FEDERAL COURT OF AUSTRALIA

NAKG of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs

[2002] FCA 1600

MIGRATION – mandatory detention of an unlawful non-citizen pending removal from Australia – whether order for release should be made when the removal of the applicant from Australia in the reasonably foreseeable future is not reasonably practicable – whether previous decision of single judge of the Federal Court on the same issue should be followed.

Migration Act 1958 (Cth), ss 48B, 189, 196, 198 and 417
Federal Court of Australia Act 1976 (Cth), s 50

Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1009 followed
Vo v Minister for Immigration and Multicultural Affairs (2000) 98 FCR 371 considered
Perez v Minister for Immigration and Multicultural Affairs (2002) 191 ALR 619 referred to
R v Governor of Durham Prison; Ex parte Hardial Singh [1984] 1 WLR 704 referred to
Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97 referred to
Zadvydas v Davis 533 US 678 (2001) referred to
Al Khafaji v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1369 followed
Repatriation Commission v Gorton (2001) 110 FCR 321 considered
NAMU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 401 referred to
Minister for Immigration and Multicultural and Indigenous Affairs v VFAD of 2002 [2002] FCAFC 390 referred to

NAKG OF 2002 v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS AND THE COMMONWEALTH OF AUSTRALIA
N512 of 2002

JACOBSON J
SYDNEY
19 DECEMBER 2002

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N512 of 2002**

BETWEEN:	**NAKG OF 2002** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	THE COMMONWEALTH OF AUSTRALIA **SECOND RESPONDENT**
JUDGE:	**JACOBSON J**
DATE:	**19 DECEMBER 2002**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

Introduction

1 The applicant is an unlawful non-citizen within the meaning of s 14 of the *Migration Act 1958* (Cth) ("the Act"). He is in immigration detention within the meaning of s 5 of the Act. He is detained at the Immigration Reception & Processing Centre ("the IRPC") situated at Port Hedland in Western Australia. He has been in detention since he arrived in Australia from Kuwait more than three years ago.

2 By an amended application and amended statement of claim, both of which were filed in Court on 11 December 2002, the applicant seeks an order that he be released from detention forthwith.

3 This application is made upon the basis that what is said to be the proper construction of ss 189, 196 and 198 of the Act. In particular, the applicant contends that the power to detain him which is conferred by s 196(1) of the Act is to be limited to a period which is to be determined according to whether two conditions have been satisfied.

4 The first condition is that the Minister is taking reasonable steps to secure the removal of the applicant from Australia. The second is that the period of detention is to continue only for so long as there are real prospects of the applicant's removal from Australia in the reasonably foreseeable future.

5 In *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1009 ("*Al Masri*"), Merkel J held at [38] that the proper construction of ss 196(1)(a) and 198 of the Act is limited to the period determined by the satisfaction of the two conditions which I have set out.

6 His Honour's decision is under appeal to a Full Court. The appeal has been argued and the Court has reserved its judgment.

7 The applicant does not suggest that the Minister is doing otherwise than taking reasonable steps to secure his removal. However, the applicant submits that the evidence establishes that there is no real prospect of removal from Australia in the reasonably foreseeable future. The respondents do not cavil with that proposition.

8 Thus, the only issue before me is whether I am bound to follow the judgment of Merkel J.

Facts

9 It is common ground that the applicant is an unlawful non-citizen. He arrived in Australia on 5 June 1999 on a commercial flight from Cairo via Singapore. He claimed on arrival that he had travelled by plane from Kuwait to Jordan and from there to Cairo by boat.

10 Upon his arrival in Australia, the applicant was placed in immigration detention at the IRPC situated at Villawood in New South Wales.

11 On or about 23 June 1999, the applicant applied for a protection visa. He claimed to be a Bidoon from Kuwait and claimed that he had a well-founded fear of persecution upon the ground that the Kuwaiti Government discriminates against Bidoons as members of that ethnic group. The word "Bidoon" is Arabic and means a stateless person.

