AN OVERVIEW OF IMMIGRATION DETENTION IN AUSTRALIA

By Anna Samson and John Gibson

Mandatory detention of asylum-seekers and others considered to be 'unlawful non-citizens' remains a controversial aspect of Australia's approach to immigration policy, most recently manifest in the broad provisions of the *Migration Act* 1958 (Cth) (the Act). These provide:

a) that an officer must detain a person found within Australia's migration zone whom the officer knows or reasonably suspects is an unlawful non-citizen (this compulsory detention extends to any person located *outside* the migration zone whom an officer reasonably suspects is seeking to enter it and who upon doing so would be considered unlawful);[1]
b) that officers have a discretionary power to detain anyone located in an excised migration zone, or whom the officer reasonably suspects may be seeking to enter an excised migration zone, if they would be considered unlawful were they to enter the migration zone;[2]
c) that an officer may detain a person whom s/he reasonably suspects has a valid visa that may be cancelled on s501 or s501A character grounds, if s/he reasonably suspects that the person may abscond or refuse to co-operate with authorities;[3]
d) that an officer may detain unlawful non-citizens outside of Australia in 'declared countries' such as Nauru;[4]
e) that unlawful non-citizens be detained until they are granted a valid visa or removed/deported;[5] and
f) that any person detained is liable to meet the costs of their own detention.[6]

The mandatory detention regime as it applies to refugees and asylum-seekers has been extensively criticised for, among other things, the well-documented physical and psychological trauma it inflicts on those in detention.[7] Australian courts have also recently considered challenges to the lawfulness of compulsory, indefinite detention by the Executive within the terms of its constitutional powers in relation to aliens and immigration.

Such challenges to the detention provisions of the Act have drawn on three mutually reinforcing strands of jurisprudence.

The first relates to the common law doctrine of habeas corpus, or the notion that the state should not arbitrarily deprive anyone of their liberty. In accordance with this principle, which dates from the 12th century, all detainees have the right to petition the court for immediate release from detention if such imprisonment is found to be unlawful. Thus detention that is *ultra vires* would be considered unlawful and subject to the writ.[8]

The second ground centres on the constitutional validity of an exercise of punitive detention powers by the Executive; powers that should be the exclusive realm of courts (as defined in Chapter III of the Constitution).

Third, it is argued that the emerging judicial recognition of principles of international human rights law, whether customary in nature or incorporated in domestic law by way of Australia's ratification of international treaties, should assist in interpreting the scope of the legitimate exercise of executive power in relation to detention.

These arguments were largely rejected by the High Court, in August 2004, in a series of judgments handed down on the same day relating to the indefinite detention of asylum-seekers and the conditions they face: *Al-Kateb v Godwin*;[9] *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*;[10] and *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*.[11]

Mr Al-Kateb was a Palestinian who arrived in Australia by boat in 2000. After spending two years in detention and being refused refugee/humanitarian protection in Australia, he requested that he be returned to Kuwait (where he was born) or Gaza. As a Palestinian without the 'right of return', the Department of Immigration accepted that it was highly improbable that he would be able to be deported in the foreseeable future. Without a valid visa, the Minister for Immigration argued that Mr Al-Kateb should remain in immigration detention until the highly improbable event of his removal occurred.

In a 4-3 majority in *Al-Kateb*, the High Court built on its decision in *Chu Kheng Lim*,[12] holding that permanent administrative detention for immigration purposes is lawful, notwithstanding the fact that the only conditions permitting release from detention are never likely to be realised.

In rejecting Mr Al-Kateb's contention that indefinite detention is beyond the scope of the Parliament's power to legislate with respect to aliens, McHugh J went so far as to say that such an exercise of power to detain aliens is valid, even if 'the detention went beyond what was necessary to effect those objects'.[13] According to McHugh J, detention by the Executive is valid so long as the subject of the law

corresponds to a power in s51 of the Constitution. Hayne and Callinan JJ agreed, but their construction of the Commonwealth's actions emphasises that *any* possibility that deportation may be effected at some time in the future, no matter how remote, meant that Mr Al-Kateb's continued detention was for the purposes of removal and thus lawful.[14]

The High Court's current preoccupation with formalistic reasoning not only gives rise to the 'tragic' outcome McHugh J acknowledges in *Al-Kateb*,[15] but also suggests that it will adopt an expansive interpretation of lawful detention by the Executive. If all that is required for a detention law to be within power is that it pertains to a s51 power, with no associated test of reasonableness as to temporal limitations,[16] Parliament can presumably provide for compulsory, indefinite imprisonment of individuals to give effect to legislation relating to any number of constitutional powers; for instance, to the bankruptcy, divorce or race powers.

Gleeson CJ, in dissent, agreed with the Federal Court's conclusion in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*[17] – that a detainee is entitled to be released from immigration detention, if and when the purpose of removal can no longer be fulfilled. While his ultimate conclusion was that the Act does not authorise the indefinite detention of non-citizens, Gleeson CJ based this finding on the absence of express language to that effect.[18] Although this approach recognises the seriousness of a policy decision that sanctions the unfettered deprivation of liberty of any person, regrettably it leaves open the possibility that such detention could be *made* lawful by more precise drafting.

