HIGH COURT OF AUSTRALIA

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

MAHRAN BEHROOZ APPELLANT

AND

SECRETARY OF THE DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ORS RESPONDENTS

Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs
[2004] HCA 36
6 August 2004
A255/2003

ORDER

Appeal dismissed. Appellant to pay costs of first respondent.

On appeal from the Supreme Court of South Australia

Representation:

J W K Burnside QC with J P Manetta for the appellant (instructed by Jeremy Moore & Associates)

D M J Bennett QC, Solicitor-General of the Commonwealth, with M A Perry for the first and second respondents (instructed by Australian Government Solicitor)

No appearance for the third and fourth respondents

Intervener

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

CATCHWORDS

Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs

Immigration – Appellant charged with offence of escape by unlawful non-citizen from immigration detention contrary to s 197A of the *Migration Act* 1958 (Cth) – Appellant sought issue of witness summonses pursuant to *Magistrates Court Act* 1991 (SA) seeking production of documentary material relating to conditions and complaints about conditions at detention centre – Whether material sought by witness summonses could have assisted appellant in his defence – Whether, by reason of conditions at detention centre, it could be said that appellant did not escape from "immigration detention" within the meaning of the offence.

Immigration – Constitutional law (Cth) – Whether detention under harsh or inhumane conditions is authorised by the *Migration Act* 1958 (Cth) – Whether *Migration Act* 1958 (Cth) only authorises detention under conditions that are reasonably capable of being seen as necessary for migration control purposes – Whether detention in harsher conditions would be punitive and therefore could not validly be authorised except as a consequence of the exercise of the judicial power under Ch III of the Constitution – Distinction between lawful authority to detain and means by which detention is achieved and enforced – Relevance of potential availability of other civil, criminal or administrative remedies to the construction of the statutory offence – Relevance of Constitutional principles and international law to construction of statutory offence.

Constitutional law (Cth) – Construction of the Constitution – Whether international law applicable to interpretation of the Constitution.

Words and phrases – "detain", "detainee", "immigration detention".

Constitution, Ch III.
Migration Act 1958 (Cth), ss 3A, 5, 189, 196, 197A, 273.
Magistrates Court Act 1991 (SA), s 20.

1 GLEESON CJ. The question in this appeal concerns the relevance, to a charge of escaping from immigration detention contrary to s 197A of the *Migration Act* 1958 (Cth) ("the Act"), of information about the general conditions at the place of detention from which the alleged offender escaped. This is an issue of law, and was argued as such by the parties to the appeal. It comes down to a question of construction of s 197A, understood in the light of other provisions of the Act, and of the Constitution.

2 The forensic context in which the question arises is as follows. The Woomera Immigration Reception and Processing Centre ("the detention centre") was established as an immigration detention centre pursuant to s 273 of the Act. The appellant[1] was detained at the detention centre as an unlawful non-citizen pursuant to the obligation imposed by s 189 of the Act. He allegedly escaped. He was charged with a contravention of s 197A. The maximum penalty for such an offence is imprisonment for five years. The charge came before a South Australian magistrate. There was some debate in the Supreme Court of South Australia as to whether the proceedings were summary, or by way of committal preparatory to indictment. It is not suggested that, for present purposes, anything turns on that. The appellant was represented by senior counsel, as he has been at all times since. The appellant's lawyers sought, and obtained, the issue of witness summonses pursuant to the *Magistrates Court Act* 1991 (SA). Those summonses sought the production of extensive documentary material relating to conditions at the detention centre. The first and second respondents made an application to the magistrate to have the summonses set aside. There were two grounds for the application. One was that, by reason of their form and content, and the volume of material they sought, the summonses were oppressive[2]. The other was that the information sought was irrelevant, and therefore the issue of the summonses had no legitimate forensic purpose[3] or, to express the point in terms of ss 3 and 20 of the *Magistrates Court Act*, the material of which they required production was not and could not be of evidentiary value[4]. The magistrate dismissed the application. There was an appeal to the Supreme Court of South Australia. The appeal was upheld at first instance by Gray J, who accepted the second of the two arguments stated above. As to the first, relating

---

1 When this matter was listed for hearing there were two other named appellants. The Court was informed that they have been removed from Australia, and the criminal charges against them dropped. At the hearing, the Court ordered that their grant of special leave to appeal be rescinded. The record has been amended accordingly.

2 *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564.

3 *R v Saleam* (1989) 16 NSWLR 14.

4 *Carter v Hayes* (1994) 61 SASR 451.

to oppression, he would have declined to interfere with the magistrate's discretion. For the reasons that follow, there is no occasion to pursue that aspect of the matter. Gray J allowed the appeal, and set aside the summonses. The Full Court of the Supreme Court of South Australia (Lander and Besanko JJ, Bleby J dissenting), refused leave to appeal.

3 The legal basis upon which the Supreme Court of South Australia acted in setting aside the summonses is well established. It was expressed by Bigham J in *R v Baines*[5], a criminal case in which there was an application to set aside subpoenas to testify on the ground that they were not issued for a legitimate forensic purpose, as follows:

> "But the Court has to inquire whether its process has been issued against [the potential witnesses] with the object and expectation on reasonable grounds of obtaining from them evidence which can be relevant."

4 In the present case, the nature of the information sought to be obtained by the issue of the summonses appears from a reading of the summonses, and was elaborated in argument. It was information concerning the conditions at the detention centre at or about the time of the appellant's escape. The potential relevance of that information was said to be that it would, or might, disclose that the conditions of detention of the appellant were such that the detention was punitive, that it was not a form of detention authorised by the Act, and that, therefore, escape from such detention did not contravene s 197A. In the appellant's written submissions in this Court, the relevance was stated as follows (referring to all appellants):

> "In defence of the charges, the appellants say that the conditions at Woomera, in their harshness, go beyond anything that could reasonably be regarded as necessary for migration purposes. They say, therefore, that their detention at Woomera was not valid 'immigration detention' and escaping from it could not constitute escape from immigration detention."

5 Such a defence must be understood in the light of the terms of the Act. It is accepted by the appellant, for the purposes of the argument, that he is an unlawful non-citizen. It is accepted that he was detained at the detention centre. It is accepted that the detention centre was established as such pursuant to s 273 of the Act. It is accepted, for the purposes of the argument, that the appellant escaped from the detention centre.

6 Section 197A provides:

---

5 [1909] 1 KB 258 at 261.

"A detainee must not escape from immigration detention."

7 Section 5 defines "detain" to mean to take, keep, or cause to be kept, in immigration detention. The word "detainee" takes its meaning from that definition. Section 5 defines "immigration detention" relevantly, to mean being held in a detention centre established under the Act. It is clear that the appellant was being held in such a detention centre. The conditions under which he was being held do not form part of the statutory concept of "immigration detention".

8 As was noted above, the proposed defence, to which the information sought is said to be relevant, must turn upon the meaning of s 197A, read in the light of s 5, and also in the light of s 3A of the Act, which limits its application to that which is constitutionally valid. The argument for the appellant amounts to the proposition that, by reason of conditions at the detention centre, it is, or may be, possible to conclude that the appellant was not in immigration detention within the meaning of s 197A, and, therefore, did not escape from immigration detention.

9 It is important to note what is not in issue. In order to establish a defence to the charge against him, it is not sufficient for the appellant to demonstrate, if he can, that conditions at the detention centre were such as to give the inmates a cause of action for damages, or a right to declaratory or injunctive relief, or a claim to some remedy in administrative law. (The potential availability of relief of that kind cannot be brushed aside, conveniently, as a fantasy. The appellant has, at every stage of this litigation, been represented by senior counsel.) The appellant seeks to demonstrate that, by reason of the conditions at the detention centre, he, and presumably all the other inmates, had the right to leave. He seeks to demonstrate that escaping from the detention centre was not prohibited by s 197A.

10 There is a possible ambiguity in the expression "unlawful detention". It may refer to a case where one person has no right to detain another; the person detained has a right to be free. It could also be used to refer to a case in which the detention is authorised by law, but the conditions under which the detention is taking place are in some respects contrary to law. In the second case, the detainee may be entitled to complain, and may have legal remedies, but it does not follow that he or she is entitled to an order of release from custody, much less that he or she is entitled, in an exercise of self-help, to escape. The argument for the appellant appears to involve an intermediate position: that, while, as an unlawful non-citizen, his detention was required ("mandatory"), conditions as harsh as those at the detention centre were unlawful; and that, by reason of those conditions, what was involved at the detention centre was not "immigration detention".

11 There is nothing novel about courts having to deal with a claim by a prisoner, or someone subjected to a form of detention authorised by law, that the conditions of custody are harsh, oppressive, or even intolerable. In *R v Deputy Governor of Parkhurst Prison; Ex parte Hague*[6], Lord Bridge of Harwich said:

> "I sympathise entirely with the view that the person lawfully held in custody who is subjected to intolerable conditions ought not to be left without a remedy against his custodian, but the proposition that the conditions of detention may render the detention itself unlawful raises formidable difficulties. If the proposition be sound, the corollary must be that when the conditions of detention deteriorate to the point of intolerability, the detainee is entitled immediately to go free. It is impossible, I think, to define with any precision what would amount to intolerable conditions for this purpose ...
>
> The logical solution to the problem, I believe, is that if the conditions of an otherwise lawful detention are truly intolerable, the law ought to be capable of providing a remedy directly related to those conditions without characterising the fact of the detention itself as unlawful."

12 The decision of the House of Lords in that case was applied by the Court of Appeal of New South Wales in 1995 in *Prisoners A-XX Inclusive v State of New South Wales*[7], where a group of inmates of New South Wales prisons unsuccessfully claimed habeas corpus, contending that the failure to provide them with condoms exposed them to a risk of life-threatening illness. The Court of Appeal also considered Canadian and United States authority on the question.

13 The Supreme Court of the United States, in *Bell v Wolfish*[8], noted that there had been a series of cases before that Court involving constitutional challenges to prison conditions or practices. That case concerned prisoners held in custody pending trial. Various conditions of their confinement were said to be punitive, and therefore unconstitutional. Speaking for the majority, Rehnquist J made the point that, by hypothesis, a person complaining of conditions of confinement is being confined against his or her will: a form of treatment which, in itself, would be described, in a colloquial sense, as punitive. He said:

> "Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense, however. Once the Government

---

6 [1992] 1 AC 58 at 165.

7 (1995) 38 NSWLR 622.

8 441 US 520 at 537 (1979).