12 On 22 July 1999, a delegate of the Minister refused the application for a protection

visa. The delegate had doubts about the applicant's identity and found that he was not a Bidoon. The delegate found in any event that the discrimination claimed by the applicant did not amount to persecution.

13 The applicant applied to the Refugee Review Tribunal ("the RRT") for a review of the delegate's decision but the application was out of time when it was received by the RRT on 4 August 1999. The RRT declined to accept the application on 16 August 1999 on the ground that it was not lodged within the time limited by the Act.

14 In the period from August 1999, requests were made to the Minister for the exercise of his discretion under ss 48B and 417 of the Act. All of the requests have been refused. There are no extant applications to the Minister for reconsideration of the applicant's immigration status.

15 On 10 September 1999, the Department wrote to the applicant stating that it had commenced making arrangements for his removal from Australia.

16 During the period of more than three years which has elapsed since the Department's letter, no country has confirmed that it is willing to accept the applicant within its borders.

17 The Department's efforts have concentrated upon discussions with the Government of Kuwait. This is because there are other persons apart from the applicant who are in immigration detention and who claim to be Bidoons from Kuwait. The Department has been endeavouring to secure the agreement of the Government of Kuwait to the return of the applicant and the other Kuwaiti Bidoons to their country of claimed origin.

18 On 21 August 2001, the applicant's migration agent, who has been representing the interests of the Bidoon asylum seekers at the Port Hedland IRPC, wrote to the Minister requesting that he resolve their situation. The migration agent requested that this be done either by deporting the Bidoons to any country which would offer them safe haven or by issuing them with visas to enter Australia on the ground that they are stateless persons who are entitled to protection under the Convention. It was accepted by the respondents that this constituted a request in writing for the removal of the applicant in accordance with s 198(1) of the Act.

19 Nearly three weeks before the letter from the migration agent, Mr Jim Williams, the Director of the Department's Unauthorised Arrivals and Detention Services Section, recorded the following in an email:-

> *"DIMA is contining (sic) to work on a removal strategy for the Bedoons in detention. Issues now being considered are:*
>
> . *third country options;*
> . *scope for UNHCR involvement; and*
> . *further diplomatic approaches to Kuwait."*

20 On 20 August 2001, the Department prepared an information brief dealing with the question of the Kuwaiti Bidoons held in immigration detention. The information brief stated that the Kuwaiti Liaison Officer advised that the Bidoons held in immigration detention who had originally resided in Kuwait were not welcome back to that country. This was because, according to the briefing paper, they were thought to have been Iraqis and were said to have had links to the Iraqi occupying forces during the Gulf War.

21 The minute paper records the following under the heading "Next Steps":-

> *"We have been advised recently that UNHCR (Kuwait City) can confirm whether the detainees have a right of residence in Kuwait. We are pursuing this as a matter of urgency but in light of the advice from the Kuwaiti Liaison Office it is not likely to advance the situation."*

22 Mr Williams has sworn two affidavits which are in evidence before me. In his shorter affidavit, Mr Williams has set out the background facts relating to the status of the Bidoons in Australia. Mr Williams states in this affidavit that he has been exploring options for the removal from Australia of the applicant and other persons who claim to be Bidoons from Kuwait.

23 Mr Williams states in this affidavit that the details of options which may be available and actions taken by the Department are set out in his second affidavit. At the request of the respondents, I made an order under s 50 of the *Federal Court of Australia Act 1976* (Cth) preventing publication of the contents of the affidavit and restricting access to the parties and their legal advisers. The order was not opposed by counsel for the applicant.

24 It is plain from the evidence before me that, in the period of more than three years

since the Department commenced its efforts to secure the removal of the applicant from Australia, there has been no indication of any real likelihood or prospect of the applicant's removal to a country which will accept him.

