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The ‘tragic’ High Court decisions in Al-Kateb and Al Khafaji: the triumph of the ‘plain fact’ interpretive approach and constitutional form over substance

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On 6 August 2004, the High Court handed down its twin decisions in Al-Kateb v. Governor and Minister for Immigration and Multicultural Affairs v. Al Khafaji. Both cases involved a challenge to the legality of the administrative detention by the Commonwealth of two unlawful non-citizens under ss 189, 194 and 195 of the Migration Act 1958 (Cth) (the Act). The appeals were heard together with the Court providing its detailed reasons for decision in Al-Kateb. These reasons were in turn applied to and disposed of the appeal in Al Khafaji. Therefore, for the purpose of this article, it is the judgments in Al-Kateb that will be outlined and discussed.

Facts

Ahmed Ali Al-Kateb was born in Kuwait and is Palestinian. He lived mostly in Kuwait before arriving by boat in Australia in December 2000 without a passport or Australian visa. Mr Al-Kateb was ‘stateless’ for, although he was a long term resident of Kuwait, the laws of that country do not extend to Palestinians the right to permanent residency or citizenship. Abbas Mohammad Hasif Al Khafaji is a national of Iraq who fled to Syria in 1990. In 1999 he left Syria, arriving in Australia by boat on 5 January 2000. He too came without legal authority. Both men were placed in administrative detention pursuant to s 189 of the Act whilst their applications for protection visas were processed. These applications were ultimately unsuccessful.

After a lengthy process of administrative and judicial review, the original migration decisions were upheld. Mr Al-Kateb and Mr Al Khafaji then made written requests to the Department of Immigration and Multicultural and Indigenous Affairs to be removed from Australia. In this situation, the Act requires that the unlawful non-citizen be removed ‘as soon as reasonably practicable’. However in both cases the Federal Court found that, as a matter of fact, ‘removal from Australia is not reasonably practicable at the present time as there is no real likelihood or prospect of removal in the reasonable foreseeable future’. These findings were made after considerable but unsuccessful attempts by the Minister and relevant departmental officers to secure the co-operation of other foreign states to accept the men. So Mr Al-Kateb and Mr Al Khafaji wished to be removed from Australia. The migration authorities sought this outcome as well. But due to international circumstances beyond the control of either party, their common purpose of removal could not be fulfilled in the foreseeable future and maybe ever.
Legislation and key issues

Statutory construction issue

The primary task of the High Court was to determine what the Act required in a state of emergency of this kind. It is, therefore, worth extracting as full the relevant parts of the provisions in order to understand the arguments made and the judgments delivered on the point.

Section 198 — Detention of unlawful non-citizens

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

Section 196 — 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.

Constitutional issue

If the Act did provide for (possibly indefinite) detention of an unlawful non-citizen, there was another question of whether a law of this kind offends a fundamental principle of the Commonwealth Constitution. That principle states that the judicial power of the Commonwealth cannot be vested in or exercised by an institution other than a Ch III court. One important manifestation of this principle is that, with few exceptions, a person can only be deprived of their liberty by order of a Ch III court upon a finding of criminal guilt beyond a reasonable doubt.9 Mr Al-Kateb and Mr Al Khafaji argued that, should the Act provide for their indefinite detention, this would be a deprivation of their liberty without the constitutionally required court order.

In reply, the Minister said that administrative detention for the purpose of removing an unlawful non-citizen was a well-established exception to this principle and that the possible length of that detention did not undermine the non-punitive character.

The majority judgments:
McHugh, Hayne, Callinan and Heydon JJ

In both Al-Kateb and Al Khafaji the majority consisted of McHugh, Hayne, Callinan and Heydon JJ. The first three justices wrote separate opinions. Heydon J agreed with the reasons stated.
and decisions made by Hayne J but reserved his decision as to whether s 196 ought to be interpreted in a manner consistent with treaties to which Australia is a party but have not been enacted in domestic law. The reasoning of the majority justices on the statutory construction and constitutional issues was, however, essentially the same. The differences lay in the amount of attention given in the respective judgments to what were, in the end, wider issues such as the proper role of international law in constitutional interpretation. 11

Statutory construction issue

For the majority justices the statutory language used in s 189, 196 and 198 was “clear and unambiguous”. 12 When read together they required an unlawful non-citizen to be held in administrative detention until they can be removed from Australia. 13 That is the purpose of the detention and it holds for as long as removal is sought by the Minister or relevant migration officer, as Hayne J explained:

[...]

