*Samuel Whittaker**

ANY TIME FOR ANY REASON? THE EXPANDED POWERS OF IMMIGRATION DETENTION: *COMMONWEALTH V AJL20* (2021) 391 ALR 562

I Introduction

Australia's mandatory immigration detention policy has not been without controversy in its almost 30 years of application.[1] During this period, the various iterations of the *Migration Act 1958* (Cth) ('*Migration Act*') have required the detention of non-citizens who are in Australia's migration zone and are without a valid permit or visa to be so.[2] The policy has attracted international criticism as a major and arbitrary breach of international human rights.[3] As at 28 February 2021, there were just over 100 people who have been in an immigration detention facility for five years or more.[4] Unfortunately, the case of *Commonwealth v AJL20*[5] has done nothing to improve this situation and has arguably expanded the powers of the executive for the detention of unlawful non-citizens.

---

* LLB (Adel); Student Editor, *Adelaide Law Review* (2021).

1 Sangeetha Pillai, '*AJL20 v Commonwealth*: Non-Refoulement, Indefinite Detention and the "Totally Screwed"', *Australian Public Law* (Blog Post, 8 August 2021) <https://auspublaw.org/2021/09/ajl20-v-commonwealth-non-refoulement-indefinite-detention-and-the-totally-screwed/>.

2 From 1992–94 see *Migration Act 1958* (Cth) s 54L. From 1994–present: see at ss 189, 196 ('*Migration Act*').

3 Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) 23–4 [9.4] ('*A v Australia*'); Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) 17–19 ('*Bakhtiyari v Australia*'); Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 58th sess, UN Doc E/CN.4/2002/77 (19 December 2001) 18; Human Rights and Equal Opportunity Commission, Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Australia's Refugee and Humanitarian Program* (November 2001) 2–3; Francesco P Motta, '"Between a Rock and a Hard Place": Australia's Mandatory Detention of Asylum Seekers' (2002) 20(3) *Refuge* 12, 24–6. For a comprehensive overview of how Australia's immigration detention framework sits within the international human rights context: see Matthew T Stubbs, 'Arbitrary Detention in Australia: Detention of Unlawful Non-Citizens under the *Migration Act 1958* (Cth)' (2006) 25(1) *Australian Year Book of International Law* 273, 285–308.

4 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, Australian Government, 28 February 2021) 12.

5 (2021) 391 ALR 562 ('*Commonwealth v AJL20*').

Liberty, in the sense of the freedom from detention, has long been recognised as a fundamental right in the common law.[6] To deprive a person of this right by involuntary detention is self-evidently punitive in character and the power to so detain 'exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[7] Chapter III of the *Australian Constitution* ('*Constitution*') exclusively vests the judicial power of the Commonwealth in courts. The separation of powers doctrine, therefore, prevents Parliament from authorising the detention of persons without 'operat[ing] through or in conformity with Chap III'.[8] However, for more than a century now, it has been recognised that the aliens power in s 51(xix) of the *Constitution* validly authorises Parliament to exclude 'aliens' by deportation and that a 'degree of restraint necessary to render the deportation effective is permissible and justifiable'.[9] The extent to which laws might authorise the detention of non-citizens is limited by what is 'reasonably capable of being seen as necessary for the purposes of deportation or … to enable an application for an entry permit to be made and considered'.[10] To this end, the power to authorise detention is limited to the minimum extent necessary to effectively facilitate the removal of an unlawful non-citizen or permit an application for a valid visa to be made and considered. This caveat has been given effect by the recognition of a duty to carry out the purpose of the detention as soon as reasonably practicable.[11] However, in *Commonwealth v AJL20*, by a 4:3 majority, the High Court held that the purposes of the executive in detaining unlawful non-citizens are no longer relevant in considering the lawfulness of the detention.[12]

This case note argues that the decision in *Commonwealth v AJL20* has taken the power to detain unlawful non-citizens under s 51(xix) too far. It will proceed in Part II with a summary of the background to the case, the relevant legislation and the decision from which it was appealed. Part III will outline each of the three judgments, noting distinctions in the approaches taken by each. Finally, before concluding, Part IV will discuss: whether the approach of the majority or the dissenting judgments should be preferred with regard to the extent that the *Migration Act* validly authorises detention; what the remedy should be where the detention of an unlawful non-citizen is found to be unlawful; and the implications of the case in light of recent amendments to s 197C of the *Migration Act*. This discussion will

6 *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 79 (Isaacs J) ('*Ex parte Walsh and Johnson*'), citing *Magna Carta 1215* ch 29.

7 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) ('*Chu Kheng Lim*').

8 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

9 *Robtelmes v Brenan* (1906) 4 CLR 395, 412 (Barton J) ('*Robtelmes*'). See also *Chu Kheng Lim* (n 7) 30–1 (Brennan, Deane and Dawson JJ).

