HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS APPELLANT

AND

ABBAS MOHAMMAD HASAN AL KHAFAJI RESPONDENT

Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji
[2004] HCA 38
6 August 2004
A254/2003

ORDER

1. *Appeal allowed.*

2. *Orders 1, 2, 3, 4, 5, 6 and 8 of the Federal Court of Australia made 5 November 2002 set aside and in lieu thereof order that the application to that Court be dismissed.*

3. *The appellant to pay the respondent's costs in this Court.*

Cause removed under s 40 of the *Judiciary Act* 1903 (Cth)

Representation:

D M J Bennett QC, Solicitor-General of the Commonwealth with H C Burmester QC and S J Maharaj for the appellant (instructed by Australian Government Solicitor)

S W Tilmouth QC with M B Manetta and H M Heuzenroeder for the respondent (instructed by Jeremy Moore & Associates)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with H C Burmester QC and S J Maharaj intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D S Mortimer SC with J K Kirk intervening on behalf of the Human Rights and Equal Opportunity Commission (instructed by Human Rights and Equal Opportunity Commission)

CATCHWORDS

Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji

Immigration – Unlawful non-citizens – Detention pending removal from Australia – No real prospect of removal from Australia in reasonably foreseeable future – Whether detention lawful under *Migration Act* 1958 (Cth) – Whether detention is temporally limited by purpose of removal – Whether requirement to remove as soon as reasonably practicable implies time limit on detention.

Statutes – Acts of Parliament – Construction and interpretation – Where meaning ambiguous or uncertain – Presumption of legislative intention not to invade personal common law rights.

Constitutional law (Cth) – Judicial power of the Commonwealth – Unlawful non-citizen in immigration detention – No real prospect of removal from Australia in reasonably foreseeable future – Whether provision for indefinite detention without judicial order infringes Chapter III of the Constitution – Whether detention involves an exercise of judicial power of the Commonwealth by the Executive – Whether detention is for a non-punitive purpose.

Constitutional law (Cth) – Construction and interpretation – Whether Constitution to be interpreted to be consistent with international law of human rights and fundamental freedoms.

Constitution, Ch III.
Migration Act 1958 (Cth), ss 189, 196, 198.

1 GLEESON CJ. This appeal was heard at the same time as *Al-Kateb v Godwin*[1].

2 The facts and issues are set out in the reasons of Gummow J. For the reasons I gave in *Al-Kateb* I consider that this appeal should be dismissed with costs.

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1 [2004] HCA 37.

3 McHUGH J. Mr Abbas Mohammad Hasan Al Khafaji is an Iraqi national and unlawful non-citizen who was refused a protection visa in Australia on the grounds that he had not taken all reasonable steps to avail himself of a right to reside in Syria. However, attempts by the Australian government to remove him from Australia have been unsuccessful. In the Federal Court, Mansfield J found that there was no real prospect of successful removal in the foreseeable future. Mr Al Khafaji's case therefore raises the same issues concerning the legality of detaining an unlawful non-citizen in immigration detention as are raised in *Al-Kateb v Godwin*[2]. For the reasons that I give in that case, ss 189, 196 and 198 of the *Migration Act* 1958 (Cth) require that Mr Al Khafaji be kept in immigration detention until he is removed from Australia.

4 Tragic as this outcome is for Mr Al Khafaji, the Minister's appeal must be allowed. I agree with the orders proposed by Hayne J.

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2 [2004] HCA 37.

5 GUMMOW J. This appeal by the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") from the judgment and order of the Federal Court of Australia (Mansfield J)[3], which was pending in the Federal Court, was removed into this Court under s 40 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") by order of this Court made on 14 August 2003. The appeal raises issues related to those in *Al-Kateb v Godwin*[4] and this judgment should be read with my judgment in that case.

6 By application to the Federal Court filed on 10 September 2002, the respondent had sought against the Minister injunctive and other relief under s 39B of the Judiciary Act. The respondent was successful and on 5 November 2002 Mansfield J ordered that the Minister forthwith release the respondent from detention. At the time of this order, the respondent, as an unlawful non-citizen, had been detained under the provisions of the *Migration Act* 1958 (Cth) ("the Act") for two years and 10 months. Mansfield J followed the construction given the legislation by Merkel J in a case thereafter affirmed by the Full Court of the Federal Court[5].