> has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, or prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment'."

14 It is one thing to challenge the lawfulness of conditions of confinement, or of practices adopted by those in charge of prisons; it is another thing to assert a right to be freed by court order; and it is another thing again to assert a right to escape.

15 One closely confined area in which the law has accepted a limited form of right to escape concerns the common law principle of necessity. In the Victorian case of *R v Loughnan*[9], and the New South Wales case of *Rogers*[10], consideration was given to the principles according to which a person, confronted in prison with some peril involving a threat to life or safety, may lawfully take steps, proportionate to the danger, to avoid the threat. Such steps do not ordinarily involve remaining at large in the community for an indefinite period. Thus, for example, there are United States authorities which make it a condition of pleading necessity as an excuse for escaping from prison that the prisoner, after escape, must report immediately to the proper authorities when he has attained a position of safety from the immediate threat[11]. The Supreme Court of Victoria, in *Loughnan*, said this was a matter of evidentiary significance, rather than a legal condition[12]. In *Southwark London Borough Council v Williams*[13], Edmund Davies LJ, discussing the defence of necessity, pointed out that "the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances". In the present case, Gray J

---

9 [1981] VR 443.

10 (1996) 86 A Crim R 542.

11 *People v Lovercamp* 43 Cal App 3d 823 (1974); *United States v Bailey* 444 US 394 (1980).

12 [1981] VR 443 at 451, 459.

13 [1971] Ch 734 at 745.

recorded that there was no suggestion that the appellant was proposing to advance a defence of necessity, and it was not contended that he was compelled to escape to avoid some peril. Where a situation of necessity arises, it may justify action taken by a prisoner or detainee to get out of harm's way, but it does not mean that the prisoner or detainee becomes free from all the constraints of custody, or may escape into the community and remain at large.

16 The first and second respondents do not submit, and have not at any stage of the proceedings submitted, that the Act authorises conditions of immigration detention that are inhumane, or that it removes what would otherwise be the rights of detainees to seek legal redress for civil wrongs or criminal offences to which they may be subjected. In that respect, they point to s 256 of the Act, which requires that detainees be given all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to their immigration detention. What is in question is whether, by reason of their conditions of detention, detainees may lawfully escape.

17 The argument for the appellant is that the information sought by the witness summonses is relevant because it will, or may, establish that conditions at the detention centre were such that the appellant was not in immigration detention within the meaning of s 197A. The reason is said to be that, in the Act's constitutionally valid application (see s 3A), the detention which is in contemplation is detention which is not punitive in nature, whereas detention under harsh or inhumane conditions is punitive.

18 The detention which the Act contemplates, authorises, and requires is detention of unlawful non-citizens (aliens) pending processing of their visa applications or deportation. Section 189 provides that, if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person. (Reference has already been made to s 273, which empowers the establishment of detention centres.) Section 196 provides that an unlawful non-citizen detained under s 189 must be kept in immigration detention until he or she is removed or deported (under ss 198, 199 or 200) or granted a visa. Applications for a visa are commonly made on the basis that the applicant is a person to whom Australia owes protection obligations under the Refugees Convention[14]. Section 198 provides, in sub-s (6), that an officer must remove as soon as reasonably practicable an unlawful non-citizen who is a detainee if the non-citizen has made a visa application and the application has been finally determined in a manner adverse to the applicant. Visa applications are dealt with administratively in the first instance, but are

---

14 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

subject to a potentially lengthy process of administrative and judicial review. Cases regularly come before this Court in circumstances where this Court is invited to undertake a fifth level of decision-making in respect of a visa application. Some visa applicants hold temporary visas, and are not in immigration detention, but those who do not have visas may be detained for a substantial period while their litigation proceeds.

19 The constitutional validity of the system of mandatory detention, which was introduced in 1992, was challenged unsuccessfully in this Court in *Chu Kheng Lim v Minister for Immigration*[15]. The Court held that the legislation was a valid exercise of the power, conferred by s 51(xix) of the Constitution, to make laws with respect to naturalization and aliens. Mason CJ said[16]:

> "I agree with [Brennan, Deane and Dawson JJ] that the legislative power conferred by s51(xix) of the Constitution extends to conferring upon the Executive authority to detain an alien in custody for the purposes of expulsion or deportation and that such authority constitutes an incident of executive power. I also agree that authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers and that such limited authority to detain an alien in custody can be conferred upon the Executive without contravening the investment of the judicial power of the Commonwealth in Ch III courts."

20 The concluding portion of that passage refers to an argument, dealt with extensively by Brennan, Deane and Dawson JJ, and rejected, that detention of the kind there under consideration was an exercise of judicial power, and could not be conferred constitutionally on the Executive. Brennan, Deane and Dawson JJ[17], distinguishing explicitly between citizens and aliens, said that, subject to certain well-established exceptions, the involuntary detention of a citizen is penal or punitive in character and exists only as an incident of judicial power. (Gaudron J said in another case that the exceptions are so numerous and important that it is difficult to sustain the primary proposition as a general rule[18].) The position with respect to aliens is different because of their vulnerability to exclusion or deportation, which flows from both the common law and the

---

15 (1992) 176 CLR 1.

16 (1992) 176 CLR 1 at 10.

17 (1992) 176 CLR 1 at 26-32.

18 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 110.

provision of the Constitution. In that respect, I would interpolate, exclusion includes what was referred to by the Solicitor-General of the Commonwealth in argument in *Chu Kheng Lim* as power to make laws "to prevent aliens who ... come to Australia without permission from entering the community pending a decision whether to grant them an entry permit or to remove them from the country"[19]. Authority to detain an alien in custody, Brennan, Deane and Dawson JJ said, in the context and for the purposes of executive powers to receive, investigate and determine an application for an entry permit and, after determination, to admit or deport, is not punitive in nature, and not part of the judicial power of the Commonwealth. In the case of a citizen, what is punitive in nature about involuntary detention (subject to a number of exceptions) is the deprivation of liberty involved. But an alien does not have a right without permission to enter Australia or to become part of the community. The alien's vulnerability to exclusion and deportation alters the nature of the detention when it is for the purpose described above. It is an incident of the executive power to exclude people who have no right to enter Australia, to process their applications for permission to enter, and to deport them if their applications fail.

21 That being the nature of the power of detention, there is no warrant for concluding that, if the conditions of detention are sufficiently harsh, there will come a point where the detention itself can be regarded as punitive, and an invalid exercise of judicial power. Whatever the conditions of detention, the detention itself involves involuntary deprivation of liberty. For a citizen, that alone would ordinarily constitute punishment. But for an alien, the detention is an incident of the exclusion and deportation to which an alien is vulnerable. Harsh conditions of detention may violate the civil rights of an alien. An alien does not stand outside the protection of the civil and criminal law. If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages. If those who manage a detention centre fail to comply with their duty of care, they may be liable in tort. But the assault, or the negligence, does not alter the nature of the detention. It remains detention for the statutory purpose identified above. The detention is not for a punitive purpose. The detainee is deprived of his or her liberty, but not as a form of punishment. And the detainee does not cease to be in immigration detention within the meaning of the Act.

22 The information the subject of the witness summonses might have assisted the appellant to demonstrate that he had a legitimate cause for complaint about his conditions of detention, and that he had a case for legal redress. But it could not have assisted an argument that he was not in immigration detention, or that s 197A did not validly prohibit his escape. The definition of "immigration detention" in s 5 of the Act includes being held in a detention centre established

---

19 (1992) 176 CLR 1 at 6-7.

under the Act. The appellant was being held in a detention centre so established. By definition, he was in immigration detention. The nature of this detention was established by the statutory provisions pursuant to which, and for the purpose of which, his detention was required. The statutory definition applied to this case. That from which he escaped was immigration detention. The conditions at the detention centre could not alter the case. For that reason, the information was irrelevant to the charge of a contravention of s 197A. The purpose for which the summonses were issued was not a legitimate forensic purpose.

23 The decision of Gray J, and of the Full Court of the Supreme Court of South Australia, was correct. The appellant's appeal should be dismissed with costs.

24 McHUGH, GUMMOW AND HEYDON JJ. Since the grant of special leave in this case on 14 August 2003, the parties identified as the second and third appellants in the special leave application, Mr Mahmood Gholani Moggaddam and Mr Davood Hossein Amiri respectively, have been removed from Australia and a *nolle prosequi* has been entered in each instance. On the first day of the hearing in this Court, the grant of special leave in their favour was rescinded. Mr Behrooz remains the sole appellant.

25 This appeal turns upon the operation of s 197A of the *Migration Act* 1958 (Cth) ("the Act") and associated provisions. Section 197A was added to the Act with effect from 27 July 2001[20]. It states:

> "A detainee must not escape from immigration detention.
>
> Penalty: Imprisonment for 5 years."

A prosecution for an offence against s 197A may be instituted at any time within five years after the commission of the offence (s 492(1)).

26 The term "immigration detention" is defined in s 5(1) of the Act so as to include:

> "being held by, or on behalf of, an officer ... in a detention centre established under this Act".

Section 273 empowers the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") on behalf of the Commonwealth to cause the establishment and maintenance of centres for the detention of persons authorised under the Act. One such centre is the Woomera Immigration Reception and Processing Centre ("Woomera") which is proximate to the township of Woomera in the far north of South Australia, some 500 kilometres from Adelaide.

27 Australasian Correctional Management Pty Ltd ("Management") and Australasian Correctional Services Pty Ltd ("Services") are, by arrangement with the Commonwealth, responsible for the management of Woomera. Management and Services are the third and fourth respondents in this Court but played no active role in the appeal. The Secretary of the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") is the first respondent. The second respondent is the Attorney-General of the Commonwealth.

---

20 By the *Migration Legislation Amendment (Immigration Detainees) Act* 2001 (Cth), Sched 1, Item 3.

28 The appellant, Mr Behrooz, is an Iranian national and unlawful non-citizen who was detained at Woomera. He was among six detainees alleged to have escaped from Woomera in the early hours of 18 November 2001. At the time of his alleged escape, the appellant had been in immigration detention under the Act for about 12 months.

29 The *Magistrates Court Act* 1991 (SA) ("the Magistrates Act") establishes the Magistrates Court of South Australia as a court of record (ss 4, 5). It is one of those State courts invested with federal jurisdiction by s 68 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act")[21]. By information sworn on 21 November 2001 and laid under the *Summary Procedure Act* 1921 (SA), Mr Behrooz and the two former appellants were charged with escaping from immigration detention contrary to s 197A of the Act.