10 *Chu Kheng Lim* (n 7) 33 (Brennan, Deane and Dawson JJ).

11 *Al-Kateb v Godwin* (2004) 219 CLR 562, 643 [241] (Hayne J) ('*Al-Kateb*'); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 233 [34] (French CJ, Hayne, Crennan, Kiefel and Keane JJ) ('*Plaintiff S4*').

12 *Commonwealth v AJL20* (n 5) 582 [71] (Kiefel CJ, Gageler, Keane and Steward JJ).

conclude by highlighting the pertinent need in Australia to enshrine the protection of rights.

II Background

A *Facts*

This case concerns an appeal by the Commonwealth from a decision of the Federal Court which ordered the release of the respondent from immigration detention. The respondent is a Syrian national who arrived in Australia on a child visa in 2005.[13] In October 2014, his visa was cancelled on character grounds by the Minister for Immigration and Border Protection ('Minister') pursuant to s 501(2) of the *Migration Act*.[14] He was subsequently detained under s 189(1) of the *Migration Act* as an unlawful non-citizen.[15] On 25 July 2019, the respondent's avenues for a valid visa had been exhausted after a request for the Minister to exercise his discretion under s 195A of the *Migration Act* was declined.[16] From 26 July 2019, he was therefore detained for the sole purpose of removal.[17] However, by 27 November 2019, the executive had not yet taken steps to effect his removal as it was discovered that he was owed protection, and thus, removal to his home country would breach Australia's non-refoulment obligations.[18] From November, the executive had begun exploring other removal options such as deportation to Lebanon.[19]

In 2020, the respondent brought proceedings in the Federal Court against the Commonwealth alleging that his detention was unlawful, since no steps were taken after 26 July 2019 to effect his removal as soon as reasonably practicable under s 198(6) of the *Migration Act*.[20] He sought damages for false imprisonment and an order of habeas corpus for his release.[21] These proceedings were heard before Bromberg J on 14 July 2020 and 17 July 2020.[22] His Honour concluded that the detention was unlawful and ordered the plaintiff (as he was in that case) to be released on 11 September 2020.[23]

13 Ibid 565 [1].

14 *AJL20 v Commonwealth* (2020) 279 FCR 549, 552 [4] (Bromberg J) ('*AJL20 v Commonwealth*').

15 *Commonwealth v AJL20* (n 5) 565 [1] (Kiefel CJ, Gageler, Keane and Steward JJ).

16 Ibid 566 [6].

17 Ibid 586 [85] (Gordon and Gleeson JJ).

18 Ibid 605 [147]–[148] (Edelman J).

19 Ibid.

20 *AJL20 v Commonwealth* (n 14) 553 [6] (Bromberg J).

21 Ibid.

22 See ibid.

23 Ibid 589–90 [172]–[178].

B *Legislation*

Section 189 of the *Migration Act* requires an officer to detain a person whom the officer 'knows or reasonably suspects … is an unlawful non-citizen'.[24] Under s 196(1), that person must be kept in detention until, inter alia, they are either: removed from Australia under ss 198 or 199; or granted a visa.[25] Where a visa application has been refused or the visa cannot be granted and another valid application for a visa has not been made, s 198(6) of the *Migration Act* obliges an 'officer' to remove the unlawful non-citizen 'as soon as reasonably practicable'.[26] Section 197C(2) provides that this duty arises irrespective of Australia's non-refoulement obligations.[27]

C *Decision in the Federal Court*

Justice Bromberg considered the 'issue at the heart of the contest' to be 'whether s 196 authorises the ongoing detention of an unlawful non-citizen when the removal purpose … is no longer being carried into effect as soon as reasonably practicable'.[28] His Honour determined that no such detention was, or could be, authorised by the *Migration Act*.[29] This is because the ability to authorise detention under s 51(xix) is constrained only for a duration that is necessary or incidental to carrying out the authorised purpose, lest the detention risk contravening the implications of Ch III.[30] In this way, s 198 ensures the validity of s 196 by requiring removal as soon as reasonably practicable and a '[d]eparture from … [this] requirement would entail [a] departure from the purpose' of detention.[31] Justice Bromberg concluded that, when read in its statutory and constitutional context, s 196 could not be read as authorising the plaintiff's detention *until* he is removed where the executive fails to effect his removal as soon as reasonably practicable.[32] In doing so, his Honour held that the relevant inquiry involves considering whether reasonably practicable steps to pursue removal were taken or not.[33] This approach was consistent with the decision of the majority in *Al-Kateb*, which found that the continued detention of an unlawful non-citizen would remain validly authorised by the terms of the *Migration Act* where removal was not reasonably practicable or possible.[34] In that case, the

---

24 *Migration Act* (n 2) s 189(1).