As the meaning of the Act was clear (“detention is mandatory and must continue until removal, or deportation, or the grant of a visa”), there was no room for the application of the interpretive principle that ‘legislation is not to be construed as interfering with fundamental rights and freedoms unless the intention to do so is unmistakably clear’. 16

Moreover, according to Hayne and Callinan JJ, their reading of ss 189, 196 and 198 was further supported by a consideration that would arise under the interpretation urged by Mr Al-Kateh and Mr Al-Khafaji. If the detention authorised under the Act was limited by implication to circumstances where “there is a real likelihood or prospect of the removal of the person from Australia in the reasonably foreseeable future”, the question arises as to how a court would in such a case make such an assessment. 17 For Callinan J, changing attitudes in other countries and international agreements, to receive, investigate and determine an application by that alien for an entry permit (and other determinations) to admit or deport, constitutes an incident of the executive power. 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, in that limited extent, authority to

The legislature having authorised detention until the first point at which removal is reasonably practicable, it is not possible to construe the words used as being subject to some narrower limitation such ... as a ‘reasonable time’. Show that accurate predictions as to the period of immigration detention are simply not possible. 18 To read the relevant provisions as subject to an ‘implied temporal limitation’ is to impermissibly rewrite the words of the Act from “as soon as reasonably practicable” to “soon” or “for so long as it appears likely to be possible of proximate performance”. 19

For the majority justices, the nature of the statutory obligation under the Act was perfectly clear. It required the continued detention of an unlawful non-citizen until they are removed from Australia. This is so even when there is no reasonable prospect of that occurring in the foreseeable future. 20 The fact that Mr Al-Kateh was stainless did not alter the nature of this duty through it clearly makes it (removal from Australia to another country) more difficult to fulfil. 21 In both cases, “[t]he duty remains unfilled; it has yet been practicable to effect removal. That is not to say that it will never happen.” 22

Constitutional issue

The majority justices first outlined when and why administrative detention of an alien was an established exception to the constitutional principle outlined above.

[The] authority to detain an alien in custody, when conferred in the context and for the purposes of executive power...
Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language ...

Statutory construction issue

The minority view is best understood as proceeding from the following proposition outlined in the judgment of Gummow J:

In considering these provisions, it is important to enquire if a construction doing so is reasonably open, a reading of the legislation which recognises a power to keep in custody for an unlimited time. Kirby J also said that the Court should read ss 196 and 198 of the Act in a way that restricts any assertion that a purely literal construction might otherwise sustain, that unlimited executive detention was three months.

For the minority justices such a construction was reasonably open as ss 189, 196 and 198 did not clearly provide for what must happen when unlawful non-citizens like Mr Al-Kateb and Mr Al-Khalaf cannot be removed from Australia through no fault of their own or the executive government. As Gleeson CJ noted, the statutory obligation on a migration officer to remove an unlawful non-citizen as soon as reasonably practicable "assumes the possibility of removal". But the Act said nothing of the situation where there was no real prospect of removal in the foreseeable future. Once this legislative silence and therefore ambiguity was identified, an important principle of legality entered into play:

Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.

In a similar vein, Kirby J noted that:

... [the common law has a strong presumption in favour of liberty, and] against indefinite detention. That presumption informs the two provisions of an Australian statute, such as ss 196 and 198 of the Act, are to be construed by an Australian court.

The principle of legality or common law presumption precluded the interpretation of the relevant provisions urged by the Minister according to Gleeson CJ:

The possibility that a person, regardless of personal circumstances, regardless of whether he or she is a danger to the community, and regardless of whether he or she might abscond, can be subjected to indefinite, and perhaps permanent, administrative detention is not one to be dealt with by implication. Gleeson J was similarly concerned with the meaning of the ss 198 mandate that an unlawful non-citizen must be removed from Australia 'as soon as reasonably practicable' and its consequence for those in (possibly indefinite) administrative detention limbo. But he resolved the issue without express resort to the principle of legality outlined by Gleeson CJ and Kirby J, though his interpretive approach was clearly infused with the same concern for, and desire to protect, individual liberty.

Critically, he thought it the term "practicable" identifies that which was to be put into practice and which could be effected or accomplished and that "reasonably" introduces an assessment of a period which is appropriate or suitable to the purpose of the legislative scheme. Gummow J concluded, therefore, that "on their proper construction, ss 196 and 198 no longer mandated the continuous detention of the applicant."

It the stay has been reached that the applicant cannot be removed from Australia, and as a matter of reasonable practicability is unlikely to be removed, there is a significant constraint for the continued operation of ss 196. In such a case ss 196 no longer remain a basis for facilitating removal from Australia which is reasonably in prospect and so that extent the operation of s 196 is spent.

In the result, both Gummow and Kirby J were able to construe the Act in a manner that avoided the conclusion that a person can be lawfully detained for an indefinite period and the "tragic outcome this would occasion for Mr Al-Kateb and Mr Al-Khalaf and others in a similar predicament."

Constitutional issue

Gummow J endorsed the essence of the constitutional principle earlier outlined and acknowledged that the administrative detention of an alien was an exception to it in limited circumstances. He did, however, suggest that considering the issue in terms of whether the purpose was punitive or non-punitive (as was done in 1989 and some of the majority judgments) "is apt to mislead". For a detention may involve both punitive and non-punitive aspects and it is primarily with the deprivation of liberty that the law is concerned, not whether that deprivation is for a punitive purpose.