Summonses for production

30 Section 20 of the Magistrates Act empowers that Court to require the production of "evidentiary material", a term given a broad meaning in s 3. On 10 January 2002, on application of the appellants, there were issued out of the Port Augusta Magistrates Court summonses to Management, Services and the proper officer of the Department. All summonses sought production of evidentiary material which had come into existence since 1 December 1999 and referred in specified ways to conditions at Woomera.

31 Applications were made by the recipients to set aside the summonses as oppressive and abuses of the process of the Court. After a contested hearing in which the Attorney-General of the Commonwealth intervened and was represented by senior counsel, the Magistrates Court delivered reasons for judgment on 24 May 2002. The Court was satisfied by the appellants that, upon the balance of probabilities, documents were sought which were likely to be relevant to their proposed defence to the charges of escaping contrary to s 197A of the Act. The Court recorded that defence as being:

> "[E]ven though detention for the purposes of [the Act] was capable of being valid detention, if the conditions of detention were so obviously

---

21 There has been no submission that Woomera is located in a "Commonwealth place" within the meaning of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth), so as to render State laws applicable (s 4) and invest federal jurisdiction in State courts by force of s 7 of that statute. See *Pinkstone v The Queen* (2004) 78 ALJR 797 at 803-805 [33]-[41], 813 [81]-[82]; 206 ALR 84 at 92-94, 105.

> harsh as to render them punitive, then the detention went beyond that which was authorised by the Act and was necessarily illegal."

Detention at Woomera was said to be of this character, so that a detainee who escaped did not escape from a form of detention authorised by the statute.

32 The applications to set aside the summonses were dismissed, save in respect of those documents relating to periods outside the period of 23 months prior to 18 November 2001 and which related solely to minors. The period of 23 months was the longest period for which any of the three appellants had been in detention before their alleged escape.

The Supreme Court

33 An appeal was taken by the first respondent to the Supreme Court of South Australia constituted by a single judge (Gray J)[22]. The Supreme Court allowed the appeal and set aside the summonses. Mr Behrooz and the other appellants then moved the Full Court of the Supreme Court for leave to appeal. The application for leave was refused (Lander and Besanko JJ; Bleby J dissenting)[23] on 16 January 2003.

34 In this Court Mr Behrooz seeks an outcome setting aside that refusal of leave to appeal from the orders of Gray J, granting that leave and reinstating the order of the magistrate.

35 In the Full Court of the Supreme Court, the majority supported the conclusion reached by Gray J. Their Honours held that it was not reasonably arguable that Gray J had erred in concluding that there had been a failure by the appellants to identify a defence to the charges under s 197A which was known to law[24].

36 Section 196(1) states that an unlawful non-citizen detained under s 189 "must be kept in immigration detention until" removal from Australia under s 198 or s 199, deportation under s 200 or the grant of a visa. Shortly before the South Australian Full Court decision, the Full Federal Court had held in *NAMU*

---

22 *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Behrooz* (2002) 84 SASR 453.

23 *Behrooz v Secretary, Department of Immigration, Multicultural and Indigenous Affairs* (2003) 84 SASR 479.

24 (2003) 84 SASR 479 at 480.

of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs[25] that "the factual consequences" of detention for a particular individual did not render s 196(1) invalid in its application to that individual.

37 The majority of the South Australian Full Court concluded that, even if by the documents production of which was sought there was disclosed "evidentiary material" within the meaning of the Magistrates Act which would support a case based on the harshness of conditions at Woomera, such a case could not provide a defence to the charges under s 197A. Lander and Besanko JJ said[26]:

> "The [appellants] seek to argue that their detention at [Woomera] was unlawful because of the harshness of the conditions at [Woomera]. The status of the [appellants] as unlawful non-citizens is not challenged. The fact that in the first instance they were lawfully detained, pursuant to s 189 of [the Act], is not disputed. The [appellants] do not question the validity of any section of [the Act], particularly s 196 of the Act.
>
> Thus, it is not disputed that in being detained they were in immigration detention. There is no dispute that [Woomera] was established as an immigration detention centre pursuant to the Act.
>
> We cannot see how it can be said that the harshness of the conditions at [Woomera] can lead to the conclusion that the [appellants] were no longer detainees or in some way they were no longer being held in immigration detention.
>
> We do not accept that harshness of conditions in a detention centre means that a detention centre ceases to have the character of a detention centre by reason that the harshness of conditions is contrary to the power of detention in the Act.
>
> Thus, we are of the opinion that even if the harshness of conditions was established that would not mean that any of the elements of this offence under s 197A of the Act would remain unproved."

The appeal to this Court

38 The appellant challenges the reasoning in that passage. No challenge is made to the decision of the Full Federal Court in *NAMU*, but it is said that the

---

25 (2002) 124 FCR 589 at 596-598.

26 (2003) 84 SASR 479 at 480.

issue here differs. The issue is said to be not whether s 196(1) of the Act which mandates a continued detention is valid, given "the factual consequences" for particular detainees, but whether the Act "can and does authorize the kinds of conditions that prevailed at Woomera; and if not, whether the [appellant was] in valid immigration detention there". Gray J had noted that the materials before the Supreme Court did not provide information about conditions at Woomera "which directly affected or related to any of [the appellants]"[27].

39 Section 197A posits a "detainee", a term defined in s 5(1) as meaning "a person detained". The restraint by which or the place where the person is detained is the "immigration detention" from which it is made an offence to escape. The submissions on the appeal, for their success, require acceptance of the proposition that a person detained in what is other than "immigration detention" in the defined sense of that term is unconstrained by s 197A from escaping that detention.

40 The appellant relies upon the definition of "detain" in s 5(1) to support the proposition that "immigration detention" may include the taking of action and using of force which is no more than "reasonably necessary" for migration control purposes. Thereby the appellant seeks to constrain the prohibition against escape imposed by s 197A with notions of the purpose and proportionality of the conditions of confinement at Woomera.

41 The definition of "detain" in s 5(1) is that it:

> "means:
>
> (a) take into immigration detention; or
>
> (b) keep, or cause to be kept, in immigration detention;
>
> and includes taking such action and using such force as are reasonably necessary to do so."

42 An example of meaning (a) is provided by s 189. This imposes upon officers what otherwise would be an incompletely expressed duty to "detain" certain persons; the definition makes it clear that the duty is discharged by the taking of persons into "immigration detention". An example of meaning (b) is provided by s 273 which authorises the establishment of centres for the detention of persons whose detention is authorised under the Act, that is to say, by keeping or causing them to be kept in "immigration detention".

---

27 (2002) 84 SASR 453 at 455.

43 The phrase in the definition of "detain", "as are reasonably necessary to do so", amplifies by the use of the term "include" what is meant by to "take into" and to "keep, or cause to be kept". As Hayne J explains in his reasons, the phrase does not qualify what is meant by "immigration detention". That is the central element for s 197A and to that term we now turn.

"Immigration detention"

44 The definition of "immigration detention" in s 5(1) spans various kinds of restraint, of which being held in a detention centre is but one. The definition reads:

> "***immigration detention*** means:
>
> (a) being in the company of, and restrained by:
>
> (i) an officer; or
>
> (ii) in relation to a particular detainee – another person directed by the Secretary to accompany and restrain the detainee; or
>
> (b) being held by, or on behalf of, an officer:
>
> (i) in a detention centre established under this Act; or
>
> (ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or
>
> (iii) in a police station or watch house; or
>
> (iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel – on that vessel; or
>
> (v) in another place approved by the Minister in writing;
>
> but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b)".

Further, the term "officer" encompasses a wide variety of individuals, as is apparent from the definition in s 5(1):

"***officer*** means:

(a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph; or

(b) a person who is an officer for the purposes of the *Customs Act 1901*, other than such an officer specified by the Minister in writing for the purposes of this paragraph; or

(c) a person who is a protective service officer for the purposes of the *Australian Protective Service Act 1987*, other than such a person specified by the Minister in writing for the purposes of this paragraph; or

(d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or

(e) a member of the police force of an external Territory; or

(f) a person who is authorised in writing by the Minister to be an officer for the purposes of [the Act]; or

(g) any person who is included in a class of persons authorised in writing by the Minister to be officers for the purposes of [the Act], including a person who becomes a member of the class after the authorisation is given."

45 So, for example, s 249(1) empowers an officer to take such action and use such force as are necessary to prevent a person reasonably suspected to be an unlawful non-citizen from leaving a vessel on which the person arrived in Australia; being held by an officer in these circumstances is "immigration detention". Again, a person who is in the company of and restrained by an officer for the purposes of executing a deportation order would be in "immigration detention" (ss 206, 253). Further, s 252F renders applicable as federal laws certain State and Territory laws where detainees are held "in immigration detention in a prison or remand centre of a State or Territory".

46 These examples, drawn from the variety of operations of the definition of "immigration detention" and thus of the reach of s 197A, support a central submission by the first and second respondents. The submission is that there is a relevant distinction to be drawn between lawful authority to detain and the means by which the detention is achieved and enforced, including the conditions of the detention.

47 The first exclusion in the concluding lines of the definition of "immigration detention" assists in making the point. "Immigration detention" does not include being restrained as described in s 245F(8A). That sub-section states:

> "If an officer detains a ship or aircraft under this section, any restraint on the liberty of any person found on the ship or aircraft that results from the detention of the ship or aircraft is not unlawful, and proceedings, whether civil or criminal, in respect of that restraint may not be instituted or continued in any court against the Commonwealth, the officer or any person assisting the officer in detaining the ship or aircraft."

48 In such provisions the Act evinces a distinction between the creation and continuance of the state or condition of being in "immigration detention" and the civil and criminal liabilities which officers may encounter in relation thereto. What otherwise might be civil or criminal liability arising by acts done by officers in the exercise of authority to detain persons is qualified by a number of express provisions[28]. One such is s 245F(8A) set out above. In addition, action in good faith and with no more than reasonable force is excused in a range of cases. These include body searches (ss 245FA, 252), and removal of persons from ships and aircraft (s 245F(9A), (9B), (10)).

49 No such qualification to what otherwise would be liabilities of officers under the criminal or civil law is made in respect of that species of immigration detention with which the present appeal is concerned.

50 These considerations give added force to the conclusion expressed by the primary judge as follows[29]:

> "If intolerable conditions were established to exist at [Woomera] civil equitable and [administrative law] remedies may be pursued. Criminal sanctions may also be available. The custodians of detainees are legally accountable. The [appellants'] detention pursuant to [the Act] is valid. As their detention is lawful the proposed defence cannot arise as a matter of law."