25 Ibid ss 196(1)(a), (c).

26 Ibid s 198(6).

27 Ibid s 197C.

28 *AJL20 v Commonwealth* (n 14) 557 [21] (Bromberg J).

29 Ibid 564 [44].

30 Ibid 562 [38], citing *Plaintiff S4* (n 11) 232 [29] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

31 *AJL20 v Commonwealth* (n 14) 560 [31], quoting *Plaintiff S4* (n 11) 233 [34].

32 *AJL20 v Commonwealth* (n 14) 555 [16]–[17], 564 [44].

33 Ibid 573 [89].

34 *Al-Kateb* (n 11) 581 [34] (McHugh J), 631 [197]–[198] (Hayne J, Heydon J agreeing at 662–3 [303]), 662 [301] (Callinan J).

Commonwealth was precluded by 'obstacles beyond its control' from taking further steps to remove the plaintiff.[35] However, in the present case, no evidence demonstrated that the failure to take steps to remove AJL20 was due to the fact that none could be taken.[36] This distinction was best described in Gordon and Gleeson JJ's dissenting judgment on appeal: '[*Al-Kateb*] was a case where the Executive *could not* remove an unlawful non-citizen. These appeals were concerned with a period … where the Executive *would not* remove'.[37]

Justice Bromberg found that from 26 July 2019, the Commonwealth had not removed AJL20 as soon as reasonably practicable due to its consideration of Australia's international non-refoulment obligations.[38] This consideration is expressly denied relevance by s 197C, and as a result, the detention did not comply with what is authorised by the *Migration Act* and was therefore unlawful.[39] After considering relevant authorities, Bromberg J determined that 'habeas is the appropriate remedy' and proceeded to order the release of the applicant.[40] His Honour further decided that the plaintiff was entitled damages for false imprisonment from 26 July 2019.[41]

III Decision

There were two distinct, yet interrelated issues for the Court to resolve on appeal. First, the lawfulness of the respondent's detention needed to be determined by reference to the nature and extent of detention that is validly authorised under ss 189 and 196 of the *Migration Act*. Second, what should be the appropriate remedy if AJL20's detention was found to be unlawful or where there was noncompliance with any duty associated with it. Three judgments were handed down. The majority, comprising of Kiefel CJ, Gageler, Keane and Steward JJ, found in favour of the Commonwealth, resulting in the respondent being returned to detention.[42] Justices Gordon, Edelman and Gleeson dissented, with Edelman J writing a separate judgment.[43]

A *Chief Justice Kiefel, Gageler, Keane and Steward JJ*

In answer to the first issue, the majority reaffirmed the validity of ss 189 and 196 of the *Migration Act* in all their potential applications.[44] Their Honours construed the

35 *AJL20 v Commonwealth* (n 14) 578 [116]–[117].

36 Ibid 580 [125].

37 *Commonwealth v AJL20* (n 5) 588 [91] (emphasis in original).

38 *AJL20 v Commonwealth* (n 14) 574 [95], 589 [171].

39 Ibid 554 [10].

40 Ibid 569 [72], 589 [174].

41 Ibid 552 [3], 589 [173].

42 *Commonwealth v AJL20* (n 5) 583 [75]–[76] (Kiefel CJ, Gageler, Keane and Steward JJ).

43 Ibid 592–3 [104]–[105] (Gordon and Gleeson JJ), 607 [156]–[157] (Edelman J).

44 Ibid 575 [45] (Kiefel CJ, Gageler, Keane and Steward JJ).

Migration Act as a whole, finding that the operation of it hinges on the dichotomy drawn between lawful non-citizens and unlawful non-citizens.[45] This identifies who is and who is not entitled to be at liberty in the Australian community.[46] The wording of ss 189 and 196 is mandatory: unlawful non-citizens are not entitled to be at liberty in the Australian community and must be taken into and kept in detention until the occurrence of one of the terminating events listed in s 196(1).[47] In their Honours' view, the *Migration Act* does not confer a *power* to detain, but a *duty* that requires detention.[48]

The purposes of the executive in detaining unlawful non-citizens are therefore irrelevant as detention is mandated.[49] The fact that the duration of the detention required by s 189 can be determined at any time by reference to the terminating events in s 196 ensures its lawfulness.[50] Furthermore, the duty in s 198 'hedge[s]' the duty to keep unlawful non-citizens in detention by providing an enforceable means that ensures a detainee is not kept in involuntary detention for longer than what is reasonably capable of being seen as necessary for the purposes of removal.[51] This duty is enforceable by an order for mandamus, requiring the executive to perform that duty if it has not been complied with.[52]