In any event, Gummow J's finding on the statutory construction issue — that the legislative purpose for the detention of Mr Al-Kateb and Mr Al-Khalaf was spent — was central to his disposal of the constitutional issue. For the power of Parliament to authorize the administrative detention of aliens is not at large and ... does not extend to
...authorised detention for any purpose selected by the Parliament. So once that purpose to facilitate removal from Australia no longer existed, the lawful authority's concern both men also came to an end.

Analysis and comment

Statutory construction issue

A careful and detailed technical analysis of ss 189, 196 and 198 was undertaken in the judgment of Hayne J. His reasoning on this issue was endorsed by McHugh and Heydon J J and Gifford J agreed that '[t]he statutory language was clear and unambiguous. Importantly, in terms of s 198, the majority justices said that 'as soon as reasonably practicable' did 'not give rise to any kind of implied temporal limitation or qualification'. But 'authorised detention until the last point at which removal is reasonably practicable'. This construction of s 189, 196 and 198 was clear and open to the text and perfectly reasonable considering that an important purpose of the Act is to facilitate the removal from Australia of unlawful non-citizens who fail to secure a visa. It led Hayne J to conclude that the words of the relevant provisions will not yield, by a process of construction, the meaning asserted by the applicant. But this is a most significant. His analysis established only that the majority construction was available, but no more. Indeed, no attempt at all was made in his judgment (or that of any other minority justice, for that matter) to address the minority's process of construction of ss 189, 196 and 198 and explain why it was incapable of yielding the asserted meaning. This is a serious omission. For if an alternative construction is possible, then the principle of legality outlined by Gleeson CJ comes into play — a judge must give the interpretation most protective of liberty unless there exists clear legislative evidence to the contrary.

The analysis undertaken in the three minority judgments demonstrated that an alternative construction of the relevant provisions was available. It was perfectly open on the text and also consistent with the purpose of the Act to conclude that underpinning ss 189, 196 and 198 is the assumption that the obligations imposed are capable of fulfilment — and furthermore, that the statutory scheme includes a number of temporal elements so that the period of detention required and authorised by s 198 is expressible to be longer.

When the possible difficulties noted by Hayne J were considered, the minority justices concluded that the words of ss 189, 196 and 198 were 'unambiguous' and 'impracticable' — that when an alternative reading was clearly available under orthodox canons of statutory construction. The preceding discussion suggests that this positive legislative clarity is not readily apparent from the terms of the Act. Something else must supplement the interpretive enterprise before one can reasonably conclude that the Act is clear and unambiguous in its operative in stalemate situations. Recourse to the purpose or object underlying the Act, as required by s 15AA of the Acts Interpretation Act 1901 (Cth), provides little assistance, for both the majority and minority justices agreed that an important primary purpose of the statutory regime was to facilitate the removal from Australia of an unlawful non-citizen if they fail to secure a visa.

In my view, ss 189, 196 and 198 were 'clear and unambiguous' in their operation in stalemate situations only if the majority judges employed, warranted or not, what Professor David Devenish calls a "plain fact" interpretive approach.

Plain fact judgements hold that the judicial role is not to make law in accordance with their convictions about what morality requires, but to apply the law as it is, on a particular conception of fact exists. When the law is a statute, they should, in deference to the legislature,
law giver, attribute to the statute the meaning Parliament, on this same conception of fact, intended it to have ... They must look to what they think the law should be, but to the sources of fact which for them legitimated an attribution of actual intent to Parliament ... One such legitimate source of fact is a particular part of the public record. It is obvious from the public record — a matter of fact — how legislatures responsible for enacting the statute would have wanted it interpreted, the judges' doctrine of judicial responsibility compels them to decide the case in accordance with that view.61

In Australia, the public record on recent migration policy as evidenced in executive government action and legislative pronouncements is clear enough. The interception of the MV Tampa, the implementation of the 'Pacific Solution' and the legislative attempts to remove, so far as possible, judicial review of migration decisions has evidenced a general tightening of migration policy.62 It is against this factual backdrop that the majority judges have interpreted ss 189, 196 and 198. When viewed in this factual context the provisions possess a clarity and intractability that may not otherwise be apparent.

For one must keep in mind, as Gleeson CJ noted, that 'the provisions of the Act ... do not address the possibility of a situation such as has arisen in the present case, and do not expressly provide for it'.63 Moreover, a natural reading of s 198 clearly assumes that its statutory obligations are capable of fulfilment, for it is triggered by the unilateral act of an unlawful non-citizen writing to the Minister asking to be removed from Australia. The reality is that the legislature did not contemplate the possibility of a stalemate situation lasting for the rest of an unlawful non-citizen's life.64 This fact alone must create at least a doubt (however small) as to the proper construction of the law in this instance. As noted, that doubt must be resolved in a manner more, not less, protective of individual liberty.65 It is also reasonable to assume that if the legislature had contemplated the stalemate situation, then for such an extraordinary and potentially tragic outcome, there would have been an additional sub-section in s 198 that either expressly stated that detention must continue notwithstanding the indefinite, maybe eternal, stalemate or provided for interim arrangements less obnoxious to liberty until removal could be effected. That, in my view, is the kind of unmistakable legislative clarity required before the relevant common law principle of legality falls away.