25 The latest communication from the Kuwaiti authorities is a letter of 30 October 2002. Portions of it have been blanked out in order to protect the identity of persons apart from the applicant. The letter states in clear terms that the applicant is not regarded as a Kuwaiti and will not be permitted to enter that country.

26 It is therefore abundantly clear that at the present time there is no real prospect that the Department will be able to secure the applicant's removal. Nevertheless, the evidence establishes that the Department is continuing to explore the prospects.

The Legislation

27 Section 189(1) of the Act provides:-

> *"If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person."*

28 Section 196(1) of the Act provides as follows:-

> *"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."*

29 Section 196(3) of the Act provides:-

> *"To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa."*

30 Section 198(1) is in the following terms:-

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

31 Section 198(6) provides:-

> *"An officer must remove as soon as reasonably practicable an unlawful non-citizen if:*
>
> *(a) the non-citizen is a detainee; and*
>
> *(b) the on-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and*
>
> *(c) one of the following applies:*
>
> *(i) the grant of the visa has been refused and the application has been finally determined;*
>
> *(ii) the visa cannot be granted; and*
>
> *(d) the non-citizen has not made another valid application for the substantive visa that can be granted when the applicant is in the migration zone."*

The Decision in Al Masri

32 It was common ground in the proceedings before Merkel J that the applicant had made a request in writing to the Minister on 5 December 2001 to remove him from Australia in accordance with s 198(1); see at [12].

33 The applicant's contention, which was accepted by his Honour, was that the power of detention contained in s 196(1) of the Act is impliedly limited to a reasonable time and it terminates when there is no reasonable likelihood of removal from Australia. Thus, it was submitted that s 196(1), when read with s 198, does not permit a detainee to be detained indefinitely; at [14].

34 The Minister's submission was that under s 189, when read with ss 196 and 198, the detention power continues for so long as it is for the purpose of removal of an unlawful non-citizen from Australia; at [15].

35 In rejecting the Minister's submissions, Merkel J distinguished the decision of a Full Court in *Vo v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 371 ("*Vo*") and the decision of Allsop J in *Perez v Minister for Immigration and Multicultural Affairs* (2002) 191 ALR 619. Those cases dealt with the construction of the power of detention of a person in respect of whom a deportation order had been made under s 200 of the Act.

36 The statutory scheme which applies to the detention of such a person is found in Part 2, Division 9 of the Act as well as in s 253 of the Act. The power to keep a deportee in immigration detention under that section is discretionary.

37 Section 253(8)(a) of the Act provides that a deportee may be kept in immigration detention pending deportation until he or she is placed on board a vessel for deportation from Australia. Section 253(9) confers express power on the Minister to release a person who is detained under this section.

38 In *Vo*, the Court said at [12], [13] and [14]:-

> *"It is true that the power to detain is available only whilst the deportation order is "in force" (s253(1)); and that this criterion is reflected in the reference to the position "pending deportation" in s 253(8)(a). But there is every reason to suppose that this was intended to refer to the state of affairs existing between the time of the making of the deportation order and its execution (unless previously revoked). These are all matters of formal record which are readily ascertainable by all concerned.* ***If the test were otherwise, that is a test of a question of degree, whereby the authority to detain is lost after the lapse of a particular amount of time, serious practical difficulties would arise: it would not be possible to identify the exact point of time when the authority is to be treated as having lapsed, in the absence of any formal process to determine when the lapse did occur.***
>
> *On the other hand, as we would understand it, the plain object of the present statutory scheme is to avoid these difficulties by defining the relevant events in which the authority to detain will lapse, as the execution of the deportation order or its earlier revocation. Short of their occurrence, the deportation order is "in force" for the purposes of s253(1), and the deportation is "pending" for the purposes of s253(8)(a). Until one of these events occurs, the authority to detain will subsist.*
>
> ***This is not to say that the Act, or the general law, will permit the authority to detain to be abused. Clearly, the authority must be exercised bona fide for the purpose for which it was conferred and not to achieve another, disguised, objective…****"* (emphasis added)

39 Merkel J said at [23] that the scheme for discretionary detention of deportees "has no counterpart in respect of the mandatory duty to remove unlawful non-citizens from Australia 'as soon as reasonably practicable' under ss 196(1)(a) and 198."