The majority criticised the primary judge for 'conflat[ing] questions of constitutional validity with questions of statutory interpretation' by concluding that s 196 was to be read down to save its validity.[53] Since the detention required by the *Migration Act* is valid, it is valid in all its potential applications — the constitutional question is for the authorising statute and not to be answered by assessing the validity of any particular application.[54] Therefore, as the respondent was at all material times an unlawful non-citizen, his detention was not unlawful.[55] Although it was accepted that the s 198 duty had been breached, this did not render the detention unlawful.[56] The appropriate remedy for this breach is an order for mandamus. However, since this remedy was not asked for, no order was made.[57]

45 Ibid 567 [14].

46 Ibid.

47 Ibid 572 [33]–[34], citing *Al-Kateb* (n 11) 647 [254], 638 [226] (Hayne J).

48 *Commonwealth v AJL20* (n 5) 582 [72].

49 Ibid 577 [51], 579 [61].

50 Ibid 575 [45].

51 Ibid 574–5 [44]–[45].

52 Ibid 577 [52].

53 Ibid 574 [42].

54 Ibid 574 [43], citing *Wotton v Queensland* (2012) 246 CLR 1, 14 [22].

55 *Commonwealth v AJL20* (n 5) 582 [72].

56 Ibid 577 [53], 583 [73].

57 Ibid.

B *Gordon and Gleeson JJ*

In their Honours' dissent, Gordon and Gleeson JJ found the detention unlawful due to the failure of the Department of Home Affairs to take steps to remove the respondent as soon as reasonably practicable.[58] Since the executive has no non-statutory power to detain, the duration of detention must be fixed by what is necessary for the execution of the powers and fulfillment of the purposes under the *Migration Act*.[59] Their Honours characterised the power to detain under the *Migration Act* by interpreting the 'plain text of the provisions' according to the 'constitutional framework within which they sit'.[60] Where the only lawful purpose for detention is to remove the unlawful non-citizen, removal must occur as soon as reasonably practicable if the detention is to be reasonably capable of being seen as *necessary* for that purpose.[61] Since the executive had prolonged the detention, contrary to s 197C, by considering removal in compliance with Australia's non-refoulment obligations, the respondent's detention was unlawful as it both exceeded the authorised duration and was not for an authorised purpose.[62]

Justices Gordon and Gleeson considered that the proper remedy for unlawful detention is one that provides an immediate remedy — the writ of habeas corpus ordering the respondent to be released.[63] Their Honours rejected the Commonwealth's submission that mandamus was the appropriate remedy as it is a prospective remedy which fails to account for the wrong ex post facto; that being the period of unlawful detention of the respondent.[64] Their Honours accepted that the release of the respondent would not nullify the duty of the executive to re-detain him, however, he could only be *kept* in detention for proper purposes.[65]

C *Justice Edelman*

Justice Edelman rejected the finding of the majority that the purposes of the executive in performing the duty to detain unlawful non-citizens are irrelevant.[66] His Honour accepted the dichotomy between lawful non-citizens and unlawful non-citizens as laid out by the *Migration Act*, however, held that this dichotomy did not reflect who could and could not be at liberty in the Australian community.[67] His Honour confirmed the distinction, as identified by Gordon and Gleeson JJ, between

58 Ibid 592 [103] (Gordon and Gleeson JJ).

59 Ibid 584 [80], citing *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 597 [31].

60 *Commonwealth v AJL20* (n 5) 585–6 [84].

61 Ibid 587–8 [90].

62 Ibid 591–2 [102]–[103].

63 Ibid 589–90 [94]–[97].

64 Ibid 588–90 [93]–[97], 590–1 [99].

65 Ibid 587 [89].

66 Ibid 593–4 [109] (Edelman J).

67 Ibid 596 [116].

the duty of taking into detention and the duty of keeping in detention.[68] While the former duty is mandatory, the latter is subject to the discretionary power of the Minister to grant a visa under s 195A or make a residence determination under s 197AB.[69] Additionally, his Honour found that the performance of a statutory duty will be constrained 'according to the scope and purposes of the statute, just as the exercise of [a statutory power] … is so constrained'.[70] 'Without such an implication', the *Migration Act* could authorise the executive to detain for any purpose, including a punitive purpose, up until the detainee applies to have the s 198 duty enforced.[71] Should s 189 empower the executive to detain unlawful non-citizens for punitive purposes at any time, it would be unconstitutional to that extent.[72] The purpose of the executive is to be assessed objectively in the circumstances.[73] Since the executive detained the respondent for removal in compliance with Australia's non-refoulment obligations, the purpose of the detention was not one which was authorised under the *Migration Act* and was therefore unlawful.[74]

