

EXECUTIVE DETENTION: A LAW UNTO ITSELF? A CASE STUDY OF *AL-KATEB V GODWIN*

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I INTRODUCTION

The detention of illegal aliens is an issue that has seen conflicting views from the media and the Australian public. In the case of *Al-Kateb v Godwin*¹ there was a challenge to the legality of administrative detention by the Commonwealth under the provisions of the *Migration Act*.² In *Al-Kateb* the High Court of Australia attempted to determine whether a stateless person, with no foreseeable chance of removal, could be held indefinitely in detention.

II FACTS³

Ahmed Ali Al-Kateb was born in Kuwait yet is a Palestinian citizen. He has lived most of his life in Kuwait, except for a brief period when he resided in Jordan. Mr Al-Kateb cannot apply for Kuwaiti citizenship, as Kuwait does not extend a right of permanent residency or citizenship to Palestinians.

Mr Al-Kateb arrived in Australia in mid-December 2000 by vessel, without a passport or Australian visa. After arriving in Australia, Mr Al-Kateb applied for a protection visa. This application was rejected by the Department of Immigration and Multicultural and Indigenous Affairs. Mr Al-Kateb appealed the department's decision to the Refugee Review Tribunal which upheld the department's decision. Mr Al-Kateb then appealed to the Federal Court and then the Full Federal Court, which both dismissed his appeal.

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1 (2004) 208 ALR 124 (*Al-Kateb*); Heard alongside *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khabaji* (2004) 208 ALR 201.

2 *Migration Act* 1958 (Cth)

3 Dan Meagher, 'The "Tragic" High Court decisions in *Al-Kateb* and *Al-Khabaji*: The triumph of the plain fact interpretive approach and constitutional form over substance' (2005) 7(4) *Constitutional Law and Policy Review* 69, 69; also Juliet Curtin 'Never say never: *Al-Kateb v Godwin*' (2005) 27(2) *Sydney Law Review*, 355,

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Mr Al-Kateb asked to be removed from Australia, but this was unsuccessful as his status as a stateless person made it extremely difficult for Australia to make arrangements with other nations to deport him. Mr Al-Kateb then sought a writ of mandamus from the Federal Court requiring compliance with s198 of the *Migration Act*. This application was dismissed by Selway J. Mr Al-Kateb then sought prerogative relief against the Minister of Immigration and Multicultural and Indigenous Affairs and two departmental officers on the grounds that his detention was unlawful. This was dismissed by von Doussa J. The appeal against this decision was removed to the High Court under s40 of the *Judiciary Act* 1903 (Cth) at the request of the Commonwealth Attorney-General.

III ISSUES⁴

The principal consideration of the High Court was whether a person who had no prospect of removal could remain in mandatory detention for an indefinite period. In order to answer this question the court looked at whether sections 189, 196 and 198 of the *Migration Act* could be interpreted to allow the indefinite detention of an unlawful non-citizen.

Secondly, the court examined whether Chapter III of the Constitution (which deals with the judicature and judicial power) is infringed where there has been a provision for indefinite detention without a judicial order.⁵ If Mr Al-Kateb could demonstrate that the executive has been using a judicial power, then they will have exceeded their constitutional powers, as it is only bodies that have been authorised under Chapter III that can exercise a judicial power.

IV DECISION

The decision of the High Court reflected the divisive nature of this issue, as the court delivered a verdict by a 4-3 majority. The decision was that indefinite detention was allowed under the provisions of the *Migration Act*, and indefinite detention did not infringe Chapter III of the Constitution.

The decision of the majority, comprised of McHugh, Hayne, Callinan and Heydon JJ, was made on strict legalistic grounds, while the minority justices, which were Gleeson CJ, Gummow and Kirby JJ, decided the case on more purposive grounds. In *Al-Kateb* each justice

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⁴ *Al-Kateb* (2004) 208 ALR 124, 124.

(except for Heydon J, who agreed with Hayne J) delivered a separate judgment.