In addition, the approving citation by Hayne J of comments made by Judge Learned Hand in two American decisions seems to be at odds with both the relevant facts of Al Kharrej and Al Khafaji and his claim that the words of ss 189, 196 and 198 were intractable. The first comment underscores the legal status of an alien and the change they take when they come to our shores that entry may be denied.

If that change turns against them, [they] know, or if they do not, they are charged with knowledge, that, since the alien cannot land, he must find an asylum elsewhere; or like the Flying Dutchman, forever sail the seas.66

First, in a case where the liberty of two persons is literally at stake, the citation of a passage that squares the circumstance of an alien seeking asylum by boat with that of a ship's captain who is doomed to sail his vessel around the Cape of Good Hope forever is at best obtuse. Second, if a factual analogy was intended, it was misconceived. Mr Al Kharrej and Mr Al Khafaji were men held in detention who, upon failing to secure a visa, voluntarily requested removal from Australia. It was not in dispute that in the circumstances Australian law required the appellants to 'find an asylum elsewhere'. The issue was whether the Act authorised the indefinite detention of both men in circumstances where there was no reasonable likelihood of their (voluntarily requested) removal occurring in the foreseeable future. Third, this confused and confusing analogical reasoning is superficial if the words of the statute are intractable and the corresponding duty crystal clear. Finally, then to characterise this construction as an act of judicial courage — which is the purpose of citing the second Learned Hand passage — is difficult to countenance.67

On the other hand, the reasoning of the three minority judges approximated what Dyzenhaus calls the 'common law' approach.65 The common law is a set of coordinating principles that both explain and justify the explicit law and that make up the context in which the judge must try to interpret the data relevant to the question at hand.66

The judge must try to interpret the data relevant to the question at hand in accordance with the explicit and implicit rules of the common law and past judicial decisions will be severely contended if they failed to comply with this mandate.67

I have where the Legislature has made provision to the contrary,' a judge must interpret legislation against this backdrop of common law principle. And, part of this backdrop, indeed the most fundamental common law concern, is the protection of liberty.68

So, as noted, when the meaning of a statute is uncertain or ambiguous the principle of legality comes into play.69

It is my argument, therefore, that the majority justices employed a 'plain fact' interpretive approach in a situation where the 'common law' approach was reasonably open to them. The language of ss 189, 196 and 198 is 'clear and unambiguous' only if one reads them in the factual context outlined above. But in our system — where 'we' act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute — such an approach is erroneous. For the political facts surrounding a statute are external to it. They cannot supply the unmistakable legislative intent required to moot the principle of legality, no matter how clear — in fact — the legislature's preferred construction might be. It is on this basis that the reasoning of the minority justices on the statutory construction issue is to be preferred.

**Constitutional issue**

It is first worth noting that McHugh and Hayne JJ made clear that it was wrong to consider the constitutional issue in terms of whether the law was 'appropriate and adapted' ... to the purpose of processing and removal of an unlawful non-citizen'.70

[A] law authorising detention of an alien ... is a law with respect to aliens such
...there is some irony in McHugh J’s claim that the minority argument on the constitutional issue would represent a triumph of form over substance. Such a claim, in my view, is more apt to describe the reasoning of the majority justices without further elaboration, it still represents, in principle, a significant shift away from the established position of the High Court (indeed of the common law since the time of Blackburn) to the view that unlawful non-citizens have no general immunity from detention otherwise than by judicial process. In Re Woodley, McHugh J went even further: He rejected, arguably, the central principle of the law which states 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.

It was, according to McHugh J, “generally too far to say that, subject to certain exceptions, detention by the Executive is always penal or punitive and can only be achieved as the result of judicial power.” A determination as to whether detention is penal or punitive must depend on all the circumstances of the case and in particular the purpose or object for which the law authorizes or requires the detention of a person.

This proposition undermines the authority of the law which states 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.

Yet it is difficult to understand the relevance of this ‘practical consideration’ to the disposal of the constitutional issue. Indeed, one might reasonably conclude that its underlying sentiment is that unlawful non-citizens must lie in a bed of their own making. If so, the central claim of the majority judges that the purpose of the detention is non-punitive is difficult to sustain.

The second point relates to Hayne J’s liberty compatible with Ch III. It is, however, a stunning triumph of constitutional form over substance if a person can be indefinitely deprived of their liberty consistently with Ch III so long as the Commonwealth formally maintains this purpose even though, as a matter of fact, there is no reasonable prospect of it being secured in the foreseeable future. It is wrong, in my view, to interpret and apply the Constitution not to what is (the relevant facts) but to what may (or may never) be.