In discussing the appropriate remedies, his Honour separated the duty of detention for a proper purpose and the duty of removal as soon as reasonably practicable.[75] The failure of the latter duty would not necessarily render the detention unlawful. His Honour explained that where the failure was linked to the mere inadvertence of the executive, the detention may still be for a purpose validly authorised by the *Migration Act* but attract the remedy of mandamus.[76] However, such a failure could be evidence of a purpose of detention not authorised by the *Migration Act*.[77] Where the detention is unlawful due to it not being performed for an authorised purpose, the proper remedy is habeas corpus to 'rectify the unlawful nature of the detention by release'.[78]

IV Comment

A *Duty or Power*

The majority found that since the relevant sections require, not authorise, detention based on the dichotomy between unlawful non-citizens and lawful non-citizens,[79]

68 Ibid 596 [117]–[118] (Edelman J), 586 [86] (Gordon and Gleeson JJ).

69 Ibid 596 [116]. See *Migration Act* (n 2) ss 195A, 197AB.

70 *Commonwealth v AJL20* (n 5) 601 [135].

71 Ibid 602 [137].

72 Ibid.

73 Ibid 603 [141].

74 Ibid 605 [148], 606 [151].

75 Ibid 594 [110].

76 Ibid 594–5 [112].

77 Ibid 604–5 [145].

78 Ibid 599 [130].

79 *Al-Kateb* (n 11) 581 [33]–[34] (McHugh J).

the purposes of the executive in detaining unlawful non-citizens are irrelevant.[80] The detention authorised by ss 189 and 196 is valid because it is circumscribed by the terms of the *Migration Act* such that the detention of an unlawful non-citizen cannot occur for purposes unconnected with 'their entry to [or] … departure from Australia'.[81] Their Honours held that the length of detention is at no point dependent on the discretion of the executive and therefore lawful.[82] However, as pointed out by Edelman J, this is not accurate.[83]

If the executive were empowered to detain until the *event* of removal, with no penalty or compensation for a failure to remove as soon as reasonably practicable, the detention continues up and until an order is obtained enforcing the s 198 duty at the 'unbounded, [or] unconstrained' discretion of the executive.[84] As noted by Gleeson and Gordon JJ, some detainees may have 'no means of obtaining information necessary to mount a case for mandamus'.[85] Furthermore, such detention could also be undertaken for punitive purposes by the cancellation of a visa on character grounds and the deliberate delaying of removal in the absence of any unlawfulness attaching to such actions — this is clearly not within the competence of Parliament to authorise under s 51(xix).[86] Finally, where removal is reasonably practicable, there is great difficulty in finding a constitutionally permissible purpose for which the continued detention is reasonably capable of being seen as necessary to fulfill.[87] Therefore, according to the *Chu Kheng Lim* principle,[88] the extent of the detention authorised by s 51(xix) should be limited for a duration of what is reasonably capable of being seen as necessary for the completion of its authorised purpose.[89]

To be clear, it is accepted that a failure by the executive to 'diligently … perform' the duty in s 198 does not erase the duty to detain unlawful non-citizens.[90] However, the scheme of the *Migration Act* does not permit the *continued* detention of unlawful non-citizens where the executive is not willing to detain for an authorised purpose.[91]

---

80 *Commonwealth v AJL20* (n 5) 577 [51].

81 *Chu Kheng Lim* (n 7) 57 (Gaudron J).

82 *Commonwealth v AJL20* (n 5) 575 [45].

83 Ibid 601 [135]–[136].

84 Ibid 590 [97], 590 [99] (Gordon and Gleeson JJ). See also *Plaintiff S4* (n 11) 233 [34] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

85 *Commonwealth v AJL20* (n 5) 590–1 [99] (Gordon and Gleeson JJ).

86 Ibid 598 [128] (Edelman J); *Migration Act* (n 2) s 501(2).

87 *Commonwealth v AJL20* (n 5) 592 [103] (Gordon and Gleeson JJ), 604–5 [145] (Edelman J). See also *Plaintiff S4* (n 11) 233 [34] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

88 See *Chu Kheng Lim* (n 7) 27 (Brennan, Deane, Dawson JJ).

89 *Commonwealth v AJL20* (n 5) 584 [79]–[80] (Gordon and Gleeson JJ), 598 [127] (Edelman J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 370 [140] (Crennan, Bell and Gageler JJ).

90 *Commonwealth v AJL20* (n 5) 576 [48] (Kiefel CJ, Gageler, Keane and Steward JJ).