A *Majority*

The major question of this case was whether the provisions of the *Migration Act* allowed Mr Al-Kateb to be detained indefinitely. Under section 196 of the *Migration Act*, an unlawful non-citizen detained under section 189 must be kept in detention until either removed from Australia, deported or granted a visa.⁶ Section 198 states that an officer of the Commonwealth must remove, as soon as is reasonable practicable, an unlawful non-citizen who asks the Minister, in writing, to be so removed.⁷

These sections were interpreted by the majority to demonstrate that the detention of unlawful non-citizens is valid. McHugh J explained the views of the majority justices most clearly:

The words of ss196 and 198 are unambiguous. They require the indefinite detention of Mr Al-Kateb, notwithstanding that it is unlikely that any country in the reasonably foreseeable future will give him entry to that country. The words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights.⁸

It is an important principle of the law that there are some fundamental common law rights so well recognised that the legislation may not interfere with them, unless the legislation sets out an express intent to do so. One of these fundamental rights is a person's right not to be detained against their will. From the statement of McHugh J, it can be determined that the provisions of the *Migration Act* expressly intended to ignore this fundamental right, so therefore an unlawful non-citizen may be indefinitely detained.

Callinan J held that the test for whether these sections still apply is whether the minister intends to remove the unlawful non-citizen from the country.⁹ It is his belief that it is not for the court to find that because removal is currently unachievable, then it must be permanently unachievable.¹⁰ Under this test from Callinan J, the executive was effectively given an open right to detain an unlawful non-citizen indefinitely as long as the requisite intention to eventually release could be demonstrated. It is likely, were this test to be applied, that no person detained would be released, as it is relatively simple for a minister or a government department to demonstrate an intention to release.

5 *Al-Kateb* (2004) 208 ALR 124, 177.

6 *Migration Act* 1958 (Cth) s196.

7 *Migration Act* 1958 (Cth) s198.

8 *Al-Kateb* (2004) 208 ALR 124, 133.

9 *Al-Kateb* (2004) 208 ALR 124, 199.

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The second major issue was whether there is a power under Chapter III of the Constitution for indefinite detention by the executive. Chapter III of the Constitution outlines the power of the judiciary. If it were held that the executive was using a judicial power, as under Chapter III, then the executive would be in breach of their constitutional powers.

To answer this question the majority affirmed the position of the High Court in *Chu Kheng Lim*¹¹ that the executive is authorised under the ‘aliens’ power¹² of the Constitution, to detain an unlawful non-citizen for the purpose of expulsion or detention.¹³ This demonstrates that the executive does have the power to detain a person under the constitution, but it does not reconcile the power with the limiting factor of Chapter III of the Constitution.

To demonstrate that indefinite detention does not conflict with Chapter III of the Constitution, the majority examined whether the detention of unlawful non-citizens is punitive in nature. This discussion of whether detention is punitive is important as only the judiciary have the power to use punitive measures. If it were held that the executive were acting punitively then they would be in breach of Chapter III of the Constitution, as it is Chapter III that outlines the power of the judiciary.

Hayne J examined the five elements of punishment stated by the noted legal philosopher HLA Hart, to determine whether immigration detention was a form of punishment. Hart’s five elements of punishment are as follows;¹⁴

- i. It must involve pain or other consequences normally considered unpleasant
- ii. It must be for an offence against legal rules
- iii. It must be of an actual or supposed offender for his offence
- iv. Human beings other than the offender must intentionally administer it
- v. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed

Hayne J concluded that this second element could not be proven, as immigration detention is not imposed due to the breach of an offence.¹⁵ On these grounds Hayne held that the detention of an unlawful non-

10 *Al-Kateb* (2004) 208 ALR 124, 199.

11 (1992) 176 CLR 1 (*Lim*).

12 Section 51(xix) of the Constitution.

13 *Al-Kateb* (2004) 208 ALR 124, 190.

14 *Al-Kateb* (2004) 208 ALR 124, 190.

15 Matthew Groves, ‘Immigration detention vs. Imprisonment: Differences explained’

citizen is not punitive. To decide that immigration detention is not punitive on these grounds is to examine the means rather than the ends of immigration detention. Although an unlawful non-citizen does not commit an offence when they enter Australia, they are still detained due to a breach of a legal rule, which are the provisions of the *Migration Act*. It is clear that the other elements of punishment are still apparent in immigration detention centres, and for Hayne J to have held that detention under the *Migration Act* is not punitive because it is not a breach of a legal rule is to miss the point of the detention of unlawful non-citizens.