7 The facts may be stated shortly. The respondent was born in Iraq on 5 January 1973 and is an Iraqi national. In about 1980, he fled Iraq with his family and went to Syria. The respondent grew up there and after completion of his schooling worked casually as a teacher. In November 1999, the respondent left Syria. He arrived in Australia without proper travel documents on 5 January 2000. He was then placed in immigration detention, where he remained until the order for his release was made by Mansfield J.

8 On 5 April 2000, the respondent applied for a protection visa within the meaning of s 36 of the Act as that section stood after the changes made by the *Border Protection Legislation Amendment Act* 1999 (Cth)[6] ("the 1999 Act"). The delegate of the Minister accepted that the respondent satisfied the criterion for such a visa provided in s 36(2). This stated:

> "A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

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3 [2002] FCA 1369.

4 [2004] HCA 37.

5 *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 192 ALR 609; affd (2003) 126 FCR 54.

6 By Sched 1, Pt 6, Item 65, which commenced on 16 December 1999.

The delegate accepted that the respondent had a well-founded fear of persecution if he were to return to Iraq, by reason of his political opinion or political opinion imputed to him. However, the respondent failed to obtain a protection visa.

9 This was by reason of the operation given by the delegate to s 36(3) with respect to Syria. The sub-section was inserted by the 1999 Act in a Part headed "Amendments to prevent forum shopping". It stated:

> "Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national."

The question posed in the concluding words of s 36(3), the country of nationality of a non-citizen, is to be determined solely by reference to the law of that country (s 36(6)). Section 36(3) would not apply in relation to Syria if the respondent had a well-founded fear of persecution there (s 36(4)). Nor would it apply to Syria if the respondent had a well-founded fear that Syria would return him to Iraq and that he would be persecuted there (s 36(5)).

10 However, the delegate concluded that the respondent had effective protection in Syria, including the right to re-enter and reside in Syria without the risk of refoulement to Iraq and that he did not have a well-founded fear of persecution for any Convention reason if he were to return to Syria. Hence s 36(3) operated, Australia was to be taken not to have protection obligations to the respondent and, as a result, he did not meet the necessary criterion in s 36(2) for a protection visa.

11 A review of the delegate's decision by the Refugee Review Tribunal ("the Tribunal") affirmed the decision on the footing that, without determining whether s 36(2) was satisfied, the delegate correctly had applied s 36(3).

12 The respondent was notified of the decision of the Tribunal on 4 December 2000. He took no steps to institute in the Federal Court an application for judicial review of the Tribunal's decision under the provisions of Pt 8 of the Act as it then stood[7]. The decision of the Tribunal had been made under Pt 7 of the Act. The absence of any application for judicial review under Pt 8 produced the result that, on 1 January 2001, the application for the protection visa was "finally determined" within the meaning of the definition

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7 Before the significant changes introduced with effect from 2 October 2001 by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth), which was construed in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

given that expression in s 5(9) of the Act. That state of affairs then called into play the obligation imposed by s 198(6) of the Act, that "[a]n officer must remove as soon as reasonably practicable an unlawful non-citizen" where the grant of a substantive visa has been refused and the application "finally determined". Further, s 198(1) of the Act stated:

> "An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed."

13 On 9 February 2001, the respondent made a written request to the effect that he be returned to Syria from Australia as soon as possible and with suggestions of other countries to which he might be sent if arrangements could not be made to send him to Syria. He made a further formal written request on 16 April 2002. The Minister has been aware of the respondent's wish to be returned at least since the written request of 9 February 2001.

14 The evidence before Mansfield J was that the respondent was regarded by the Minister's Department as falling into a group of Iraqi nationals found to be at risk of persecution in Iraq but with effective protection in a third country. In an affidavit the subject of a confidentiality order, the director of the Unauthorised Arrivals Section of the Department explained steps taken to arrange for the return from Australia to Syria of failed asylum seekers who are formerly residents of Syria. His Honour said that it was inappropriate to set out the detailed nature of these confidential steps, but he recorded the director's opinion that the return of the respondent was "still achievable".

15 The provisions of the Act with respect to the period of immigration detention of unlawful non-citizens are apt to draw a court exercising federal jurisdiction in a matter arising under the Act or s 75(v) of the Constitution into an issue respecting the conduct of the executive branch in attempting to procure the removal of unlawful non-citizens from Australia and to other countries. Both this appeal and that in *Al-Kateb* provide examples. The term "non-justiciable" has been used with respect to certain aspects of the conduct by the executive branch of foreign relations[8]. But the Act itself and its subjection to the operation of Ch III of the Constitution render that term inapplicable to cases such as the present[9]. That is not to deny that confidentiality orders, such as that apparently made by Mansfield J in this case, may be appropriate[10].