---

28 cf *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 43 [11], 49 [43], 57 [90], 66-67 [134]; 192 ALR 561 at 565, 573, 584-585, 597.

29 (2002) 84 SASR 453 at 472.

51 In this Court, the first and second respondents accepted that the Act does not authorise detention in inhumane conditions. Rather, it was submitted, the Act:

> "provides a scheme which operates against the fabric of the common law and State law pursuant to which remedies are available to redress issues relating to conditions of detention and treatment of detainees, to the extent to which they are not inconsistent with the Act".

The reference to inconsistency with the statute was to the line of authority exemplified by *Crimmins v Stevedoring Industry Finance Committee*[30] which indicates that a common law duty of care will not be imposed where to do so would be inconsistent with a particular statutory scheme.

52 Subject to that qualification, the respondents accept that the statute confers no immunity from liability in negligence for breach of a duty of care nor from the application of the general criminal law. Their submission adds:

> "Equally, for example, an action for damages may lie for assault or trespass to the person, subject to express or implied statutory authority to carry out such acts as in the case of bodily searches or the provision of medical treatment without consent."

53 Those propositions should be accepted and provide an answer to the primary submission of the appellant respecting the construction of s 197A. While the conditions in which detention is suffered may attract remedies of the nature indicated above, they do not deny the legality of the immigration detention and so cannot found a defence to a charge under s 197A.

Additional authorities

54 This conclusion is reached without particular assistance otherwise than by way of loose analogy from the reasoning in two decisions to which much reference was made in submissions. The first is that of the House of Lords in *R v Deputy Governor of Parkhurst Prison, Ex parte Hague*[31]. In that case, the House of Lords decided that the operation of legislation which provided lawful authority for the detention of convicted prisoners was not qualified or abrogated by conditions of detention of particular prisoners. In *Prisoners A-XX Inclusive v*

---

30 (1999) 200 CLR 1.

31 [1992] 1 AC 58.

State of New South Wales[32], the New South Wales Court of Appeal referred to *Hague* as authority supporting its conclusion that with the New South Wales legislation, as with that in the United Kingdom, "intolerable" conditions of detention did not deprive imprisonment of its continued statutory basis.

55 Reference was made in argument to a number of decisions of the United States Supreme Court. These have concerned two questions. The first is whether conditions or treatment of convicted federal and state prisoners may attract protection of residual "liberty interests" by the Due Process Clause and by the proscription in the Eighth Amendment of the infliction of cruel and unusual punishments. *Wolff v McDonnell*[33] and *Sandin v Conner*[34] indicate that the conduct of disciplinary systems and procedures may enliven the Due Process Clause. In 1976, it was decided in *Estelle v Gamble*[35] that there was an Eighth Amendment violation by reason of failure to provide adequate medical care. Thereafter, in *Wilson v Seiter*[36], Scalia J, delivering the opinion of the Court, explained:

> "[W]e see no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement'. Indeed, the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates."

On the other hand, the Supreme Court has warned federal trial courts not to become "enmeshed in the minutiae of prison operations"[37].

56 The second question concerns the remedy for such violations of constitutional rights, in particular the availability of habeas corpus for deprivation of "residual liberty", in addition to the civil action under 42 USC

---

32 (1995) 38 NSWLR 622 at 628-630.

33 418 US 539 (1974).

34 515 US 472 (1995).

35 429 US 97 (1976).

36 501 US 294 at 303 (1991).

37 *Bell v Wolfish* 441 US 520 at 562 (1979). See, generally, Antieau and Rich, *Modern Constitutional Law*, 2nd ed (1997), vol 2, pars 41.45-41.52.

§1983. That statutory action is for deprivation of "any rights, privileges, or immunities secured by the Constitution and laws", the remedy being by "an action at law, suit in equity, or other proper proceeding for redress"[38]. In *Prisoners A-XX Inclusive v State of New South Wales*[39], Sheller JA referred to the detailed discussion of the United States position respecting habeas corpus by the Supreme Court of Canada in *Miller v The Queen*[40]. Sheller JA concluded that, on the United States authorities placed before the Court of Appeal, the reach of the "residual liberty" to found a writ of habeas corpus for "intolerable conditions" was unsettled[41]. However, it is to be noted that the actions which reached the Supreme Court in the authorities referred to above, *Wolff v McDonnell*, *Sandin v Conner*, *Estelle v Gamble* and *Wilson v Seiter*, were proceedings under §1983.

57 It is unnecessary further to consider these matters in this appeal. Enough has been said to indicate that the primary question in the United States has been the reach of the constitutional guarantees found in express terms not seen in Australia.

Other grounds

58 The conclusion that the decision of Gray J was properly based on his Honour's conclusion that the proposed defence could not arise as a matter of law makes it unnecessary to consider further grounds advanced in this Court to support the setting aside of the summonses.

59 While Gray J allowed the appeal and set aside the summonses on the ground indicated, his Honour also held that the magistrate had not otherwise erred in declining to set the summonses aside on grounds that they were oppressive or involved an abuse of process[42]. Upon these matters this Court should find it unnecessary to enter.

---

38 42 USC §1983 derives from s 2 of the *Civil Rights Act of 1866* (14 Stat 27) and s 1 of the *Ku Klux Klan Act of 1871* (17 Stat 13): Wright and Kane, *Law of Federal Courts*, 6th ed (2002), §22A, n 11.

39 (1995) 38 NSWLR 622 at 630-633.

40 (1985) 24 DLR (4th) 9.

41 (1995) 38 NSWLR 622 at 633.

42 (2002) 84 SASR 453 at 473-478.

Order

60 The appeal should be dismissed with costs.

61 KIRBY J. In *Rhodes v Chapman*[43], Brennan J, in the Supreme Court of the United States, observed that where "voteless, politically unpopular, and socially threatening" detainees bring proceedings before the courts to assert or defend their legal rights, judicial intervention may be indispensable "if constitutional dictates – not to mention considerations of basic humanity – are to be observed". I agree with this proposition. It informs my approach to this appeal.

62 The appeal concerns whether "immigration detention" ceases to be such, within the *Migration Act* 1958 ("the Act"), when the conditions of that "detention" are inhuman or intolerable. In my view, it is arguable that it does: detention is not "immigration detention" if it involves conditions that are inhuman or intolerable. Evidence on the point was therefore admissible in these proceedings, indeed critical. The court below erred in concluding that the issue was not legally arguable.

The facts

63 *The "escape" and charges*: Mr Mahran Behrooz ("the appellant"), a national of Iran, arrived in Australia without a visa. He was designated by the Act an "unlawful non-citizen"[44]. He was taken into immigration detention. From early 2000, he was held at the Woomera Immigration Reception and Processing Centre ("Woomera").

64 On or about 18 November 2001 the appellant left (to use a neutral expression) Woomera along with other detainees being held there. He was subsequently taken back into custody. Together with two others (Mr Mahmood Gholani Moggaddam and Mr Davood Hossein Amiri) he was charged with an offence against s 197A the Act. The offence was that "being a detainee [he] escaped from Immigration Detention". The section provides:

> "A detainee must not escape from immigration detention.
>
> Penalty: Imprisonment for 5 years."

65 Similar charges were brought against Mr Moggaddam and Mr Amiri. They made common cause with the appellant in their defence. However, between the decision under appeal and the hearing in this Court they were, at their own request, removed from Australia. The Director of Public Prosecutions

---

43 452 US 337 at 354, 358 (1981). See Taylor, "Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine", (1995) 22 *Hastings Constitutional Law Quarterly* 1087 at 1127.

44 ss 5, 14(1).

withdrew the criminal proceedings against each of them. The proceedings against the appellant remain on foot.

66 *The magistrate's ruling*: In the Magistrate's Court of South Australia, the appellant foreshadowed a defence that he wished to bring in answer to the charge. In part, the defence was based on the terms of the Act, on their face, and in part upon those terms as understood in the light of the Constitution. Counsel indicated that he wished to argue that the conditions in which the appellant was kept at Woomera were "so obviously harsh" as to fall outside the notion of "immigration detention" as envisaged by the Act and as permitted by the Constitution. Because the conditions in which he was kept did not, therefore, amount to "immigration detention", the appellant's departure from those conditions did not constitute an "escape from immigration detention" within s 197A. He was therefore entitled to be acquitted of the charge.

67 The appellant placed certain materials before Mr Moss CM in a hearing in the Magistrate's Court relating to the charge. These were designed to demonstrate the bona fides and factual arguability of the defence just stated. In an attempt to establish the defence by relevant evidence, witness summonses were issued by the Magistrate's Court in January 2002 at the request of the appellant. These required the departmental and management organisations responsible for Woomera to produce to the Court documents concerning the conditions at Woomera and complaints received about those conditions. An application was made on behalf of the recipients of the summonses for an order setting them aside. The Attorney-General of the Commonwealth intervened to support that application. In substance, the Chief Magistrate rejected the application. With some modifications as to detail, he confirmed the summonses.

68 *Decisions in the Supreme Court*: Against those orders, an appeal[45] was taken to the Supreme Court of South Australia. It was heard by the primary judge (Gray J). His Honour rejected one of the two bases argued, namely that the summonses were expressed in terms that were oppressive[46]. However, he upheld the primary objection that the appellant had not "established that the material sought by the summonses has evidentiary value in the proceedings"[47]. Principally, his Honour concluded that the appellant had not identified a "defence known to the law" and that his complaint about the conditions in which he was held at Woomera, even if proved, could not, "as a matter of law make the

---

45 And a proceeding for judicial review which did not ultimately have to be decided.

46 *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Behrooz* (2002) 84 SASR 453 at 457 [11], 477-478 [88]-[90].

47 *Behrooz* (2002) 84 SASR 453 at 473 [72].

detention unlawful"[48]. On that basis, the primary judge set the witness summonses aside.

69 The appellant then sought leave to appeal. His application came before the Full Court of the Supreme Court of South Australia[49]. That Court dealt only with the arguability of the defence. It did not consider the primary judge's determination of the issue relating to alleged oppression.

