271 at 285, 299, 300–301. See also B (2004) 78 ALJR 737 at 769 [174]; 206 ALR 130 at 173–174.

228. For the position in Canada, the United States, the United Kingdom and New Zealand, see reasons of McHugh J at [110]-[113]. For the position in Europe, see McAdam, "Asylum Seekers: Australia and Europe — worlds apart", (2003) 28 Alternative Law Journal 193. An important point of differentiation, referred to in Australian official reports as justifying the

policy of mandatory detention in Australia, is the absence of an obligation in Australia to possess, and to present, on official demand, a universal document of identity.

229. (2004) 78 ALJR 737 at 766–768 [160]-[169]; 206 ALR 130 at 170–173.

230. See above, fn 212.

231. Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218 at 242–243, referring to Hewer v Bryant [1970] 1 QB 357 at 372. See also E (Mrs) v Eve [1986] 2 SCR 388 at 407–417 per La Forest J.

232. See Marion's Case (1992) 175 CLR 218 at 255–263. See also B (2004) 78 ALJR 737 at 762 [136], 769 [176]-[177]; 206 ALR 130 at 164, 174.

233. Minister for the Interior v Neyens (1964) 113 CLR 411 at 419 , 422–425; Carseldine v Director of Department of Children's Services (1974) 133 CLR 345 at 348 , 351–353 , 362–363 , 365–366; Johnson v Director-General of Social Welfare (Vict) (1976) 135 CLR 92 at 97–98.

234. B (2004) 78 ALJR 737 at 769 [176]-[177]; 206 ALR 130 at 174.

235. eg the Constitution, ss 71, 72, 73, 75, 76, 77 and Judiciary Act 1903 (Cth), ss 30, 32, 33.

236. Jumbunna Coal Mine NL v Victorian Coal Miners' Assn (1908) 6 CLR 309 at 363–364 per O'Connor J; Lim (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 287–288 per Mason CJ and Deane J; Kartinyeri v The Commonwealth (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ; Plaintiff S 157/2002 v The Commonwealth (2003) 211 CLR 476 at 492 [29] per Gleeson CJ; Behrooz (2004) 78 ALJR 1056 at 1079–1080 [125]-[129]; 208 ALR 271 at 301–303; Al-Kateb v Godwin (2004) 78 ALJR 1099 at 1128 [150]; 208 ALR 124 at 162–163; Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji (2004) 78 ALJR 1156 at 1161–1162 [27]-[28]; 208 ALR 201 at 207–208; Coleman v Power [2004] HCA 39 at [240].

237. The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543 at 553 [11], 562–563 [43], 578 [93]-[94], 591–592 [132]; Attorney-General (WA) v Marquet (2003) 78 ALJR 105 at 133 [160]; 202 ALR 233 at 271; Coleman [2004] HCA 39 at [185], [225], [250]-[251].

238. The Act, s 5(1).

239. The Act, s 14(1), read with s 13(1).

240. The Act, s 5(1).

241. See, for example, the Act, ss 10, 78, 83, 84, 86, 199, 205, 211. See also ss 252A and 252B of the Act, explained by Gummow J at [129]. See also McHugh J at [46].

242. See above at [188].

243. See eg Australian Parliament, Joint Standing Committee on Migration (Senator McKiernan, Chairman), Asylum, Border Control and Detention, February 1994 ("Detention Report 1994"); Australia, Human Rights and Equal Opportunity Commission, Those who've come across the seas: Detention of unauthorised arrivals, (1998); Australian Parliament, Joint Standing Committee on Migration (Mrs Gallus, Chair), Not the Hilton: Immigration Detention Centres: Inspection Report, September 2000. See B (2004) 78 ALJR 737 at 766–768 [160]-[169]; 206 ALR 130 at 170–173.

244. See B (2004) 78 ALJR 737 at 766–768 [160]-[169]; 206 ALR 130 at 170–173.

245. Insurance Commission of Western Australia v Container Handlers Pty Ltd (2004) 78 ALJR 821 at 843 [115]; 206 ALR 335 at 365.

246. (2004) 78 ALJR 737 at 763–764 [144]-[146]; 206 ALR 130 at 166–167.

247. Done at New York on 20 November 1989, [1991] Australian Treaty Series No 4. See discussion in the reasons of McHugh J at [107]-[109], [114].

248. Done at New York on 19 December 1966, [1980] Australian Treaty Series No 23.

249. Done at New York on 19 December 1966, [1991] Australian Treaty Series No 39.

250. Bakhtiyari v Australia, Human Rights Committee Communication No 1069/2002 (2003). See B (2004) 78 ALJR 737 at 764–765 [147]-[151]; 206 ALR 130 at 167–168.