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8 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 555 [92].

9 See *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 367-373.

10 See *Federal Court of Australia Act* 1976 (Cth), ss 17(4), 50; *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228.

16 After referring to the text of ss 196 and 198 of the Act, and recording the absence of any challenge to the validity of s 196, Mansfield J said:

> "I find that the removal of [the respondent] from Australia is not 'reasonably practicable', because there is not at present any real prospect of [the respondent] being removed from Australia in the reasonably foreseeable future. I have had regard to the period of [the respondent's] detention since 5 January 2000, or perhaps more accurately since 9 February 2001 when he requested in writing that he be returned to Syria, including the periods during which he has had unresolved requests to [the Minister] under s 417 of the Act. I have had regard to his communications with [the Minister] and [Department] officers. I have had regard to the affidavits filed on behalf of [the Minister], to which I have referred above."

His Honour expressed his conclusions as follows:

> "In my view there is nothing to indicate that there is any real prospect of [the respondent] being returned to Syria in the reasonably foreseeable future, and nothing to indicate that he can successfully be removed to another country in any measurable timeframe. I accept the director's evidence that 'with persistence' there is some prospect of [the respondent] being successfully removed from Australia to a third country, possibly including Syria, after 'protracted' steps are taken, but the period of time over which those steps may be taken – assuming, which is by no means clear, that they are ultimately successful – is indefinite and is certainly not of short compass. There is no material to suggest [the respondent's] removal from Australia will probably or might necessarily be effected within a time span of (say) several months. That is a finding which senior counsel for [the Minister] contested only in a relatively faint way."

17 The reference by Mansfield J to the respondent's unresolved requests to the Minister under s 417 requires some elaboration. That provision empowered the Minister, acting personally, to substitute for a decision of the Tribunal another decision, more favourable to the respondent, if the Minister thought that it was in the public interest to do so. In December 2000, the respondent, in conjunction with some 20 other persons in immigration detention, had requested the Minister to exercise that power by granting protection visas. The signatories were all persons of Iraqi nationality who had come to Australia from Syria and were in immigration detention. On 9 February 2001, the Minister had informed the respondent that he had decided not to exercise the power under s 417. Mansfield J explained as follows what then transpired:

> "In about mid 2001 [the respondent] learned that several of the signatories to the request of December 2000 had been granted protection

> visas by [the Minister] in the exercise of his powers under s 417 of the Act. He then made a fresh written request to [the Minister] to exercise that power in his favour, sent on or about 13 July 2001, and to otherwise arrange for his departure from Australia to Syria or to some other country as soon as possible. He expressed his very strong desire to get out of immigration detention either by being sent to another country or by being granted a protection visa. By letter of 18 July 2001, an officer of [the Minister] informed [the respondent] that his further request under s 417 would not be referred to [the Minister] for decision as it contained no new information."

18 The chain of events narrated above indicates the odd, if not paradoxical, position in which both the respondent and the Minister found themselves. The application for a protection visa had failed because of the conclusion by the delegate and the Tribunal that the respondent still had "a right" within the meaning of s 36(3) to enter and reside in Syria but had not taken all possible steps to avail himself of that "right". Yet it thereafter became apparent that, while the respondent wished to avail himself of that right, by triggering the requirement under s 198(1) of the Act that he must be removed as soon as reasonably practicable, there was, as Mansfield J found, no real prospect of that return to Syria coming to pass in the reasonably foreseeable future. The result, on the construction of the Act for which the Minister still contends in this Court, is the continued mandatory detention of the respondent.

19 There must be a serious question as to whether there exists a "right" of the nature identified in s 36(3) where it is insusceptible of exercise within a reasonable time of its assertion. It has long been notorious that the term "right" has no definite or stable connotation and bears a variety of meanings according to the connection or context in which it is used. Here, as s 36(3) emphasises, the entry and residence may be merely temporary and the right may have arisen or be expressed in various ways. Nevertheless, remarks of Professor Hohfeld, nearly a century ago, are on point[11]:

> "[E]ven those who use the word and the conception 'right' in the broadest possible way are accustomed to thinking of 'duty' as the invariable correlative."