McHugh J used a different ground of argument in finding that the detention is not punitive. McHugh J confirmed that indefinite detention is not punitive due to its administrative character. As long as the purpose of the detention is to make the unlawful non-citizen available for deportation or to prevent them from entering Australia, or the Australian community, then according to McHugh J, the detention will not be punitive.¹⁶

McHugh J also held that the decision to detain unlawful non-citizens under the 'aliens power' of the Constitution is not a matter that is examinable in any court exercising federal jurisdiction, including the High Court.¹⁷ This is because it is not for the court to determine whether the actions of the executive are unjust or contrary to basic human rights.¹⁸ This statement, when teamed up with the test given by Callinan J on the provisions of the *Migration Act*, gives a clear demonstration that the majority of the High Court in this case is limiting the court's influence over the actions of the executive.

B *Minority*

Regarding the primary issue of the provisions of the *Migration Act*, the minority held that ss196 and 198 are ambiguous. Gleeson CJ examined both of these sections closely and concluded that the *Migration Act* did not contemplate the circumstances of stateless people who could not be deported.¹⁹ As these sections give no clear definition of what is to occur when a person cannot be deported, then a beneficial interpretation should be preferred. This is consistent with the principle that Parliament is not to infringe fundamental civil liberties, unless an express intention can be inferred.²⁰ Gummow J also held that detention under sections 196 and 198 of the *Migration Act* has the purpose of facilitating

Alternative Law Journal (2004) 29(5) 228, 231.

16 *Al-Kateb* (2004) 208 ALR 124, 135.

17 *Al-Kateb* (2004) 208 ALR 124, 135.

18 *Al-Kateb* (2004) 208 ALR 124, 145.

19 *Al-Kateb* (2004) 208 ALR 124, 124.

20 *Al-Kateb* (2004) 208 ALR 124, 164.

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availability for deportation. Once deportation is no longer a realistic possibility, then these sections do not authorise ongoing detention.²¹ In the decision of the majority, it was held that ss196 and 198 are unambiguous, hence only one interpretation is available.²² This is inconsistent with the judgments of the minority. Gummow J raised an interpretation of ss196 and 198 stating that these sections have the purpose of facilitating availability for deportation. This was a definite conflict with the opinions of the majority. It could therefore be argued that the majority erred in stating that these sections are unambiguous, as the minority demonstrated that different interpretations are available. Since there are ambiguities in the interpretation of the provisions of the *Migration Act*, then the minority was correct in finding that there should be a beneficial interpretation of these sections.²³

Of the dissenting justices, Gummow and Kirby JJ both decided on similar grounds that indefinite detention infringed Chapter III of the Constitution. Gummow J stated that the court is not greatly assisted in attempting to brand detention as either punitive or non-punitive, as there is such a thin line between the two.²⁴ Gummow J agrees with the majority and the precedent from *Lim* in finding that the executive does have a basic power to detain unlawful non-citizens under the constitution. However it is not for the executive to detain a person indefinitely without their being an adjudication of an offence by the judiciary.²⁵ Such an indefinite administrative detention by the executive would breach the constitutional separation of powers doctrine once the detention is no longer for the objective purpose of facilitating removal.²⁶ Once there is no adjudication by the judiciary, or there is no purpose of removal then the executive will be in breach of Chapter III of the Constitution.

Gleeson CJ gave little comment on whether indefinite detention breached Chapter III of the Constitution, but he did concur with the majority in stating that the detention of unlawful non-citizens was not punitive in nature and therefore the executive can legitimately exercise a right to detain illegal aliens as long as it is a valid exercise of its

21 *Al-Kateb* (2004) 208 ALR 124, 156.

22 *Al-Kateb* (2004) 208 ALR 124, 133. (McHugh J)

23 Dan Meagher, 'The "Tragic" High Court decisions in *Al-Kateb* and *Al Khafaji*: The triumph of the plain fact interpretive approach and constitutional form over substance' (2005) 7(4) *Constitutional Law and Policy Review* 69, 73.