There were two further noteworthy points in the judgments of Hayne and Callinan J regarding the constitutional issue. Both in my view are cause for concern. The first relates to statements that unlawful non-citizens ‘may personally create the conditions compelling their detention for prolonged periods’. Another practical consideration is that by their manner of entry, repetitive unsuccessful applications and litigation founded on unsubstantiated claims, or if and when it occurs, escape from immigration detention, some aliens may attract so much sympathy that other countries will become or refuse to receive them.

This proposition undermines the authority of the law which states that subject to certain exceptions, detention by the Executive is always penal or punitive and can only be achieved as the result of judicial power. A determination as to whether detention is penal or punitive must depend on all the circumstances of the case and in particular the purpose or object for which the law authorizes or requires the detention of a person.

This proposition undermines the authority of the law which states that subject to certain exceptions, detention by the Executive is always penal or punitive and can only be achieved as the result of judicial power. A determination as to whether detention is penal or punitive must depend on all the circumstances of the case and in particular the purpose or object for which the law authorizes or requires the detention of a person.
the Commonwealth with considerable scope to detain persons they consider relevant to a terrorism investigation without a court order. Indeed, this more deliberative approach to the Ch III limitation would probably show up any doubts as to the constitutionality of the new powers granted to the Australian Security Intelligence Organisation that permit a person to be held in administrative detention for questioning for up to a week if there are reasonable grounds for believing that it will assist in the collection of intelligence that is important in relation to a terrorist offence. For it is relatively easy to characterise such detention as protective of the Australian community rather than punitive, the distinction central to the reasoning of the majority justices on the constitutional issue.91

This is not to suggest that the High Court ought to dogmatically cling to a past interpretation of the Ch III limitation that fails to take sufficient account of new and dangerous conditions faced by the Commonwealth and the citizenry more generally. It is, however, appropriate in my view for judges in the common law tradition to subject to even greater scrutiny laws that are patently enacted to 'protect the Australian community but in fact operate in some cases to undermine individual liberty.92 This is why the basic principle from which the constitutional analysis of Gummow J proceeds — "the confinement of the person, in any way, is an imprisonment" and one which, subject to certain exceptions, is usually only permissible if consequent upon some form of judicial process —93 — is to be preferred.94

The problem with, and the practical consequence of, the majority view on the constitutional issue is that executive government is made judge and jury in its own cause as to the content and scope of the Ch III limitation. As Gummow and Kirby JJ noted, such a construction undercuts the central proposition of the Communist Party Case:95

[The validity of a law or an act of the executive branch does under a law cannot depend upon the view of the legislature or executive officers that conditions require for validity have been satisfied.96

In an important passage, Gummow J recognised the threat that this construction posed to continuing strength of the separation of powers and rule of law under the Australian Constitution: The continued validity of the purpose of deportation or expulsion cannot be presumed by the legislature as a matter of course for the operation of the executive government. The reason is that it cannot be for the executive government to determine the policy from time to time of that boundary line which is made for the purpose of deprivation of aliens from the reach of Ch III. The location of that boundary line rests in a question arising under the Constitution or involving its interpretation... Such an exercise of power is not consonant with the Constitution for it involves the deprivation of alien rights without their consent or the submission of any offence requiring adjudication, and for a purpose unconnected with the entry, investigation, detention or deportation of aliens.97

It is noteworthy (and in my view unsatisfactory) that no member of the majority expressly dealt with the substance of this important constitutional proposition.98 And in relation to the Communist Party case, it was simply not the point for McHugh J to reject its relevance on the ground that "factually it had nothing to do with aliens..."99 The relevance of an important principle which this case affirmed that it was ultimately for the High Court to determine the limits of federal legislative and executive power — was clearly the reason for its citation by Gummow and Kirby JJ. And while McHugh J correctly noted that in the Communist Party case "no Justice found that the law infringed Ch III of the Constitution", he made it clear that if the law infringes Ch III of the Constitution, "no attempt was made by him or any other justice in the majority to address the well-known and compelling argument made by Professor George Winternitz that [i]t is highly likely the Communist Party Dissolution Act 1950 would today be considered an invalid attempt to exercise the judicial power of the Commonwealth and to confer it on the executive government..."100

The remedy issue (on the minority view)

I have argued that on both the statutory construction and constitutional issues the reasoning of the minority justices is to be preferred. In the result, those Justices suggested that an appropriate federal Court remedy could be the conditional release of Mr Al-Kateb and Mr Al Khafaji that is to release them into the Australian community with the requirement that they report regularly to the appropriate authorities to ensure they are available to be removed from Australia when that becomes reasonably practicable.101 According to the minority justices, this possible remedy would be authorised by s.22 of the Federal Court of Australia Act 1976 (Cth) which allows the Court to "grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled" to finally determine if possible all legal matters in controversy.