40 His Honour considered that the approach which he took to the construction of ss 196 and 198 was supported by the decision of Woolf J in *R v Governor of Durham Prison; Ex*

parte Hardial Singh [1984] 1 WLR 704 and by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 as well as by the majority of the United States Supreme Court in *Zadvydas v Davis* 533 US 678 (2001); see the discussion of these authorities by Merkel J at [25] to [38].

41 The effect of those authorities is that, upon the proper construction of the statute in question, the power of detention is impliedly limited to a period reasonably necessary to effect removal. What is a reasonable period will depend upon the circumstances and if the removal is not possible within that period, further detention is not authorised.

42 In the course of his discussion of the overseas authorities, Merkel J referred at [26] and [27] to English and Privy Council authorities for the proposition that once the legality of the detention is put in issue, the burden of proof lies with the Executive to establish on the balance of probabilities that the detention is lawful. Merkel J adopted that view; at [41].

Whether I should follow the Decision of the Primary Judge in *Al Masri*

43 In *Al Khafaji v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1369 ("*Al Khafaji*"), Mansfield J dealt with an application which was indistinguishable from the decision in *Al Masri*. His Honour found at [21] that the removal of the applicant from Australia was not "reasonably practicable" because there was not, at the time of the hearing, any real prospect of the applicant being removed from Australia in the reasonably foreseeable future.

44 His Honour said at [24] that he should follow the decision of Merkel J in *Al Masri* unless he was of the view that it was plainly wrong. His Honour cited a number of authorities in support of that proposition.

45 The authorities which his Honour cited included the decision of the Full Court in *Repatriation Commission v Gorton* (2001) 110 FCR 321 ("*Gorton*"). His Honour referred to a passage of the judgment of Heerey J which appears at [25] in the decision of the Full Court. The effect of what Heerey J said is that a Full Court should exercise caution in embarking upon a detailed re-examination of the issues considered by an earlier Full Court.

46 Counsel for the Minister in *Al Khafaji* put what are effectively the same submissions to Mansfield J as were put before Merkel J and to me. Mansfield J concluded at [32] that "whilst there is much to be said for the position adopted by the respondent" he was not persuaded that the decision of Merkel J in *Al Masri* was plainly wrong. Mansfield J said that he had resisted the temptation to reach his own view as to the proper construction of ss 196(1) and 198 because of the cautionary words stated by Heerey J in *Gorton*.

47 The remarks of Heerey J were directed at the question of whether a Full Court should follow the decision of an earlier Full Court. Here, the question which arises is whether I should follow the decision of a single judge of the Court.

48 If it were not for the fact that a Full Court has heard an appeal from the decision in *Al Masri* and has reserved its judgment, I would, because of the importance of the question which arises here, decide for myself the question of construction of the provisions of ss 189, 196 and 198 of the Act. However, since a decision of the Full Court in *Al Masri* will be binding upon me when it is published, I do not consider that I should express a final view one way or the other on this question.

49 Nevertheless, I do wish to record here that, in my view, there is considerable force in the submissions put to me by counsel for the respondents. In particular, I have real difficulty in seeing how the plain words of s 196(1)(a) and indeed the even plainer words of s 196(3) of the Act can lend themselves to the implied limitation imported by Merkel J.

50 I have come to this view even though s 196(1)(a) is to be construed in the light of s 198 of the Act. Although I have not reached a final view, I do not see how the obligation to remove "as soon as reasonably practicable" in s 198 cuts down the obligation under s 196(1) to keep an unlawful non-citizen in immigration detention until one of the conditions in s 196(1) is satisfied.