24 *Al-Kateb* (2004) 208 ALR 124, 158.

25 *Al-Kateb* (2004) 208 ALR 124, 160.

26 Juliet Curtin 'Never say never: *Al-Kateb v Godwin*' (2005) 27(2) *Sydney Law Review*, 355, 363.

27 Section 51(xxvii) of the Constitution.

constitutional power under the 'immigration power'²⁷ and the 'aliens power'.²⁸

C Summary of Judgment

The High Court held that the provisions of the *Migration Act* allow an unlawful non-citizen to be detained indefinitely. Such prolonged detention does not infringe on Chapter III of the Constitution, and finally, according to McHugh J, international law is not to be used in interpreting the Constitution.

Under this judgment, Mr Al-Kateb was to remain in detention until arrangements could be made with another nation to take him. This amounted to an effective life sentence by the High Court. Following the *Al-Kateb* decision, the Minister for Immigration and Multicultural and Indigenous Affairs decided, on her discretion, to grant Mr Al-Kateb a bridging visa.

V SUBSEQUENT CASE LAW

Since the judgment of *Al-Kateb* was delivered, there have been a number of Federal Court and High Court decisions that have considered the decision of the court. There has been almost universal support from the courts for the decision in *Al-Kateb*. In *Re Woolley*²⁹ the High Court has taken the opportunity to affirm the majority judgment of *Al-Kateb*.

VI COMMENT

When the decision of *Al-Kateb* was handed down by the High Court there was an immediate backlash against the decision. Much academic comment has preferred the broader judgments of the minority to the position of the majority justices.³⁰ Media comment was also critical of the decision of the majority in *Al-Kateb*. Gerard Henderson suggested that the decision of the majority 'stemmed from a lack of empathy'.³¹ However it was ex-lawyer David Marr who provided the most foresight as to what the response to the decision in *Al-Kateb* would be. Marr suggested that after *Al-Kateb* there would be 'a future where the disquiet of decent Liberal voters and a few fractious backbenchers are a

28 *Al-Kateb* (2004) 208 ALR 124, 127.

29 (2004) 210 ALR 369.

30 See, eg; Dan Meagher, 'The "Tragic" High Court decisions in *Al-Kateb* and *Al Khafaji*: The triumph of the plain fact interpretive approach and constitutional form over substance' (2005) 7(4) *Constitutional Law and Policy Review* 69; Matthew Groves, 'Immigration detention vs. Imprisonment: Differences explained' (2004) 29(5) *Alternative Law Journal* 228.

31 Gerard Henderson, 'A bit of empathy wouldn't go amiss', *The Sydney Morning Herald* (Sydney), 17th August 2004.

32 David Marr, 'Liberty is left in shaky hands when the High Court no longer defends it',

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better safeguard of fundamental liberty than the High Court'.³²

Subsequent political activity has since proven Marr to be correct. Due to the recent threatened 'backbench revolt' by Liberal Party members Petro Georgiou, Judi Moylan, Russell Broadbent and Bruce Baird, there are due to be a number of changes to the *Migration Act*. Yet one of the provisions that has not changed, despite the wishes of the rebel backbenchers, is the allowance of indefinite detention under the *Migration Act*.

Therefore the decision of the High Court in *Al-Kateb* is still valid law in giving the executive powers to indefinitely detain unlawful non-citizens. However the decisions in *Al-Kateb* should not be considered settled law. The reasoning of the majority contains some underlying flaws. The provisions of the *Migration Act* are not unequivocal in giving a right to indefinite detention. There are a number of varied interpretations to these sections, and where there is doubt as to the intent of a section, then a beneficial interpretation, preventing indefinite detention, should be preferred.

The judgment of the High Court in *Al-Kateb* has not resolved the question of whether the executive can indefinitely detain an unlawful non-citizen. Due to the flawed majority decision, the slim majority and the questionable political climate, *Al-Kateb* is a decision that should remain the subject of caution.

The Sydney Morning Herald (Sydney), 31st March 2005.