70 A majority of the Full Court (Lander and Besanko JJ) favoured refusal of leave to appeal[50]. Their Honours considered it arguable that the primary judge had placed too high an onus on the appellant in rejecting the factual relevance of the materials that the appellant had sought in the summonses[51]. However, like the primary judge, the majority concluded that the evidence sought could not, as a matter of law, establish a defence to the charge under s 197A. The other judge constituting the Full Court (Bleby J) dissented. He concluded that the appellant had an arguable case and that the issues were of obvious importance for the operation of the Act. He would have granted leave to appeal[52].

71 *The hearing in this Court*: By special leave, the appellant now brings an appeal to this Court. Some of the issues argued in the case overlapped those presented in concurrent proceedings[53]. However, unlike those proceedings, it is not possible in my view to resolve the appellant's arguments in this appeal by means of statutory interpretation, confining the issues for decision to the four corners of the Act.

72 Here, the issues are more numerous and complex. In resolving those issues, this Court had the considerable assistance of written submissions filed for the Human Rights and Equal Opportunity Commission ("HREOC"). Whilst not offering argument addressed to the merits of the appellant's case, HREOC's

---

48 *Behrooz* (2002) 84 SASR 453 at 473 [73].

49 *Behrooz v Secretary, Department of Immigration, Multicultural and Indigenous Affairs* (2003) 84 SASR 479.

50 *Behrooz* (2003) 84 SASR 479 at 479 [1], 480 [10]. See also reasons of McHugh, Gummow and Heydon JJ (the "joint reasons") at [35]; reasons of Callinan J at [201].

51 *Behrooz* (2003) 84 SASR 479 at 479-480 [2]-[3].

52 *Behrooz* (2003) 84 SASR 479 at 480 [11]. See reasons of Callinan J at [202].

53 In *Al-Kateb v Godwin* [2004] HCA 37 and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38.

submissions added a dimension to the arguments by reference to the obligations accepted by Australia under international law, affecting the "detention" of the appellant. It is easy for a Court such as this to overlook such important legal perspectives. To the extent that it does, this Court places itself outside the mainstream of constitutional and common law doctrine as it is developing in virtually every country of the world[54].

Common ground

73 *Uncontested issues*: The issues for decision in the appeal were narrowed by a high measure of common ground between the parties. For the appellant it was conceded that, in accordance with the Act, he was an "unlawful non-citizen"[55] and that, his initial detention, as such, was lawful[56]. The appellant did not contest the constitutional power of the Federal Parliament to enact provisions for the detention of an alien such as himself[57]. It was not the appellant's case that, because of the conditions of his "detention" at Woomera he was entitled to free release into the Australian community. He confined his claim to the assertion of a defence to the criminal charge brought against him and to his argument that the conditions in which he was kept did not answer, under the Act or the Constitution, to a legally permissible form of administrative "detention".

74 The respondents accepted that the witness summonses were addressed to the proper officers of their organisations and that the course of appealing against the Chief Magistrate's order had interrupted the trial of the appellant on a serious criminal charge. They also accepted that if the trial were to go ahead without all, or any, evidence as sought in the summonses, it would have to be decided on the limited factual basis that the appellant could otherwise provide. Thus, it would be determined without the benefit of evidence procured from the respondents. If a defence were legally available, this would place the appellant in an intolerable position.

75 The appellant conceded that, for the purpose of advancing his submission that his detention amounted to a form of "punishment", impermissible under the

---

54 See, for example, *Lawrence v Texas* 539 US 558 (2003). See also Koh, "International Law as Part of Our Law", (2004) 98 *American Journal of International Law* 43.

55 *Behrooz* (2003) 84 SASR 479 at 480 [5]-[6].

56 Under the Act, ss 5, 14(1), 189(1).

57 Under the Constitution, s 51(xix). See also s 51(xxvii). The validity of immigration detention was upheld in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

Constitution and outside that contemplated by the Act, the mere fact that immigration detention impinged on his liberty, did not make it punitive as such. The respondents, for their part, conceded that the Act does not authorise detention in inhuman or intolerable conditions. However, they argued that the remedies for inhuman detention lay not in denial of the legality of the detention itself, but in tortious, administrative and other proceedings brought to challenge the alleged mistreatment.

76 The appellant did not assert that he was compelled to escape from Woomera by an immediate threat or danger. Nor did he propound a defence to the charge brought against him based on the doctrine of necessity in criminal law[58]. He confined the defence, for which he sought to procure the evidence specified in the summonses, to one based on the meaning of "detention" as provided in the Act and as permitted by the Constitution.

77 *Three added facts*: This Court was informed, without opposition, of three facts. First, that as a result of the interruption occasioned by the interlocutory appeal to the Supreme Court, the trial of the appellant had been delayed pending the outcome of these proceedings. Secondly, that a number of communications complaining about the conditions of immigration detention under the Act at Woomera and elsewhere had been taken to the Human Rights Committee of the United Nations ("UNHRC"). We were supplied with copies of the views of the UNHRC and other bodies upon some such communications[59]. Thirdly, the Court was told that, since the happening out of which the charge against the appellant arose, the immigration detention centre at Woomera has been closed[60].

The applicable legislation

78 *The system of mandatory detention*: The provisions of the Act relevant to the determination of the appeal, in addition to s 197A under which the appellant is charged are set out, or referred to, in other reasons[61]. I will not repeat any of this material.

---

58 *Behrooz* (2002) 84 SASR 453 at 472-473 [71] per Gray J, referring to *R v Loughnan* [1981] VR 443 at 448.

59 *A v Australia*, Human Rights Committee Communication No 560/1993; *C v Australia*, Human Rights Committee Communication No 900/1999; *Baban v Australia*, Human Rights Committee Communication No 1014/2001. See also *Bakhtyari v Australia*, Human Rights Committee Communication No 1069/2002.

60 [2003] HCATrans 306 at 433.

61 Joint reasons at [25], [44]; reasons of Hayne J at [159]-[164]; reasons of Callinan J at [203]-[211].

79 Different countries have established various schemes for the determination of claims to refugee status under the Refugees Convention[62]. Australia's enactment of a system of mandatory detention for persons arriving without due authority is not the only response available to that problem[63]. However, the reasons for it are sometimes explained by reference to considerations of history, geography, the size of the continent, its scattered centres of population and the absence of any general obligation to carry identity documents within Australia.

80 The appellant accepted the constitutional validity of the scheme established by the Act to impose regulations upon entrants to Australia's "migration zone"[64], to require the identification of non-citizens, to detain those attempting to enter without authority, to hold them in detention whilst processing any application they might make to remain in Australia and to remove or deport those remaining non-citizens determined to have no authority to remain or who, like the appellant's co-accused, request their own removal[65].

81 *Conditions of detention*: The Act lays down relatively clear obligations to effect detention in given circumstances[66]; what that detention involves, in terms of physical action and place[67]; and what must ensue "as soon as reasonably

---

62 Convention relating to the Status of Refugees done at Geneva on 28 July 1951, [1954] *Australian Treaty Series* No 5; Protocol relating to the Status of Refugees done at New York on 31 January 1967, [1973] *Australian Treaty Series* No 37.

63 Billings, "A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims", (2000) 52 *Administrative Law Review* 253 at 268-269. In 1998, the HREOC report *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals*, recommended that the detention of asylum seekers should be a last resort, for use only on exceptional grounds (at 53). This recommendation has not been accepted by the Parliament. The Parliamentary Joint Standing Committee on Migration subsequently undertook a review of the Act. However, it concluded that no alternative to mandatory detention was acceptable given the absence of a national identity card in Australia and the consequent difficulty of identifying illegal non-citizens once they had crossed the frontier.

64 See the Act, ss 5(1), 6, 13(1), 14(1). See also *Migration Amendment (Excision from Migration Zone) Act* 2001 (Cth) and *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth).

65 See the Act, s 4 ("Object of Act"), set out in the reasons of Callinan J at [203].

66 The Act, s 189, set out in the reasons of Callinan J at [209].

67 The Act, s 5. See reasons of Callinan J at [204].

practicable" for the removal (or deportation) of the non-citizen. However, it is generally silent concerning the conditions of such detention. In particular, nothing is said in the Act specifically about the minimum conditions that must be observed for people held in "immigration detention" or at "a detention centre". On the face of things, this might appear to leave such conditions to the unfettered discretion of the Minister, accountable for them to the Parliament, or to officials and other persons (such as the respondents) concerned in the organisation and maintenance of detention centres. The Act permits regulations to be made which might conceivably include provisions for the conditions of persons in "immigration detention"[68]. However, it is apparent that, to the relevant time, no such regulations had been made to govern the conditions of detention centres[69]. True, there are immigration detention standards. The appellant complained that these were not complied with in his case[70].

82 The absence of a statutory elaboration of the conditions within an immigration detention centre does not mean that there are no standards which the law of this country will uphold. Correctly, the respondents accepted that the Act, being made as a law to operate "against the fabric of the common law and State law", would not authorise administrative detention in inhuman and intolerable conditions. The obligations implied into the Act by the general law, or grafted onto its provisions, could not contradict the necessities, express or implied, in valid provisions of the Act[71]. But the respondents submitted that the way to enforce any complaint about inhuman or intolerable conditions was by proceedings brought for that purpose. It was not self-help, such as by escape from "detention". The authority to be in immigration detention being established by law, escape could not therefore be lawful. The respondents supported the conclusion of the Supreme Court that the argument to the contrary was legally untenable.

The issues

83 The following issues arise in the appeal:

(1) *Approach to the claim for summary relief*: What approach was it proper for the courts below to take to the respondents' application for peremptory relief against the witness summonses sought by the appellant? Was it

---

68 The Act, s 273.

69 [2003] HCATrans 458 at 6465-6467.

70 [2003] HCATrans 458 at 6469-6484.

71 See *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 34 [79].

appropriate in the circumstances for the Supreme Court to grant such relief?

(2) *The common law and escape from custody*: What light, if any, does the common law throw on the meaning of "immigration detention" and the entitlement of a detainee to leave such "detention" to avoid allegedly inhuman and intolerable conditions?

(3) *The constitutional necessity of a federal source and judicial order for punishment*: What light does the Constitution throw on, or what meaning does the Constitution require of, the phrase "immigration detention" in s 197A of the Act, for an offence against which the appellant has been charged?

(4) *International law and arbitrary detention*: What light, if any, do the obligations assumed by Australia under international law throw on the meaning of "escape" and "immigration detention" in s 197A?

(5) *Exhausting alternative remedies*: Is it an answer to the complaints of the appellant concerning the allegedly inhuman and intolerable conditions of his "immigration detention" that he may bring proceedings for relief under administrative law, or for civil wrongs, but not a challenge to the validity and lawfulness of his "detention"?