91 Ibid 593–4 [109] (Edelman J).

Where the executive is so unwilling, perhaps due to the presence of some undesirable collateral consequence, Parliament has provided the executive with powers under ss 195A or 197AB of the *Migration Act* to grant a Bridging (Removal Pending) Visa or order community residence respectively.[92] Since the terminating events in s 196(1) require positive action on the part of the executive, the 'duty' to *keep* in detention is clearly subject to the discretion of the executive.[93] Therefore, since detention could occur under the *Migration Act* for purposes other than those expressly provided for, the purpose of the executive in keeping an unlawful non-citizen in detention is relevant to the question of lawfulness. Regretfully, the law no longer reflects this sentiment with the majority authorising the detention of unlawful non-citizens at the pleasure of the executive, for any period until the occurrence of one of the events listed in s 196(1) in the absence of any application for an order of mandamus that the duty under s 198 be fulfilled.

B *Remedy*

There is a serious question over what remedy should be granted to an unlawful non-citizen where it is found that their detention is unlawful. The obvious answer is to release the person. However, to where should they be released? As identified by Hayne J in *Al-Kateb*, it is not a question of the detention of one 'who, but for the fact of detention, would have been, and been entitled to be, free in the Australian community'.[94] As early as 1906, it was recognised that the right to exclude aliens was retained in Australia by the operation of s 51(xix).[95] In *Chu Kheng Lim*, this right to exclude was identified as a necessary incident of sovereignty[96] and in the Australian context, 'exclusion' means the right to exclude from the Australian community, not merely the geographical locality.[97] Indeed, Gaudron J held in *Chu Kheng Lim* that '[a]liens … have no right to enter *or remain* in Australia unless such right is *expressly granted*',[98] confirming the statement by Isaacs J in *Ex parte Walsh and Johnson; Re Yates* that aliens have 'no right to enter Australia against the will of its people'.[99]

Where an unlawful non-citizen cannot be removed, it was held in *Al-Kateb* that the segregation of such a person is a necessary incident of the right of the executive to exclude them from Australia.[100] The majority in *Commonwealth v AJL20* stated that

---

92 Ibid 583 [74] (Kiefel CJ, Gageler, Keane and Steward JJ), 596 [116] (Edelman J).

93 Ibid 585 [83] (Gordon and Gleeson JJ).

94 *Al-Kateb* (n 11) 637 [219] (Hayne J).

95 *Robtelmes* (n 9) 397, 400 (Griffith CJ).

96 *Chu Kheng Lim* (n 7) 29 (Brennan, Deane, Dawson JJ).

97 Ibid 71 (McHugh J).

98 Ibid 57 (Gaudron J) (emphasis added).

99 *Ex parte Walsh and Johnson* (n 6) 82.

100 *Al-Kateb* (n 11) 645 [247], 648 [255], 651 [267] (Hayne J). Chief Justice Gleeson's dissent is of no assistance to the contrary as his Honour relied on the principle of legality to find the words of the statute did not expressly provide for the indefinite

it had long been recognised that s 51(xix) includes a power to prevent unauthorised entry into the Australian community.[101] Indeed, the preponderance of authority has accepted that Parliament possesses the power under s 51(xix) to exclude and prevent the entry of non-citizens.[102] A majority of the Court now seems to accept segregation from the Australian community until removal can be effected as a valid corollary of the aliens power.[103]

While Ch III generally prohibits Parliament from enacting legislation which empowers the executive to detain without trial,[104] the power to detain or segregate unlawful non-citizens is not merely an incident of the aliens power; it is 'at the centre of the power … directly operating on the subject matter'.[105] While directing a writ of habeas corpus is well recognised to be within the Court's jurisdiction to order release from unlawful imprisonment,[106] the effect of habeas corpus in the case of unlawful non-citizens goes much further than restoring the status quo; it grants a right to be in the Australian community.[107] The granting of a right that previously did not exist is not consistent with the nature of judicial power, which 'is concerned with the ascertainment, declaration and enforcement of the rights and

abrogation of the right to liberty. This does not refer to the content of the *Constitutional* power to authorise such detention: at 577–8 [19]–[23]. Justice Gummow (with whom Kirby J agreed) did not need to address this issue by finding that the ability to detain indefinitely is inconsistent with Ch III limitations on the powers of Parliament, though his Honour may be taken to imply that the right to exclude under s 51(xix) is not absolutely within Parliament's competence: at 613 [140].

101 *Commonwealth v AJL20* (n 5) 569 [21] (Kiefel CJ, Gageler, Keane, and Steward JJ).

102 *Robtelmes* (n 9); *Ex parte Walsh and Johnson* (n 6) 81–2 (Isaacs J); *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 558–9 (Latham CJ) ('*Koon Wing Lau*'); *R v Forbes; Ex parte Kwok Kwan Lee* (1971) 124 CLR 168, 173 (Barwick CJ); *Chu Kheng Lim* (n 7) 32 (Brennan, Dean and Dawson JJ); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 8–9 [26] (Gleeson CJ); *Al-Kateb* (n 11) 585 [47] (McHugh J), 644–5 [247] (Hayne J), 658 [289] (Callinan J), 662–3 [303] (Heydon J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 367 [130] (Hayne J), 381 [189] (Kiefel and Keane JJ). See also the discussion of authority in *Commonwealth v AJL20* (n 5) 568–72 [20]–[33] (Kiefel CJ, Gageler, Keane and Steward JJ).