251. United Nations, Committee on the Rights of the Child, "Concluding observations of the Committee on the Rights of the Child: Australia", (1997) at [20]; United Nations, Commission on Human Rights, "Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention on its visit to Australia (Addendum)", (2002) at [28]-[35]; Bhagwati, "Report of Justice PN Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights: Mission to Australia 24 May to 2 June 2002: Human Rights and Immigration Detention in Australia", (2002) at [51]-[53].

252. Concern about a possible breach of international law was raised by the federal Attorney-General's Department and recorded in: Detention Report 1994 at 111 [4.18], 115 [4.36], 117 [4.41]. The majority report recommended consideration of release from detention, having regard to "special need based on age" and "Australia's international obligations": at xv [11]. No legislative amendment has followed this recommendation.

253. Plaintiff S 157/2002 (2003) 211 CLR 476 at 492 [29] per Gleeson CJ; Coleman [2004] HCA 39 at [225], [240] and authorities cited in fn 230.

254. Young v Registrar, Court of Appeal [No 3] (1993) 32 NSWLR 262 at 272–274; Re Kavanagh's Application (2003) 78 ALJR 305 at 308 [13]; 204 ALR 1 at 5.

255. (2004) 78 ALJR 1056; 208 ALR 271.

256. Reasons of Callinan J at [260]-[264].

257. (2004) 78 ALJR 1099; 208 ALR 124.

258. The Act, ss 196 and 198.

259. See reasons of Gleeson CJ in Al-Kateb (2004) 78 ALJR 1099 at 1102 [3], 1105–1106 [21]-[23]; 208 ALR 124 at 126, 130–131.

260. (The rationale of a legal rule no longer being applicable, that rule itself no longer applies). See Zadvydas v Davis 533 US 678 at 699 (2001), where Breyer J, for the Court, cites 1 Coke Institutes 70b. See further Al-Kateb (2004) 78 ALJR 1099 at 1127 [145]; 208 ALR 124 at 161.

261. See Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji (2004) 78 ALJR 1156 at 1160–1161 [16]-[22] per Gummow J, 1161 [25]-[26] of my reasons; 208 ALR 201 at 205–207, 207.

262. See reasons of Callinan J at [239]-[242].

263. See reasons of Callinan J at [240].

264. See eg Hylton v Hylton (1754) 2 Ves Sen 547 [28 ER 349]; Bainbrigge v Browne (1881) 18 Ch D 188; Lamotte v Lamotte (1942) 42 SR NSW 99; Re Pauling's Settlement Trusts [1964] Ch 303.

265. WACB v The Minister for Immigration and Multicultural and Indigenous Affairs [2004] HCA 50.

266. Pursuant to O 55 r 2 of the High Court Rules.

267. (2004) 78 ALJR 1099; 208 ALR 124.

268. (2004) 78 ALJR 1156; 208 ALR 201.

269. (2004) 78 ALJR 1099 at 1144–1145 [247]; 208 ALR 124 at 185–186.

270. Al-Kateb v Godwin (2004) 78 ALJR 1099 at 1148 [266]; 208 ALR 124 at 190.

271. (2004) 78 ALJR 1099 at 1146 [254]; 208 ALR 124 at 188.

272. s 189(1).

273. s 196.

274. ss 198, 199.

275. (2004) 78 ALJR 1099 at 1146–1147 [252]-[262]; 208 ALR 124 at 187–189.

276. Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

277. cf Kruger v The Commonwealth (1997) 190 CLR 1 at 109–110 per Gaudron J.

278. (1992) 176 CLR 1.

279. The applicants' parents did not hold visas on entry to Australia (s 42 of the Act) and have not become entitled to remain in Australia as refugees holding protection visas (s 36 of the Act).

280. In Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 33–34 Brennan, Deane and Dawson JJ thought it relevant that a person could under the legislation there terminate detention by seeking repatriation.

281. (1992) 176 CLR 1.

282. (1997) 190 CLR 1.

283. (2004) 78 ALJR 1056; 208 ALR 271.

284. (1992) 176 CLR 1.

285. (2004) 78 ALJR 1099; 208 ALR 124.

286. cf Kruger v The Commonwealth (1997) 190 CLR 1 at 110–111 per Gaudron J.

287. (2004) 78 ALJR 1099 at 1153 [291]; 208 ALR 124 at 196–197.

288. (2004) 78 ALJR 1099 at 1153 [291]; 208 ALR 124 at 196–197.

289. See Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs (2004) 78 ALJR 1056 at 1097 [219]; 208 ALR 271 at 326.

290. See Minister for Immigration and Multicultural and Indigenous Affairs v B (2004) 78 ALJR 737 at 776 [215]; 206 ALR 130 at 184.

291. Minister for the Interior v Neyens (1964) 113 CLR 411; cf Carseldine v Director of Department of Children's Services (1974) 133 CLR 345; Johnson v Director-General of Social Welfare (Vict) (1976) 135 CLR 92.