However, if neither the Constitution nor the Act authorises the detention of both men, then the doubts expressed by Hayne J as to the legality of an order for their conditional release must be compelling. If the detention is not lawful, it must end. It is not to be replaced with some other set of limitations on the person's freedom. If the detention is unlawful, the only order which a court may make is an order requiring the person to be discharged from detention.102 If the Act no longer operates upon Mr Al-Kateb and Mr Al Khafaji then, as a matter of logic and according to law, they are free men. It would, therefore, be odd if their remedy nullified to some extent the unqualified liberties which the law otherwise extends to them. Moreover, the consequence of the principle of legality outlined by Gleeson CJ applying to these appeals ought to be a remedy fully consistent with that principle.

The role of international law in the interpretation of the Constitution

The judgments of McHugh and Kirby JJ also contained an interesting, but ultimately academic, clash (as far as the immediate appeals were concerned) as to the proper role of international law in the interpretation of the Constitution. Kirby J again pressed for recognition of the following interpretive principle: multinational courts, and especially national constitutional courts... have a duty, so far as possible, to interpret their...
In the result, these decisions override both the reasoning in Al Mater v. Minister for Immigration and Multicultural and Indigenous Affairs109 — where the Full Court of the Federal Court held that ss 199, 196 and 198 of the Act did not authorise the continued detention of an unlawful non-citizen in circumstances similar to those faced by Mr Al-Khatib and Mr Al-Khafaj — and its decision to grant such a person conditional liberty.110 The “tragic”111 outcome of these appeals for Mr Al-Khatib, Mr Al-Khafaj and other unlawful non-citizens in a similar predicament is that they may remain lawfully in detention until another country is willing to accept them, if that were never to occur then a period of administrative detention becomes, effectively, a life sentence.

In the aftermath of the appeals, however, the Minister for Immigration and Multicultural and Indigenous Affairs granted both men bridging visas in the exercise of discretion.112 Whilst this welcome ministerial intervention tempers the harshness of the High Court’s rulings for Mr Al-Khatib and Mr Al-Khafaj, the decisions may still leave an unfortunate interpretive and constitutional legacy. The purative clarity of ss 199, 196 and 198 for the majority justices was, in my view, a consequence of their use of the “plain facts” interpretive approach rather than the intractability of the relevant statutory language. The judgment of Gummow CJ in particular demonstrated that a reading of the Act consistent with the common law’s strong presumption in favour of individual liberty was reasonably open and ought, therefore, to have been employed. It was unnecessary to have recourse to a Bill of Rights “to eschew … a reading of the legislation which [the court] recognise[s] a power to keep a person in custody for an unlimited time.”113 Irrespective of principles of statutory and constitutional construction were available to that end. Moreover, the practical consequence of the majority’s judgments from a constitutional standpoint is that the scope and operation of the Ch III limitation is no longer the sole province of the High Court.

Concluding comments

The decisions in Al-Khatib and Al Khafaj confirm that the Commonwealth may detain an unlawful non-citizen until it becomes reasonably practicable to remove them from Australia. If that is unlikely to occur in the foreseeably future due to circumstances beyond the control of either party, the continued detention of the unlawful non-citizen remains lawful so long as removal from Australia is still sought by the Commonwealth. And, for as long as the purpose of the administrative detention is to effect removal, the Ch III limitation on legislative and executive power is not breached.