103 *Commonwealth v AJL20* (n 5) 574–5 [44] (Kiefel CJ, Gageler, Keane and Steward JJ).

104 Jeffrey Steven Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-Criminal Detention' (2012) 36(1) *Melbourne University Law Review* 41, 70.

105 *Al-Kateb* (n 11) 583 [39] (McHugh J). Cf Joyce Chia, 'Back to the Constitution: The Implications of Plaintiff S4/2014 for Immigration Detention' (2015) 38(2) *University of New South Wales Law Journal* 628, 650.

106 See *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 57 [108] (Gummow J).

107 *Commonwealth v AJL20* (n 5) 579 [60] (Kiefel CJ, Gageler, Keane and Steward JJ).

liabilities of the parties *as they exist* … at the moment the proceedings are instituted'.[108] As recognised in *Al-Kateb*, the separation of powers doctrine under the *Constitution* is not just concerned with preventing the encroachment of legislative and executive power on judicial power, it also prevents Ch III courts from exercising those powers exclusively granted to the legislature and the executive.[109] Therefore, with respect, there is difficulty with the decision of Bromberg J which ordered that AJL20 be released. A recent example of a successful application for habeas corpus, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL*,[110] did not need to confront this issue as the detainee, in this case, had already been granted a visa and therefore possessed a lawful right to be at liberty in the Australian community.[111] In *Al-Kateb*, Gleeson CJ did not address this difficulty when his Honour found that habeas corpus was the appropriate remedy by finding that the words of the *Migration Act* had not clearly authorised the executive to abrogate the common law right to liberty for an indefinite period.[112] The appropriate remedy would therefore appear to be mandamus ordering removal as soon as reasonably practicable to bring about the end of the detention.

However, this conclusion fails to remedy the previous period of unlawful detention and therefore does not deter the executive from detaining for an improper purpose *until* the time such an order is obtained. As recognised by Gordon and Gleeson JJ, damages would not be able to be claimed for the preceding period of unlawful detention.[113] Their Honours approached the issue by granting an order for release while simultaneously acknowledging that the provisions of the *Migration Act* would immediately require re-detention.[114] However, this detention could only continue if it was for a proper purpose.[115] By doing so, their Honours avoided granting a right which the *Migration Act* expressly denies.[116] The unlawful non-citizen is required to be re-detained, but since they can only be *kept* in detention for a proper purpose, the executive is placed in a position of having to either detain for a proper purpose, or

108 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 463 (Isaacs and Rich JJ) (emphasis added). See also: *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); Gordon (n 104) 55–6; Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2nd ed, 2018) 269.

109 *Al-Kateb* (n 11) 595 [74] (McHugh J).

110 [2020] FCA 394, [30]–[31] (Wigney J).

111 See also: *Chan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 308, 323–4 [54] (Gray J), where notice of a visa cancellation had not been effected; *Koon Wing Lau* (n 102) 555–6 (Latham CJ), where legislation only granted authority to deport.

112 *Al-Kateb* (n 11) 578–80 [24]–[29].

113 *Commonwealth v AJL20* (n 5) 590–1 [99].

114 Ibid 593 [105] (Gordon and Gleeson JJ).

115 Ibid 596 [118] (Edelman J).

116 *Migration Act* (n 2) s 189.

alternatively grant a lawful right of being at liberty in the Australian community.[117] Due to the risk of a claim for damages, the executive is then constrained to detain only for proper purposes and only for a duration in which those purposes can be carried into effect as soon as reasonably practicable.

C *Addendum: Section 197C Reform*

Recent amendments to s 197C[118] have strengthened the ability of the executive to keep unlawful non-citizens in detention. The amended section now provides that 'section 198 does not require or authorise an officer to remove an unlawful non-citizen' to the country from which they are owed protection, so long as they have not asked to be removed to that country in writing.[119] Section 197C was expressly amended in response to the decision of Bromberg J in *AJL20 v Commonwealth* to ensure that the consideration of non-refoulment obligations would not make the detention fall outside of the scope of the *Migration Act*.[120] Essentially, the new section provides for an unlawful non-citizen to remain in detention while the executive considers removal consistent with Australia's non-refoulment obligations.[121]

This would seem to authorise detention for a period longer than what is reasonably capable of being seen as necessary for the purpose of removal, however, the new provisions include that detention is only authorised where the unlawful non-citizen has not asked to be removed to their country of nationality (that being the country from which they are owed protection).[122] Therefore, it might be argued in accordance with *Chu Kheng Lim* that since the detention essentially continues at the unlawful non-citizen's election (by failing to request to be removed to their home country), the prolonged period of detention avoids invalidity.[123] The detention can no longer be characterised as 'involuntary' and is not protected by the implications of Ch III.[124] This is despite the fact that it effectively authorises the executive to detain for longer than is reasonably capable of being seen as necessary for the bare purpose of removal.