20 On the present facts, any correlative duty must be that of Syria. Presumably the duty is owed under its municipal law to the respondent personally and must be shown to exist by evidence in an acceptable form to the Australian decision-maker dealing with the protection visa application. It may

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11 "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 *Yale Law Journal* 16 at 31.

also be that there is a duty owed to him, or to Australia, as an international obligation. These questions of the intersection between municipal and international law have not been explored in submissions.

21 It is enough for this appeal to note that the issues of construction that do arise respecting the application to this case of the duties to remove the respondent from Australia under s 198 should not be approached on the footing that, as a matter of international obligation to Australia, Syria is required to permit the respondent to re-enter that country and to reside there.

22 The relevant provisions of the Act are construed in my judgment in *Al-Kateb*. The findings of Mansfield J set out earlier in these reasons lead to the conclusion that ss 198 and 196 no longer mandated the continuing detention of the respondent. Section 198 no longer retained a present purpose of facilitating removal from Australia as an end reasonably in prospect; as a result, the temporal imperative imposed by the word "until" in s 196(1) lost the necessary condition or assumption for its operation that s 198 still operates to provide for removal *under* that section.

23 The consequence is that the appeal by the Minister fails and must be dismissed with costs. That leaves standing the orders made by the primary judge. Order 1 required the release of the respondent from detention. Orders 2-6 provided for what was to happen thereafter and established what was described in submissions to this Court as a reporting regime restraining the activities of the respondent and requiring his compliance with any arrangements for his removal from Australia which might be made in the future. Order 8 reserved to either party liberty to apply to vary or discharge these orders, including as to the reporting requirements.

24 There has been no cross-appeal against these orders imposing restrictions on the respondent after his release. Indeed, his counsel in a sense relied upon them as supporting the practicality of a reporting regime as an alternative to detention. In these circumstances, it is sufficient to say here that the considerations referred to under the heading "Orders" in my reasons in *Al-Kateb* may supply a statutory footing for the restrictive orders in question here.

25 KIRBY J. My conclusion in this appeal follows from my reasons in the connected proceeding in *Al-Kateb v Godwin*[12]. As in that case, I agree with the orders proposed by Gummow J. I also agree with his Honour's remarks concerning the lawfulness of the original orders of the primary judge thereby confirmed[13].

26 For the reasons given by Gummow J, this appeal by the Minister can be determined by giving meaning to the language of ss 196 and 198 of the *Migration Act* 1958 (Cth) ("the Act")[14]. Most of the wider constitutional and other issues that were argued do not need to be decided. However, as Gummow J shows, it is impossible to ignore the constitutional setting, and the basic hypotheses that it presents, in approaching the radical assertions urged for the Minister which this Court should reject.

27 The interpretation of the Act favoured by Gummow J has an added attraction for me. It is supported by the presumption that Australian statutes (such as the Act) are to be interpreted and applied, as far as their language permits, so as to be in conformity with international law, including the international law of human rights and fundamental freedoms. This principle ensures that Australian law is construed so that it is not needlessly in breach of the obligations binding upon Australia under international law. Since the earliest days of this Court, the latter principle has been one that has helped to guide this Court in the construction of Australian legislation[15].

28 International law[16], like the common law of Australia, has a strong presumption in favour of individual liberty and against a power of indefinite detention by the executive government. Certainly, that is how an ambiguous

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12 [2004] HCA 37.

13 Reasons of Gummow J at [22].

14 Reasons of Gummow J at [22]-[24].

15 See, for example, *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ, 417-418 [166] of my own reasons; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36 at [125]-[129].

16 eg International Covenant on Civil and Political Rights, done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23, Arts 7, 9, 10.

statutory provision in this country is to be read[17]. This case affords no exception. In relevant respects, the Act is ambiguous. In such circumstances, this Court should certainly uphold an interpretation that denies to the Executive what is effectively a self-defining and self-fulfilling power of indefinite detention of the respondent. Such a power would be incompatible with Ch III of the Constitution. It would also be inconsistent with past decisions of this Court that have declined to extend such self-determining powers to the Executive[18].

29 The appeal should be dismissed with costs.

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17 See *Piper v Corrective Services Commission of NSW* (1986) 6 NSWLR 352 at 361; *Director of Public Prosecutions v Serratore* (1995) 38 NSWLR 137 at 142-143 [1]-[2]. See further *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 at 706; [1984] 1 All ER 983 at 985; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111; *Zadvydas v Davis* 533 US 678 at 699 (2001); *Hamdi v Rumsfeld* 72 USLW 4607 at 4614-4615 (2004).