Notes

1. In Minister for Immigration and Multicultural Affairs v Al Khatib (2000) 208 ALR 201, 203 McHugh J stated that in “tragically as this outcome is for Mr Al-Khafaj, the Minister’s appeal must be allowed.”
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5. Both cases were appeals pending in the Federal Court. The whole of each case was removed by order of the High Court pursuant to ss 40 of the Judicature Act 1939 (Cth) and the appeals were heard and determined in the High Court.
6. This finding regarding Mr Al-Kateb was made by von Doussa J, cited in Al-Kateb (2004) 208 ALR 124, 131-132 (Gunnow J). A similar finding was made regarding Mr Al-Khatez by Mansfield J, cited in Al-Khatez (2004) 208 ALR 201, 205 (Gunnow J).
8. Ibid at 128-129.
11. See p 76-77 above, under the heading 'The role of international law in the interpretation of the constitution'.
13. In the more recent case of Re Woolley, Ex Parte Applicants, M73/2003 (by their next friend GJ) (2004) 210 ALR 369, all members of the Court found that the term 'unlawful non-citizen in ss 189 and 196 of the Act does not distinguish between unlawful non-citizens who are above and those who are below the age of 18 years'; at 371 (Gleeson CJ); see also 381 (McHugh J), 405 (Gunnow J), 419-420 (Kirby J), 427 (Hayne J) with whom Heydon J agreed (at 436f), 435 (Callinan J).
15. Ibid at 184 (Hayne J).
16. Ibid, see also 133 (McHugh J).
17. See ibid at 182-183 (Hayne J).
18. Ibid at 197.
19. Ibid.
20. Ibid at 183 (Hayne J).
21. Each of the majority justices affirmed this view in Re Woolley (2004) 210 ALR 369, 394-395 (McHugh J), 428 (Hayne J) with whom Heydon J agreed (at 436f), 435 (Callinan J). However, McHugh J at 395-396 said that although express time limits for the processing of a visa application were absent from the Act, he saw no difficulty in construing the Act as requiring the steps to be processed within a 'reasonable time'. If this 'implied obligation' is not discharged within a reasonable time 'the remedies afforded by s 75(2) of the Constitution are open to the defendant'.
23. Ibid at 181 (Hayne J) (emphasis in original).
25. Ibid at 136 (McHugh J); see also 140-141 (Gleeson J), 196-197 (Callinan J).
26. Ibid at 187 (Hayne J).
27. In Re Woolley (2004) 210 ALR 369 the majority justices have made clear that the purpose of executive detention determines its compatibility with Ch III. If the detention has a protective (non-protective) purpose then Ch III will not be infringed: at 391 (McHugh J), 428 (Hayne J) with whom Heydon J agreed (at 436f), 435 (Callinan J).
29. Gleeson CJ discussed only the statutory construction issue and Kirby J noted at ibid, 161 that the case was 'decided primarily on the basis of the construction of the applicable legislation'.
30. See ibid at 147 (Gunnow J) and 169 (Kirby J).
31. Ibid at 155.
32. Ibid at 173.
33. Ibid at 130.
34. Ibid at 129.
35. Ibid at 130 (Gleeson CJ).
36. Ibid.
37. Ibid at 162-163 (footnotes omitted).
38. Ibid at 131 (emphasis added).
39. See text accompanying n 31 above.
41. Ibid at 156; see also 161 where Kirby J said that he agreed 'in the reasons of Gunnow J that is 196 and 198 of the Act do not apply, in terms, to the applicant's case as it now stands. It follows that these sections do not sustain his continuing detention' (footnotes omitted).
42. Ibid at 156.
45. Ibid at 159.
46. Ibid.
47. Ibid at 177.
48. Ibid at 133, 201.
49. Ibid at 199.
50. Ibid at 197.
51. Ibid at 182 (Hayne J) (emphasis added).
52. Judges in both the majority and the minority agreed that this was an of not the important purpose of the Act; see, for example, ibid at 129 (Gleeson CJ), 155 (Gunnow J), 181 (Hayne J).
53. Ibid at 182.
54. See, for example, ibid at 128 (Gleeson CJ), 155-156 (Gunnow J).
55. Ibid at 128 (Gleeson CJ).
56. Ibid at 153 (emphasis in original).
57. Ibid at 182.
58. Ibid at 179 (emphasis added).
59. Ibid at 155 (Gunnow J).
60. See above n 52.
61. D Denysreith, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (Oxford, 1993), 57-58. It should, however, be noted that in the context of the Denysreith thesis, he articulated the 'plain fact' approach as a method used by some South African judges during the era of apartheid to resolve issues of legislative ambiguity or uncertainty. But, as earlier noted, the majority judges considered the statutory language in ss 189, 196 and 198 to be clear and unambiguous. It is my argument, however, that this putative clarity stems from what is essentially a 'plain fact' interpretive approach.
62. For example, the Migration Reform Act 1992 (Cth) diminished the judicial review power of the Federal Court with respect to migration decisions, a law found to be constitutional by a majority of the High Court in Ahe. v Commonwealth.

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(1999) 197 CLR 117. In addition, the Commonwealth prevented the asylum seekers on board the MV Tampa from landing in Australia, a decision held constitutional by the Full Court of the Federal Court in Ruddock v Vaddaras (2001) 20 NCJR 491, for a discussion of these laws and other legislative and executive actions that constitute the recent public record regarding migration policy see R Sackville, 'Refugee Law: The Shifting Balance' (2004) 26 Sydney Law Review 37, 65. Al-Kateb (2004) 208 ALR 124, 129.

64. There is nothing in the parliamentary debates of the House of Representatives or the Senate regarding the Magna Carta Reform Act 1992 (Cth) — the Act which inserted the relevant provisions into the Migration Act 1958 (Cth) — that indicates that the stalemate situation arising in these appeals was ever contemplated by the legislature. On the contrary, in its second reading speech in the House of Representatives, the Minister for Immigration, Local Government and Ethnic Affairs stated that 'granting visas will not be available to people who arrive in Australia without authority: Commonwealth Parliamentary Debates, House of Representatives, 4 November 1992, 2621 (Gerry Hand). However, both Mr Al-Kateb and Mr Al Khati were given bridging visas after the High Court disposed of their appeals. This implicitly suggests that the stalemate situation was never contemplated by the legislature at the time of the amending Act's passage.


67. Ibid, where Hayne J cited the following Learned Hand J comment in Stangency v Meyer (1952) 312 US 405, 415 (2nd Cir): 'Think what one may of a statute when passed by a society which professes to put its fault in [freedom], a court has no warrant for refusing to enforce it. If that society chooses to finish when its principles are put to the test, courts are not set up to give it derring-do.'

68. Dyzenhaus, above n 61, 62.

69. Ibid at 59.

70. See Michael v R (1995) 184 CLR 117, 120 where Gaudron J said that 'individual liberty is the most important and fundamental of all common law rights'. See also Dyzenhaus, above n 61, 3 where the author states that 'restricting the most important of the common law standards are those protective of the liberty of the individual' (footnote omitted).