Under the amendments, the unlawful non-citizen is placed in a contemptible position of having either to return to a country from which they are owed protection or face remaining in detention until the executive can find a country to which they can be

117 *Commonwealth v AJL20* (n 5) 601 [135] (Edelman J).

118 *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) sch 1 item 3.

119 *Migration Act* (n 2) s 197C(3), as inserted by *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) sch 1 item 3.

120 Explanatory Memorandum, Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 (Cth) 2–3.

121 *Migration Act* (n 2) s 197C(3).

122 Ibid s 197C(3)(c)(iii).

123 *Chu Kheng Lim* (n 7) 34 (Brennan, Deane and Dawson JJ).

124 Ibid 72 (McHugh J).

removed.[125] As was the case in *Commonwealth v AJL20*, detention may continue for substantial periods of time with the executive taking no action whatsoever. This amendment, in conjunction with the decision in *Commonwealth v AJL20*, opens up the possibility for the executive to detain for the purpose of coercing an unlawful non-citizen to request to be returned to a country from which they are owed protection, under the guise of detention continuing according to unlawful non-citizen's 'choice'.

V Conclusion

The sobering thought, ever-present while writing this case note, is the fact that the respondent is likely to have been returned to immigration detention where he faces either detention until another country is willing to receive him or requesting he be returned to Syria.[126] There is great difficulty in reconciling this situation to one that is 'reasonably capable of being seen as necessary for the purposes of deportation'.[127] However, the majority's holding seemed to omit the first limb of that test, disregarding whether or not the authorising provisions should be reasonably capable of being seen as *necessary*. As a result, it is doubtless that the extent of lawful detention permitted under s 51(xix) has grown substantially beyond what was considered in *Al-Kateb*:[128] the purposes of the executive in detaining an unlawful non-citizen are no longer relevant to the lawfulness of the detention.[129] A corollary of this finding is that, under the revised s 197C, there is apparently nothing that prevents the executive from detaining an unlawful non-citizen in the position of AJL20 for the purpose of coercing them to request to be returned to their country of nationality.

These issues highlight a serious need in Australia for a Bill of Rights in order to prevent vulnerable people from gross human rights abuses.[130] Any form of the deprivation of liberty imposes serious adverse consequences on the person so deprived. In this way, all involuntary detention could be said to have a punitive effect.[131] *Commonwealth v AJL20* joins a long line of authority which confirms that s 51(xix) confers on the Parliament an exclusive power to exclude, admit and deport non-citizens. The dissenting judgments provide little comfort in their distinction between the duty to take into detention (absolute) and the duty to keep in detention where the 'proper purposes' under the amended s 197C of the *Migration Act* permit

125 Pillai (n 1).

126 Frank Brennan, 'The High Court's Surrender to the Morrison-Dutton Immigration Detention Regime', *Eureka Street* (Web Page, 24 June 2021) <https://www.eurekastreet.com.au/article/the-high-court-s-surrender-to-the-morrison-dutton-immigration-detention-regime>.

127 *Chu Kheng Lim* (n 7) 34 (Brennan, Deane and Dawson JJ).

128 *Commonwealth v AJL20* (n 5) 593 [106] (Edelman J).

129 Ibid 582–3 [72] (Kiefel CJ, Gageler, Keane and Steward JJ).

130 MH McHugh, 'The Need for Agitators: The Risk of Stagnation' (Speech, Sydney University Law Society Public Forum, 12 October 2005) 8.

131 Gordon (n 104) 68.

detention for the purpose of removal in compliance with Australia's non-refoulment obligations. As a result, those seeking asylum now join stateless persons as a class of people who could face indefinite detention by the Commonwealth, albeit with the 'choice' to return to the country from which they are owed protection. Shortly after forming part of the majority judgment in *Al-Kateb*, McHugh J lamented extra-curially that without a Bill of Rights, the Court is not empowered to 'prevent unjust human rights outcomes in the face of [valid] federal legislation that is unambiguous'.[132] One can only hope, however remote such hope may be, that in response to this case, society might 'flinch' enough that Parliament is compelled to make laws which uphold human rights.[133]

132 McHugh (n 130) 21–2.

133 *United States v Shaughnessy*, 195 F 2d 964, 971 (Learned Hand J) (2nd Cir, 1952).