The line of reasoning adopted by six of the seven judges (Kirby J being the exception) suggests that the Court will acquiesce to any legislation expressly expanding the detention power, especially if it is purportedly aimed at 'protecting' the Australian community. McHugh J cited with approval cases that arose during the World Wars where the High Court was willing, it seems, to give the state the benefit of the doubt in habeas corpus matters relating to the internment laws then in force,[19] accepting that ministers acted within power when detaining individuals – some of whom were not even non-citizens – for many years on the Executive's subjective belief that they posed 'threats' to public safety.[20] McHugh J's contention that the High Court would not have any reason to strike down similar laws should they be enacted in future is alarming, particularly at a time when laws are being adopted by state and federal governments to enable preventative detention, the imposition of control orders, and compilation of secret lists of 'excludable persons' in the context of the 'war on terror'.[21]

Further, a majority of the court rejected the notion that courts should consider well-established international human rights norms opposing arbitrary detention when deciding habeas corpus applications, or that Parliament should apply these same norms when developing refugee policy.[22]

The reasoning in *Al-Kateb* was applied in *Al Khafaji*, with the latter case highlighting how destructive the practical outcome of such a decision can be to individual liberty. Mr Al Khafaji, an Iraqi who spent two years in immigration detention, was declared to be a refugee but denied protection in Australia on the basis that he had not sought protection in Syria, the country to which his family had initially fled from persecution. Despite the Refugee Review Tribunal's finding that Al Khafaji could receive effective protection in Syria, the Department of Immigration found it impossible to return him to that country, with the High Court agreeing that his indefinite detention could therefore continue. *Al-Kateb* and *Al Khafaji* thus gave the minister for immigration judicial authority to have other asylum-seekers and stateless individuals – who could not be removed but who had been released from detention – returned to immigration detention.[23]

In *Behrooz*, the High Court held that information concerning the general conditions of immigration detention, from which a detainee had allegedly escaped contrary to s197A of the Act, was not relevant to the proper construction of that section. The applicant was seeking the release of government documents detailing the conditions of detention for the purposes of mounting a defence to a charge of escaping from detention. The High Court was asked whether, if it could be ascertained that the conditions of immigration detention were particularly horrendous, this could render detention itself punitive and beyond the power contemplated by not only the *Migration Act* but also by the constitutional separation of powers. >>

The majority of the Court held that the conditions endured by those in immigration detention were not relevant to whether the detention was constitutionally valid; no matter how harsh the conditions, they will never be regarded as punitive and thus an invalid exercise of judicial power. The effect of this is that if a non-citizen wants to complain about their treatment in detention they would have to pursue other remedies, such as in tort.

It should be noted that, in 2004, the High Court also unanimously overruled a finding by the full Family Court that it had jurisdiction to compel the minister for immigration to release children in detention. The High Court in *MIMIA v B*[24] held that the Family Court had no jurisdiction to make the orders it did. The orders sought were not concerned with the relationship between the parents of the children – a necessary requirement for the Family Court to have jurisdiction – nor did they seek to enforce obligations owed to children by their parents.

Eventually, as a result of community and political pressure, the *Migration Act* was amended so that children should only be detained as 'a matter of last resort'.

Similarly, some amelioration of mandatory indefinite detention permitted by the *Migration Act* and sanctioned by the High Court has been achieved by s195A of the Act in circumstances where the minister, in his unfettered discretion, personally grants a visa enabling release, believing it to be in the public interest to do so, or invites a person to apply for a Removal Pending Bridging Visa. In this second situation, the detainee will remain in the community until granted a substantive visa, or until the visa is withdrawn and s/he is removed from Australia, or is detained and then removed. The adoption of alternative forms of detention, coupled with the release of families in such circumstances, has also significantly reduced the harsh effects of the formal policy of mandatory detention.

That being said, the fact remains that indefinite mandatory detention for unauthorised arrivals seeking asylum remains a central plank of the legislative scheme. Until such time as it is replaced by a provision that allows detention only for initial screening and on national security or safety grounds, it can always be invoked by a Commonwealth government intent on taking a hardline, punitive approach to anyone who seeks the protection of Australia under the Refugees Convention but who arrives without prior sanction. ■

Notes: **1** *Migration Act* 1958 (Cth), ss189(1) and (2). **2** *Ibid*, ss189(3) and (4). **3** *Ibid*, s192. **4** *Ibid*, s198A. **5** *Ibid*, s196. **6** *Ibid*, s209. **7** See, for example, Ophelia Field (2002) *By Invitation Only: Australian Asylum Policy*, Human Rights Watch, New York, available at http://hrw.org/reports/2002/australia/; Human Rights and Equal Opportunity Commission (2007) *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities*, HREOC, Sydney, available at http://www.hreoc.gov.au/pdf/human_rights/HREOC_IDC_20070119.pdf. **8** See statement of principles in *Hicks v Ruddock* [2007] FCA 299 (Tamberlin J) at [35]-[51]. **9** (2004) 219 CLR 562. **10** (2004) 208 ALR 201. **11** (2004) 208 ALR 271. **12** *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1. **13** *Al-Kateb v Godwin* (2004) 219 CLR 562 at 41. **14** *Al-Kateb v Godwin* (2004) 219 CLR 562 at 230-231 per Hayne J and at 290 per Callinan J. **15** *Al-Kateb v Godwin* (2004) 219 CLR 562 at 31. **16** This amounted to a reversal of the full Federal Court's decision in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (1992) 126 FCR 54. **17** (2003) 126 FCR 54. **18** *Al-Kateb v Godwin* (2004) 219 CLR 562 at 20-22. His Honour left open the possibility of a different approach to construction if the power to detain is coupled with a discretion related to the circumstances of individual cases. **19** See, for example, *War Precautions Regulations* 1915 (Cth); *National Security (General) Regulations* 1939 (Cth). **20** *Al-Kateb v Godwin* (2004) 219 CLR 562 at 55-62. **21** See *Anti-Terrorism Act (No. 2)* 2005 (Cth) and APEC Meeting (Police Powers) Bill 2007 (NSW). **22** *Al-Kateb v Godwin* (2004) 219 CLR 562 at 238-9 per Hayne J, at 63 per McHugh J. **23** See, for example, *WAKX v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1639. **24** [2004] HCA 20.

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