18 eg *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J, 206 per McTiernan J, 222 per Williams J, 263 per Fullagar J.

30 HAYNE J. This appeal was heard at the same time as the appeals in *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*[19] and *Al-Kateb v Godwin*[20]. Although the facts which give rise to this appeal, and the administrative and curial steps which lie behind it, differ in some respects from those considered in *Al-Kateb*, the ultimate issue, concerning the lawfulness of the detention of the respondent in immigration detention, is identical. For the reasons I give in *Al-Kateb*, the *Migration Act* 1958 (Cth) validly requires that the respondent be kept in immigration detention until he is removed from Australia.

The facts

31 The respondent, an Iraqi, came to Australia by boat on 5 January 2000. He had no visa to enter or remain in Australia. A delegate of the appellant Minister determined that the respondent had a well-founded fear of persecution by reason of his political opinion, or a political opinion imputed to him, if he were to return to Iraq. The Minister's delegate concluded, however, that the respondent had a right to re-enter and reside in Syria, without the risk of refoulement to Iraq, that he did not have any well-founded fear of persecution for any Convention reason if he were to return to Syria, and that accordingly the respondent would have effective protection in Syria. The respondent's application for a protection visa was refused.

32 The respondent sought review of this decision by the Refugee Review Tribunal and the Tribunal affirmed the delegate's decision not to grant the respondent a protection visa. The respondent did not seek review of that decision in the Federal Court of Australia.

33 In February 2001, the respondent asked the Minister, in writing, to remove the respondent to Syria or to a third country. He has not been removed from Australia.

The proceedings below

34 On 10 September 2002, the respondent applied to the Federal Court for habeas corpus. On 5 November 2002, Mansfield J ordered[21] that the respondent be released from detention forthwith. The orders required the respondent to

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19 [2004] HCA 36.

20 [2004] HCA 37.

21 *Al Khafaji v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1369.

notify the Australian Government Solicitor of his address, and any subsequent change of address, and to submit to the custody of the Minister if "specific arrangements" were made for his removal. In addition, he was required to report periodically to the Minister's Department or to a police station.

35 Mansfield J found that "the removal of [the respondent] from Australia is not 'reasonably practicable', because there is not at present any real prospect of [the respondent] being removed from Australia in the reasonably foreseeable future"[22]. Mansfield J accepted evidence led on the Minister's behalf that:

> "'with persistence' there is some prospect of [the respondent] being successfully removed from Australia to a third country, possibly including Syria, after 'protracted' steps are taken, but the period of time over which those steps may be taken – assuming, which is by no means clear, that they are ultimately successful – is indefinite and is certainly not of short compass"[23].

36 From these orders the Minister appealed to the Full Court of the Federal Court. By order made under s 40 of the *Judiciary Act* 1903 (Cth) that appeal was removed into this Court.

Conclusion and orders

37 For the reasons given in *Al-Kateb*, those provisions of the *Migration Act* which require the continued detention of the respondent are not invalid. Accordingly, his detention was not unlawful and the orders made by Mansfield J should, therefore, be set aside. In addition, as is also explained in *Al-Kateb*, if it had been shown that the respondent's continued detention was unlawful, he should have been released unconditionally. There could be no basis for imposing any of the conditions imposed in the orders.

38 The appeal to this Court should be allowed. The orders made by Mansfield J on 5 November 2002 (other than the order for costs) should be set aside and, in their place, there should be orders that the application be dismissed.

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22 [2002] FCA 1369 at [21].

23 [2002] FCA 1369 at [21].

Consistent with the terms on which the matter was removed into this Court, the appellant should pay the respondent's costs in this Court.

39 CALLINAN J. This appeal raises a question as to the legality of the respondent's detention in immigration detention for an indefinite period but for the purpose of his deportation. These reasons should be read with the reasons in *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*[24] and *Al-Kateb v Godwin*[25].

Facts

40 This was the third of three cases heard together on 12 and 13 November 2003. The respondent is an Iraqi. He was detained as an unlawful non-citizen upon his arrival in Australia without proper travel documents on 5 January 2000, pursuant to s 189 of the *Migration Act* 1958 (Cth) ("the Migration Act"). He was held to be a genuine refugee by the delegate of the appellant. It was determined however that he was not a person to whom Australia owed protection obligations because of a finding that he could obtain protection in Syria.