(6) *An arguable "defence" under the Act*: In the light of the resolution of the foregoing issues, does the appellant have an arguable defence to the charge under s 197A of the Act, based on the conditions of his immigration detention, so that he is entitled, in principle, to obtain the evidence directed to that defence as sought in the witness summonses?

(7) *The argument of oppression and remitter*: If the answers to the foregoing issues are favourable to the appellant, are the witness summonses in their terms oppressive, entitling the respondents, on their notice of contention, to relief on that ground? If it be necessary to decide this issue, should it be determined by this Court or by the Supreme Court?

Approach to the claim for summary relief

84 The decision of the Chief Magistrate that triggered the present proceedings was one occasioned by the application for the respondents seeking, in effect, summary relief against the witness summonses. Four points need to be made in relation to this issue. They are significant for the conclusion that I will ultimately reach.

85 *Disadvantages of interlocutory appeals*: This Court has repeatedly affirmed that it is ordinarily undesirable that the course of a criminal trial should

be interrupted by interlocutory appeals[72]. Even where the point in issue is legally important and arguable, where its resolution might save time or affect other persons or result in a termination of the trial, reasons of principle normally demand that appellate interlocutory intervention be refused[73].

86 In part, this approach is taken to avoid oppression of individuals by interlocutory appeals brought by the prosecution or misuse of criminal process by well-resourced litigants who prolong proceedings without real merit. In part, it arises because of the law's experience that many interlocutory issues resolve themselves in the course of a trial[74]. Normally, such issues are resolved more satisfactorily on the basis of findings based on evidence rather than holdings made on hypotheses adopted in advance of the evidence. The course adopted by the respondents in this case, in interrupting the trial of the appellant, arguably denied this Court a proper evidentiary foundation upon which to rest conclusions of significance for the meaning of the Act and the operation of the Constitution upon the Act. A majority of this Court now reaches its conclusion without having the desirable evidentiary foundation in the primary court, which is the way this Court has repeatedly said cases of the present kind should ordinarily be decided.

87 *Restraint in peremptory relief*: The peremptory relief sought by the respondents was governed by established principles that insist upon restraint on the part of judges exercising such jurisdiction whether by way of appeal or judicial review. Such restraint, which applies to civil as well as criminal applications, arises from a number of considerations, some of them already mentioned. Rulings on the availability of a legal action or defence are normally better made by courts when any evidence, said by the party propounding the action or defence, has been adduced. Legal issues are rarely, if ever, wholly disjoined from facts. Facts cast light upon the operation of the law. Factual merits are not irrelevant to the way courts, which are sworn to do justice, respond to alternative elaborations of the law. It is futile to suggest that the substance of law is somehow disconnected from facts.

88 Because, under the rule of law, parties propounding serious actions or defences are normally entitled to have their day in court, it is exceptional to stop them in their tracks on the footing that they have no arguable cause of action or no arguable defence. The exceptional character of the relief sought at trial in the

---

72 eg *Smith v The Queen* (1994) 181 CLR 338 at 346; *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 591-593.

73 eg *R v Elliott* (1996) 185 CLR 250 at 257.

74 *In re the Will of F B Gilbert (dec'd)* (1946) 46 SR (NSW) 318 at 323.

Magistrate's Court was doubled when the respondents lost the application there, interrupted the trial further and renewed their demand in the Supreme Court. To the extent that discretionary considerations and considerations involving the evaluation of complex materials were found in the Magistrate's Court to support the matter proceeding in the normal way, these were added reasons for restraint on the part of the primary judge. The Full Court was bound to observe and uphold such restraint.

89 The approach to be taken to the application made by the respondents before the Chief Magistrate is not in doubt. It is established by analogy to the approach taken by this Court in many cases[75]. In *Dey v Victorian Railways Commissioners*[76], Dixon J explained that a "case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting [the plaintiff's] case for determination in the appointed manner by the court with or without a jury". A similar insistence on "great care" before denying a party the "opportunity for the trial of [the party's] case by the appointed tribunal" was voiced by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)*[77].

90 The foregoing words, expressed in the context of civil proceedings, have added force in a case such as the present. Here, what is at stake is the right of the appellant to defend himself against an indictable criminal charge. Ordinary principles suggest an added requirement of caution before preventing such a person obtaining evidence, as he is advised, in order to establish matters relevant to his resistance to the charge. This is especially so where the "defence" propounded amounts, in effect, to a challenge to the capacity of the prosecution to prove an essential element of the offence charged against him[78].

91 It is true that argument, "perhaps even of an extensive kind, may be necessary to demonstrate that" the issue to which the evidence is directed "is so clearly untenable that it cannot possibly succeed"[79]. However, it is the repeated instruction of this Court that peremptory relief of the kind sought by the

---

75 eg *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; *Jackamarra v Krakouer* (1998) 195 CLR 516 at 529 [35].

76 (1949) 78 CLR 62 at 91.

77 (1964) 112 CLR 125 at 130.

78 Namely "escape from immigration detention". See the Act, s 197A.

79 *General Steel* (1964) 112 CLR 125 at 130.

respondents in the present case "must be sparingly exercised"[80]. As McHugh J has explained, in relation to a civil case, "the mere fact that the plaintiff's prospects of success are slim is not enough to strike out a pleading"[81]. *A fortiori*, the mere fact that the arguments of a defendant in a criminal proceeding present novel and difficult issues is not enough to strike out the process that seeks to adduce evidence propounded as evidence to resistance to the charge. In our legal system, the proper place and time to resolve novel and difficult questions of law in such matters is normally in the trial and the regular appellate system after trial. It is not in interlocutory process[82].

92 *Special restraint in new areas of law*: This is not to deny that proper cases will exist where a firm conclusion may be reached with reasonable efficiency and on limited materials that the propounded action or defence is "doomed to fail". However, where the law is uncertain, where it is in a "state of transition"[83] and (I would add) where the resolution concerns aspects of fundamental human rights and criminal liability, the restraints normally applicable to applications for summary relief are enlarged. This is because of the "undesirability of courts attempting to formulate legal rules against a background of hypothetical facts" involving "the potential unfairness to [parties] if their cases were finally ruled upon before they were able, with the benefit of [court procedures], to refine their factual allegations"[84]. Like judges who have gone before (and in much simpler cases) "I share the unease … at deciding questions of legal principle without knowing the full facts"[85].

93 *Evidentiary foundation for bona fides*: Enough facts were adduced before the Chief Magistrate to demonstrate, in the words of Bleby J in the Full Court, that "the issues concerned are of importance … in the operation of the [Act]"[86].

---

80 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 271.

81 *Esanda* (1997) 188 CLR 241 at 271.

82 See *Fejo v Northern Territory* (1998) 195 CLR 96 at 122 [29], 134-135 [66]-[67].

83 *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 694; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 78 ALJR 628 at 654 [138]; 205 ALR 522 at 558.

84 *E (A Minor)* [1995] 2 AC 633 at 693 per Sir Thomas Bingham MR, citing argument recorded in *Lonrho Plc v Fayed* [1992] 1 AC 448 at 469-470.

85 *E (A Minor)* [1995] 2 AC 633 at 693 per Sir Thomas Bingham MR.

86 *Behrooz* (2003) 84 SASR 479 at 480 [11].

With respect, in the Supreme Court only Bleby J adopted the correct legal approach to the application mounted by the respondents.

94 However, although the appellant was deprived by the resolution of that application of the full evidentiary foundation he sought for his arguments, there was sufficient evidence before the Chief Magistrate to make it clear that the appellant was not wasting the time of the courts. He was propounding a serious and potentially important issue to be tried.

95 It is true that much of the material filed by the appellant in the Magistrate's Court was not specifically related to Woomera[87]. Some of it was "vague"[88] and addressed to times distant from the appellant's alleged "escape"[89]. Some was from sources not wholly independent and dispassionate. However, the appellant fairly pointed out that this was inherent in denying him access to recorded and official material specific to complaints and investigations concerning conditions in Woomera at the time of his alleged offence.

96 For all that, there remained a considerable body of disturbing evidence, assembled for the appellant's case, from which inferences might be drawn that the conditions of supposed "detention" in which he was kept were inhuman and intolerable. I will not repeat all of this evidence, necessarily untested at this stage of the proceedings. But it includes that included in an address by Professor Richard Harding, Inspector of Custodial Services in Western Australia, based on an inspection of the Curtin Detention Centre in Western Australia which, as he put it, like that at Woomera, was "in the middle of nowhere"[90]. Professor Harding described the conditions that he had seen as "an absolute disgrace": involving gross overcrowding, broken toilets, unprivate conditions, lack of medical and dental facilities, combining with a situation at Curtin said to be "almost intolerable" and a statement that such "evidence as exists indicates things are little better at the other Centres"[91].

---

87 *Behrooz* (2002) 84 SASR 453 at 467 [48].

88 *Behrooz* (2002) 84 SASR 453 at 470 [64].

89 *Behrooz* (2002) 84 SASR 453 at 470 [64].

90 Harding, "Standards and Accountability in the Administration of Prisons and Immigration Detention Centres", unpublished speech to the International Corrections and Prisons Association Conference, Perth, 30 October 2001 ("Harding"). The conclusions are cited by the primary judge: *Behrooz* (2002) 84 SASR 453 at 467 [49]-[50].

91 Harding, cited in *Behrooz* (2002) 84 SASR 453 at 467-468 [50]. Note that this statement was misquoted in the reasons of the primary judge as "things are *a* little better at other centres" (emphasis added to identify misquotation).

97 A detailed newspaper report describes what is said to have been the unanimous advice to the Minister for Immigration calling for the closure of Woomera and other measures to help avert a "human tragedy of unknowable proportions"[92]. This report, based on the opinion of the Immigration Detention Advisory Group whom the Minister reportedly called in to negotiate with hunger-strikers at Woomera, demanded an end to the "demonisation" of the detainees. Another report recounts reports of suicide, hunger-strikes and self-harm[93]. The report states that "[a]lmost every day, asylum seekers inside [Woomera] cut and slash their bodies, drink shampoo or try to hang themselves. But mostly they are ignored". A psychiatric nurse is quoted in the report as stating that the detainees felt they "were treated like animals … medication [was] fed through wire mesh to detainees and [there was] a pervasive belief that suicide was the only way out". According to this nurse, "Woomera is a totally traumatising, alienating experience because they are not treated with humanity"[94]. Particularly distressing is the recorded description of the alleged treatment of children kept in detention, one of whom, detained at Woomera, reportedly went mute for a time in apparent reaction to his experiences[95].