51 Moreover, the considerations which led the Full Court in *Vo* to come to the view that the authority to detain is not dependent upon considerations of the period of detention seem to me to apply with even greater force to s 196(1). If time considerations are irrelevant to the construction of a discretionary power of detention, how can they apply to a scheme for mandatory detention expressed in the clear language of ss 196(1) and 196(3)?

52 It seems to me that the legislation which was construed in *Hardial Singh, Lam & Zadvydas* was in quite different terms from ss 189, 196 and 198 of the Act.

53 If the proper construction of these sections is as submitted by the respondents, the only limit on the power of detention would be that it must be exercised *bona fide* for the purpose of securing the removal of the detainee from Australia. This would authorise periods of detention which may be very long. However, that is a question of policy for the legislature and not for the courts. So long as the legislation is not unconstitutional, it must be applied by the courts in accordance with its terms.

54 A Full Court has recently held that s 196 of the Act is constitutional; see *NAMU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 401. The Court said at [10]:-

> *"…s 196 precludes a court from ordering the release of persons who are lawfully detained. No court has power to direct the release of persons who are being lawfully detained, and s 196 does no more than restate this axiomatic position. It does not prevent the court from examining whether a person is an unlawful non-citizen and, if the person is not, ordering his or her release. What a court cannot do is order the release of a person who has been held to be an unlawful non-citizen."*

55 Their Honours also said at [13] of the judgment:-

> *"When one compares the statutory regime considered in* [*Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1] *with that applicable to the present case, it is clear that Parliament has constructed the latter so as to avoid the features of the former that led to the invalidity of s 54R. Section 196 is drafted in a form that all justices in* Lim *said would be valid. Far from making the appellants' case,* Lim *destroys it. Section 196(3) does not direct this Court as to the manner in which it is to exercise its s 39B jurisdiction. No fetter is imposed on the Court's ability to determine whether a person in detention is in fact an unlawful non-citizen, and if it finds he or she is not, to order the person's release."*

56 The same Full Court handed down judgment on the same day in *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD of 2002* [2002] FCAFC 390. There the Court considered the question of whether s 196(3) abrogated the power to grant interlocutory injunctive relief in circumstances where a person in detention claims not to be an unlawful non-citizen.

57 Their Honours found that s 196(3) did not abrogate the power of the Court under s 23 of the *Federal Court of Australia Act 1976* (Cth) to order interlocutory injunctive relief in an appropriate case; see at [104].

58 This decision does not bear upon the present case because the applicant seeks final relief.

Decision

59 Notwithstanding the reservations which I have about the correctness of the decision of the primary judge in *Al Masri*, I have decided that in the absence at the present time of the decision on appeal, I ought to follow his Honour's judgment. I am unable to say it is plainly wrong.

60 However, the orders which I will make should provide for the possibility that the Full Court may reverse the decision of the primary judge.

61 In my view, if the Full Court does not uphold the decision of Merkel J, there is nothing in the evidence before me to make good the proposition that the power is being exercised other than *bona fide* for the purpose of securing the applicant's removal. In coming to this view, I have taken into account the evidence of Mr Williams including the evidence contained in the affidavit in respect of which I made an order under s 50 of the *Federal Court of Australia Act 1976* (Cth). Accordingly, I propose to make an order for the release of the applicant from immigration detention upon conditions which will enable the Department to facilitate his removal from Australia in the event that such arrangements can be made.

62 The conditions are to include liberty to apply generally and the parties are to bring in short minutes. I have taken this course because the conditions imposed by Merkel J in *Al Masri* were different from the conditions which Mansfield J imposed in *Al Khafaji*. The parties were not in agreement as to which form of conditions should apply in the event that I order the release of the applicant. In the absence of agreed short minutes, I will hear argument as to the conditions.

I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jacobson.

Associate:

Date: 19 December 2002

Counsel for the Applicant:	Mr D Higgs SC
Solicitor for the Applicant:	Jackson Smith
Counsel for the Respondent:	Mr S Lloyd
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	11 December 2002
Date of Judgment:	19 December 2002