41 On 30 November 2000, the Refugee Review Tribunal ("the Tribunal") upheld that finding but made no finding as to the respondent's status as a refugee. The result was communicated to the respondent on 4 December 2000. The respondent did not seek to have this decision reviewed by the Federal Court and the time within which he might do so expired on 1 January 2001. On 9 February 2001 the respondent made a written request for removal to Syria. The appellant has been unable so far to effect his removal.

42 On 10 September 2002, the respondent made an application to the Federal Court for an order for his release in reliance on the decision of the Federal Court in *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs*[26]. Mansfield J heard the application on 16 September 2002. His Honour gave judgment on 5 November 2002 ordering the respondent's release from detention forthwith on strict terms and conditions. By then he had been in detention for 2 years and 10 months.

43 In his reasons, Mansfield J said[27]:

> "I find that the removal of the [respondent] from Australia is not 'reasonably practicable', because there is not at present any real prospect

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24 [2004] HCA 36.

25 [2004] HCA 37.

26 (2002) 192 ALR 609.

27 *Al Khafaji v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1369 at [21].

> of the [respondent] being removed from Australia in the reasonably foreseeable future. I have had regard to the period of the [respondent's] detention since 5 January 2000, or perhaps more accurately since 9 February 2001 when he requested in writing that he be returned to Syria, including the periods during which he has had unresolved requests to the [appellant] under s 417 of the Act. ... [The detention] is indefinite and is certainly not of short compass. There is no material to suggest the [respondent's] removal from Australia will probably or might necessarily be effected within a time span of (say) several months. That is a finding which senior counsel for the [appellant] contested only in a relatively faint way."

44 The appellant appealed to the Full Court of the Federal Court against the decision of Mansfield J on 20 November 2002. On 14 August 2003 this Court (Gummow, Kirby and Hayne JJ) ordered that the proceedings be removed into this Court for hearing pursuant to s 40 of the *Judiciary Act* 1903 (Cth). The proceedings therefore come before this Court as an appeal to the Full Court of the Federal Court to be heard and determined effectively as an appeal to this Court. The order was granted on condition as to costs: that the appellant not challenge the order as to costs made by Mansfield J, that the appellant not seek costs against the respondent in this Court, and that the appellant pay the costs of the respondent in this Court in any event.

45 The reference by Mansfield J to reasonable practicability and reasonable foreseeability was directed to the situation "at present". The Migration Act imposes no such temporal qualification. It is to purpose to which attention must be paid, and the purpose of deportation has not been abandoned. As I have observed in *Al-Kateb*, in the nature of human and international affairs, long periods may be involved just as circumstances may change very quickly. Neither current predictability nor delay can determine the constitutional nature of the detention and its continuation.

46 Only two further submissions should be noted. They adopt judicial pronouncements which cannot be disputed but this case falls outside their general language. The first was that the common law's jealous protection of liberty is both fundamental and ancient[28]:

> "The right to personal liberty is, as Fullagar J described it, 'the most elementary and important of all common law rights'. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without sufficient cause'." (footnotes omitted)

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28 *Williams v The Queen* (1986) 161 CLR 278 at 292 per Mason and Brennan JJ.

47 The statutory purpose of deportation provides sufficient cause here.

48 The second was that to effect the curtailment of fundamental rights it must be apparent that[29]:

> "the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights."

49 The statutory language here is specific and clear. It gives effect to the difference in status between aliens and citizens. Such curtailment of freedom as occurs, occurs for a statutory purpose within constitutional power only. People who do not have valid claims to refugee status or to whom the nation owes no obligations of protection take the risk in unlawfully entering the country that they will be detained. It is difficult to believe that they can have any different understanding. If they do, ignorance of the Australian law can afford them no greater excuse than it would an Australian citizen.

50 The appeal should be allowed and the orders of Mansfield J made on 5 November 2002, save as to costs, should be set aside. In accordance with the order of this Court on the application to remove the proceedings pursuant to s 40 of the *Judiciary Act*, the order as to costs made by Mansfield J on 5 November 2002 should not be disturbed, and the appellant should pay the costs of the respondent in this Court.

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29 *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.

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

52 It is therefore not necessary to decide whether, if the respondent's continued detention were unlawful, any conditions could be imposed on his release.