98 *Conclusion: available inferences*: The materials adduced before the Magistrate's Court are far from perfect. However, given the limitations upon the gathering of evidence, in default of court-assisted process, they sufficiently answer any suggestion that the contentions made for the appellant concerning the conditions of his detention at Woomera before his "escape" were factually unarguable and groundless. If it could be shown that conditions such as those described existed and were legally relevant to the charge which the appellant faced, enough was before the Chief Magistrate to support his conclusion that the appellant should have the opportunity to procure relevant evidence[96]. Courts in other lands might turn a blind eye to such materials. But the independent courts of the Australian Judicature are not so indifferent to such evidence as to reject the inferences that reasonably arise from it[97].

---

92 *The Age*, 29 January 2002 at 1, cited in *Behrooz* (2002) 84 SASR 453 at 468 [53].

93 *The Age*, 24 April 2002, cited by the primary judge: *Behrooz* (2002) 84 SASR 453 at 468-469 [54].

94 Cited in *Behrooz* (2002) 84 SASR 453 at 468-469 [54].

95 Australian Broadcasting Corporation, *Asylum Seekers in Detention: Health Report*, 13 August 2001, in evidence below.

96 See *Carter v Hayes SM* (1994) 61 SASR 451.

97 See *Rasul v Bush* 72 USLW 4596 (2004).

The common law and escape from custody

99 *Common law and prisoners' escapes*: From before the time of Hale's *Pleas of the Crown*[98], the common law has generally resisted the notion that conditions in prison, even if extreme, afford a legal excuse to a prisoner for effecting an escape. In *People v Whipple*[99], Houser J, citing Hale's work, stated[100]:

> "[I]t is said that 'if a prison be fired by accident, and there be a necessity to break prison to save his life, this excuseth the felony'. The sole authority for such declaration of the common law is Coke's Second Institutes, 590, where, without the citation of either judicial or other authority in its support, the statement occurs that if 'a man imprisoned for petit larceny or for killing of a man se defendendo, or by misfortune, and break prison, it is no felony, because he shall not for the first offense subire judicium vitae vel membri. Et sic de similibus'. But whatever may be the common law with reference to escape, where either 'se defendendo', misfortune, or 'first offense' is or may be invoked as a defense to the accusation for which imprisonment has resulted, so far as the decisions by the courts of sister states are concerned, neither the insanitary condition of the jail[101], fear of violence from third persons[102], nor unmerited punishment at the hands of the custodian[103] will present a situation which in the law may be accepted as an excuse for violation of the statute.
>
> In the case of *State v Cahill*[104], the defendant was charged with escaping from a solitary cell of the penitentiary, rather than from the prison itself. He presented the defense that while in solitary confinement his food consisted of an insufficient quantity of bread and water; that the cell was infested with bugs, worms, and vermin; that the toilet was so out of repair that when it was flushed the water ran out upon the floor; that the

---

98 (1736) vol 1 at 611.

99 279 P 1008 (1929).

100 279 P 1008 at 1009 (1929).

101 *State v Davis* 14 Nev 439 (1880); 33 Am Rep 563 (1880).

102 *Hinkle v Commonwealth* 66 SW 816 (1902).

103 *Johnson v State* 50 SE 65 (1905).

104 194 NW 191 at 193 (1923).

> cell was without a chair, bed, or other reasonable comforts. He further claimed that he had been suffering from lung trouble, and that the cell was rendered unhealthful by the conditions existing and the manner in which it was kept. In deciding the particular question of whether such conditions would constitute a defense to the crime of escape, the court, in part, said: 'The quantity of bread furnished appellant was inadequate if the confinement was protracted over many days, but neither this nor the other matters complained of afforded him the slightest justification for escaping from the cell, or attempting to secure his liberty from confinement.'"

100 I accept this statement of the common law as applicable to Australia. Decisions given in more recent times in this country[105] and in the House of Lords[106] add strength to it as an accurate exposition of the law's approach. So do the reasons of policy mentioned in *Whipple*. These include the inadmissibility of allowing "a prisoner to decide whether the conditions justify him in attempting to escape", a prospect destructive of prison discipline and inviting a danger of the "slaying or serious wounding" of officers, guards and other prisoners that might arise from resisting attempts at escape[107].

101 The appellant did not challenge this line of legal authority. Nor did he seek to invoke the defence of necessity, applicable, for example, where a person (out of necessity) breaks free from a prison which is on fire[108]. Instead, the appellant's argument met this line of authority head-on. He distinguished the requirement of a prisoner serving a lawful sentence following conviction of a criminal charge, as punishment imposed by a court of law and his own situation as a person merely confined to an administrative status, namely "immigration detention", and then pursuant to an Act of Parliament without any conviction, judicial order or proof of an offence.

102 *Answering a statutory question*: I accept the appellant's argument that the issue presented by the case he seeks to bring in answer to the charge against him under s 197A of the Act is not resolved by considerations of the common law. It is a statutory question. It presents issues concerned with the meaning of words in an Australian statute ("escape" and "immigration detention") enacted by the Federal Parliament, as understood having regard to the provisions of the Constitution.

---

105 *Prisoners A-XX Inclusive v State of NSW* (1995) 38 NSWLR 622.

106 *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58.

107 *Whipple* 279 P 1008 at 1010 (1929).

108 *Whipple* 279 P 1008 at 1009 (1929), citing Hale's *Pleas of the Crown* (1736) vol 1 at 611.

103 In *Whipple*, the judges[109] were asked only to say whether positive law excused or justified the escape of the prisoner in that case from his confinement following a criminal conviction and therefore warranted the conclusion that the instruction given to the jury in that case had been erroneous. The appellate judges reached their conclusion "with very great reluctance". They did so only because of what they took to be the state of "the established law"[110]. They acknowledged that "if the facts were as stated by the defendant, he was subjected to brutal treatment of extreme atrocity"[111]. They felt unable to find legal error.

104 However, the issue in *Whipple* was not the issue raised in these proceedings. From first to last that issue concerns the meaning and operation of a provision in a law enacted by the Parliament. Upon that question statements about the common law, and indeed the provisions of constitutional protections in other countries[112], are of little assistance. Whatever such authorities may say, the question for us remains whether, at a certain point, it is reasonably arguable that intolerable conditions of custody, if proved to exist in his "immigration detention", would provide the appellant with a lawful answer to a charge brought against him under s 197A of the Act.

105 The other members of this Court are of the opinion that it is not reasonably arguable that they would. I am of the opposite opinion. Three considerations, two of them deriving from the Australian Constitution and one from international law, lead me to my result.

The constitutional necessity of a federal source

106 *Judicial determination of the law*: The first step in deciding questions of constitutional validity of federal legislation is to construe the statutory provisions[113]. This is a course common to constitutional courts everywhere. It

---

109 Houser J (Conrey PJ and York J concurring). See *Whipple* 279 P 1008 at 1009, 1010 (1929).

110 *Whipple* 279 P 1008 at 1010 (1929).

111 *Whipple* 279 P 1008 at 1010 (1929).

112 See, for example, joint reasons at [54]-[56]; reasons of Callinan J at [222].

113 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 185-186 per Latham CJ; *R v Hughes* (2000) 202 CLR 535 at 565-566 [66]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81].

sometimes provides a complete answer to a legal question, without the need to resort to constitutional invalidation[114].

107 In Australia, it is basic to the operation of a statute affording powers to the Executive Government of the Commonwealth that the law cannot "have the effect of making the conclusion of the legislature final and so the measure of the operation of its own power"[115]. The Parliament is not able to recite itself into power by declaring the existence of a constitutional fact comprising an actual and factual connection between the law and the subject matter upon which the law operates[116]. The existence, or absence, of such a fact can only be decided, in case of dispute, by the judiciary. In *Australian Communist Party v The Commonwealth* ("*Communist Party Case*"), Williams J made this point succinctly[117]:

> "[I]t is clear to my mind that it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation".

108 This, then, is the "axiom" of judicial review which derives from the structure of the Constitution and the separation of the judicial power which the Constitution establishes[118]. Only the judiciary, and ultimately this Court, can determine whether a power sought to be exercised by the Federal Parliament was in fact conferred on it by the Constitution.

109 When the meaning of "immigration detention" as appearing in s 197A of the Act is in question (as it is in the present case) it is not for the Parliament to state conclusively what it means. That function is the responsibility of the courts, ultimately this Court. By established constitutional doctrine, and more recently with encouragement from the Parliament itself[119], this Court, in the event of

---

114 As it does in the companion proceedings in *Al-Kateb* [2004] HCA 37 and *Al Khafaji* [2004] HCA 38. See also *Zadvydas v Davis* 533 US 678 at 689 (2001).

115 *Australian Communist Party v The Commonwealth* ("*Communist Party Case*") (1951) 83 CLR 1 at 193 per Dixon J, 206 per McTiernan J, 263 per Fullagar J. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 602 [193].

116 *Communist Party Case* (1951) 83 CLR 1 at 193.

117 (1951) 83 CLR 1 at 222.

118 Winterton, "The Significance of the *Communist Party* Case", (1992) 18 *Melbourne University Law Review* 630 at 650.

119 The Act, s 3A. See also *Acts Interpretation Act* 1901 (Cth), s 15A.

doubt, will prefer a construction of a disputed legislative text that ensures that it remains within its constitutional powers to one that would involve the law travelling beyond the powers that belong to the Parliament[120].

110 Thus a Minister may assert that a fact exists, such as the fact that the appellant was in "immigration detention" at the time that he "escaped". But that assertion is not, and cannot be, conclusive in Australian law. Nor can an Act of Parliament make it conclusive. It cannot do so by the use of preambles (as in the *Communist Party Dissolution Act* 1950 (Cth)). Nor can it do so by the use of statements of objects, or of definitions (as in the Act in question here). As Fullagar J explained in the *Communist Party Case*[121]:

> "The validity of a law *or of an administrative act done under a law* cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse."

111 The assertion by a Minister or by officials or others performing the work of Executive Government that a person was at a relevant time in "immigration detention" cannot be conclusive of that fact. To paraphrase the words of Kitto J in the *Communist Party Case*, such a construction would mean that it is "impossible to attribute to the legislation any other [conclusion] than that [the Executive] may exercise [its] power [to detain] with complete immunity from judicial interference"[122]. To avoid such a result, incompatible with the assumption of the rule of law upon which the Constitution is drawn, the assertion is not conclusive. It remains for a court (ultimately this Court) to declare whether the Act applies to the established facts proved in the particular circumstances of the case.