71. There is strong evidence that the majority judges also consider the 'common law' approach appropriate in the context of legislative ambiguity; see, for example, Coates v R (1994) 179 CLR 427, 436-438 (Mason CJ, Brennan, Gaudron and McHugh JJ); Daniels Corporation International Pty Ltd v Australian Construction and Consumer Commission (2002) 213 CLR 543, 553 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 591 (Callinan J).


74. Ibid at 133 (McHugh J).


77. See (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ), 10 (Mason CJ) (agreement).

78. See Re Woody (2004) 210 ALR 375, 376 (Gleeson CJ), 413-414 (Gummow J), 416 (Kear J).

79. See Al-Kateb (2004) 208 ALR 124, 136 where McHugh J said that 'form would triumph over substance' if 'parliament were forced to achieve its object of preventing entry into the Australian community by making it a criminal offence with a mandatory sentence for a person to be ... a prohibited immigrant'.

80. See above, n 1.

81. Al-Kateb 208 ALR 124, 196 (Callinan J).

82. Ibid. See also 189 and 191 (Hayne J).

83. See 188 and 191 (Hayne J).

84. See William Blackstone wrote in his Commentaries on the Laws of England that '[t]he confinement of a person, in any wise, is an improvement, So that the keeping [of] a man against his will, ... is an imprisonment. ... To make an imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison', quoted in Lennie (1992) 176 CLR 1, 28 (Brennan, Deane and Gummow JJ). Moreover, Magna Carta 1215 (Reg) clause 59 states: 'No freeman shall be taken, or imprisoned, or newged, or outlawed, or exiled, or in any way destroyed, nor will we go upon him, or send upon him — save by the lawful judgment of his peers or by the law of the land.'

85. For the libretto orthodoxy view of this point, see Lennie (1992) 176 CLR 1, 27-28 (Brennan, Deane and Dawson JJ). However, it must be noted that as Law Gaudron J articulated a position similar to the one advocated by Hayne J when she wrote that she was 'not presently persuaded that legislation authorising detention in circumstances involving no breach of the criminal law and travels beyond the presently accepted categories is necessarily and inevitably offensive to Ch III' (at 55).

86. Al-Kateb 208 ALR 124, 189.


88. Ibid at 384 (emphasis in original).

89. Ibid, at 385.

90. Australian Security Intelligence Organisation Act 1979 (Cth) s 34C.

91. 208 ALR 124, 136 (McHugh J).

92. Ibid (Hayne J), 190-197 (Callinan J).

93. Ibid at 136.

94. This proposition — in essence the Lennie principle — was defended by Gleeson CJ, Gummow and Kirby JJ in Re Woody (2004) 210 ALR 369, 374 (Gleeson J), 410 (Gummow J), 418 (Kear J).

95. Australian Communist Party v Commonwealth (1951) 83 CLR 1.

96. Al-Kateb (2004) 208 ALR 124, 148 (Gummow J) and 164 (Kear J).

97. Ibid, at 160.

98. My thanks are due to the anonymous referee for this point.


103. Al-Kateh (2004) 208 ALR 124, 167 where Kirby J himself notes that the interpretive principle be taxation which is yet to be endorsed by a majority of the High Court.

104. Al-Kateh (2004) 208 ALR 124, 162-167 (Hayne J). In reply, Kirby J states in Al-Kateh (2004) 208 ALR 201, 203, "Tragos: as this outcome is for Mr Al-Khafaj, the Minister’s appeal must be allowed."

105. Ibid at 203 (McHugh J). In reply, Kirby J states in Al-Kateh (2004) 208 ALR 201, 203, "Tragos: as this outcome is for Mr Al-Khafaj, the Minister’s appeal must be allowed."

106. Ibid at 169.

107. Ibid at 141 (McHugh J). In reply, Kirby J states in Al-Kateh (2004) 208 ALR 201, 203, "Tragos: as this outcome is for Mr Al-Khafaj, the Minister’s appeal must be allowed."

108. Ibid at 143 (McHugh J). In reply, Kirby J states in Al-Kateh (2004) 208 ALR 201, 203, "Tragos: as this outcome is for Mr Al-Khafaj, the Minister’s appeal must be allowed."

109. Ibid.

110. Ibid.

111. Ibid. In reply, Kirby J states in Al-Kateh (2004) 208 ALR 201, 203, "Tragos: as this outcome is for Mr Al-Khafaj, the Minister’s appeal must be allowed."

112. After Al-Kateh and Al Khafaji, the Minister for Immigration and Multiculturalism and Indigenous Affairs reviewed the circumstances of 28 cases affected by the decisions. 19 cases had been granted to nine people. I have requested further information in two cases, and I have decided not to grant visas in 13 cases (Senator Amanda Vanstone, 'Al-Manso Deportation', media release, 31 August 2004).