112 *Examinability of executive assertions*: This is a powerful reason for rejecting the respondents' argument that s 197A of the Act applied to the appellant simply because he was in Woomera at the time he "escaped". The

---

120 See *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 161-167. See also *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 364; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267.

121 (1951) 83 CLR 1 at 258 (emphasis added).

122 (1951) 83 CLR 1 at 280.

appellant wishes to assert that the conditions in Woomera did not, at the time of his "escape" amount to "immigration detention" of the kind for which the Parliament provided in the Act. If need be, the appellant wishes to contend that an attempt to provide a form of administrative restraint, called "immigration detention", that involved inhuman and intolerable conditions would exceed the powers afforded to the Parliament by the Constitution[123]. Only a court could determine such issues. A court would do so in the normal way by the application of the law to the facts proved in the evidence. Under our Constitution, it would not do so simply by accepting the assertion of the Minister or proof that at some earlier time the appellant had arrived in Australia as an "unlawful non-citizen" and for that reason had been taken into "immigration detention". I agree in this respect with the joint reasons in *Attorney-General (WA) v Marquet*[124]:

> "[Australian] constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements. As Fullagar J said, in *Australian Communist Party v The Commonwealth*, 'in our system the principle of *Marbury v Madison* is accepted as axiomatic'. It is the courts, rather than the legislature itself, which have the function of finally deciding whether an Act is or is not within power."

113 By parity of reasoning, it is the courts, rather than the legislature itself, that have the function of deciding finally whether disputed facts enliven a statutory provision. Where a law, otherwise understood, would exceed the applicable constitutional powers of the Parliament, this Court in discharge of its own functions, will read down that law or hold it invalid to any extent necessary[125].

114 If, therefore, on its true construction, s 197A purported to mean that this Court could not determine the meaning of "immigration detention", and therefore that it was not open to this Court to find that certain extreme conditions fell outside "immigration detention" as provided by the Parliament, such meaning would exceed the limits of legislative and executive power under the Constitution. It would contradict the basic function of the judiciary to decide such questions authoritatively. As explained above[126], s 197A should be read so

---

123 Constitution, s 51(xix) ("aliens"). See also s 51(xxvii) ("immigration and emigration").

124 (2003) 78 ALJR 105 at 116 [66]; 202 ALR 233 at 248 (footnotes omitted).

125 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-278 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [104].

126 These reasons, above at [109].

that it conforms with the Constitution. Therefore, s 197A should not be read so as to prevent this Court from determining the meaning of "immigration detention". It presents a question, examinable by the courts, as to whether, in a given case, particular conditions, proved by evidence, amount to "immigration detention" for the purpose of the offence there provided or not. The contrary cannot be asserted consistently with the limited powers of the Parliament and Executive and the function of the courts in declaring conformity, or disconformity, with constitutional powers.

115 To the extent that there is any ambiguity in the language of s 197A of the Act, the section should be read as permitting the appellant to challenge, in the way he proposes, the application of the section to the facts concerning him. To allow this follows from the requirement *explicit* in the section that the place from which the appellant "escaped" should answer to the statutory description of "immigration detention". It also follows *implicitly* from the constitutional necessity to demonstrate a valid connection (which I would call "proportionality"[127]) between the propounded heads of constitutional power[128], necessary to the validity of the section, and the statutory provision for detention of persons such as the appellant.

116 Putting it quite simply, whereas, as this Court has held[129], the constitutional head of power supports the administrative confinement of a person such as the appellant in "immigration detention", implicitly under reasonable and humane conditions, it would not support his prolonged confinement in inhuman and intolerable conditions. If that form of confinement were attempted in Australia it would be unlawful. It would be contrary to the Constitution. To the extent that the appellant could prove that the conditions in Woomera before his "escape" were inhuman and intolerable, he could avail himself not only of an argument arising out of the meaning of s 197A of the Act but also of a constitutional argument that any other meaning would undermine the validity of the section under the Constitution.

The constitutional necessity of a judicial order for punishment

117 *Punishment only by judicial order*: This last observation leads to a second way of demonstrating that the appellant's "defence" is reasonably arguable. It

---

127 *Levy v Victoria* (1997) 189 CLR 579 at 645-646. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562.

128 Principally the power to make laws with respect to "aliens". See Constitution, s 51(xix).

129 *Lim* (1992) 176 CLR 1.

has exactly the same consequence. It provides support for a construction of s 197A of the Act that would permit the appellant to prove that the conditions of his custody immediately prior to his "escape" were so inhuman and intolerable as to amount to "punishment".

118 Not only would this conclusion arguably take the conditions of his custody outside the description of "immigration detention" as the Parliament provided under the Act. Under the Constitution, it would also arguably threaten the validity of ss 197A and 198 in their application to the appellant. This is because, under federal law, the infliction of punishment, as such, is reserved by the Constitution to the judiciary. It cannot be imposed, as such, by the legislature or the executive government.

119 Such a point was made clear by this Court in *Chu Kheng Lim v Minister for Immigration*[130]. As the joint reasons in that case explained[131]:

> "… [T]he two sections [of the Act as it then stood] will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates."

120 If, by evidence, the appellant could demonstrate that the conditions in which he was held at Woomera immediately before he left that place passed beyond the language of the Act ("immigration detention") and the purposes for which the Parliament had provided in the Act for detention (holding, processing, admitting or expelling "unlawful" alien entrants) he would have a reasonable argument that his custody not only fell outside the "immigration detention" for which the Parliament had provided. It would also fall outside any such administrative detention for which the Parliament *could* provide, without the prior authorisation of a judicial order.

---

130 *Lim* (1992) 176 CLR 1.

131 *Lim* (1992) 176 CLR 1 at 33 per Brennan, Deane and Dawson JJ. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 97, 131.

121 *Inhuman conditions as punishment*: This is a point that distinguishes the issue which the appellant sought to raise from those considered under the common law cases or in jurisdictions where a constitutional norm such as that he invoked is unavailable. It may be accepted that detention of illegal alien entrants to Australia is a burden on their liberty. However, as such, it is not "punishment" of the kind reserved under federal law to the consequences of a judicial order. It may also be allowed that, in federal law, the categories of "exceptional cases", involving involuntary detention without a judicial order[132], are not forever closed[133]. They certainly extend beyond the "exceptional cases" mentioned in *Lim.* Nevertheless, the basic rule established by *Lim* remains true today. That case holds that normally "the involuntary detention of [an individual] in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[134].

122 It is one thing to establish, and enforce, a form of administrative custody for the detention of aliens unlawfully entering Australia and for the limited purposes envisaged by the Act. Arguably, it is quite a different thing, outside the Act and beyond constitutional power, to subject such an alien as a detainee to inhuman and intolerable conditions. If such conditions could be proved by evidence, it would be reasonably arguable, as a matter of statutory construction, that "escape" from them was not escape from "immigration detention", as enacted and as constitutionally permitted. Arguably, it would be no more an "escape" from "immigration detention" than it would be for the detainee to "escape" from equivalent inhuman and intolerable conditions into which the detainee had been illegally confined in a wholly private detention facility falling outside the Act. Or in an offshore cage selected in the vain hope of avoiding accountability to the standards of Australian law[135].

123 On such issues, the designation of the detention facility and the name on the gate could be no more determinative of its statutory and constitutional character than was the name on the gate of the facilities established by oppressive regimes. What matters, in our system of law, is the legal and constitutional character of the "detention". That character is not decided finally by the name

---

132 eg Committal without bail awaiting trial; quarantine against infectious diseases; detention on account of mental illness; infliction of discipline by military tribunals; and possible powers of detention in wartime. See *Lim* (1992) 176 CLR 1 at 28.

133 *Lim* (1992) 176 CLR 1 at 55; *Kable* (1996) 189 CLR 51 at 121; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162.

134 *Lim* (1992) 176 CLR 1 at 27.

135 See *Rasul v Bush* 72 USLW 4596 (2004).

that the Parliament adopts or the description which the Executive asserts. It is decided by courts of law applying legal standards to proved evidence.

124 That is why the decision to prevent the appellant from adducing the evidence that he has propounded, in resistance to the charge brought against him, was legally erroneous. Proof that "punishment" was lawfully inflicted under a valid order of a criminal court might indeed prevent examination of the character and incidents of the punishment that followed, so long at least as it could possibly answer to the description of "imprisonment". But that answer was not available in the present case. Here, there was no judicial order of punishment. There was no judicial order of commitment to imprisonment. An assertion that the true character of the "detention" imposed on the appellant was a form of punishment (permitted, if at all, under the Constitution "only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt"[136]) presented a reasonably arguable allegation that could only be decided by a court acting on evidence. The appellant was therefore entitled to secure evidence addressed to that issue. He was wrongly deprived of that evidence.

International law and arbitrary detention

125 *Relevant provisions of international law*: A still further consideration reinforces the foregoing conclusions. It is derived from international law binding on Australia pursuant to the provisions of the International Covenant on Civil and Political Rights ("ICCPR")[137]. Australia is a party to that treaty and to the First Optional Protocol that supplements it[138]. The latter renders Australia accountable to the UNHRC for derogations from its obligations under the ICCPR.

126 The influence of the ICCPR on the development of Australian law was explained by this Court in *Mabo v Queensland [No 2]*[139]. Leaving aside the contested question of whether the Constitution may be construed by reference to

---

136 *Lim* (1992) 176 CLR 1 at 27.

137 Done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23. See Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993).

138 First Optional Protocol to the International Covenant on Civil and Political Rights, done at New York on 19 December 1966, [1991] *Australian Treaty Series* No 39.

139 (1992) 175 CLR 1 at 42. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288; *AMS v AIF* (1999) 199 CLR 160 at 180 [50].

international law[140], it has long been established by the authority of this Court that statutes are to be interpreted and applied so as to be in conformity with international law[141]. The presumption of compliance applies "as far as [the] language [of the statute] permits"[142]. However, that is true of all rules for the construction of legislation where language necessarily takes primacy. Ambiguity in the written law will often stimulate consideration of the requirements of international law[143].

127 It is not in my view essential to demonstrate ambiguity in the meaning of the provision of a statute before this canon of construction may be applied[144]. If the language permits an interpretation that is consistent with international law, that is the construction that should be favoured by Australian courts. I take this to be uncontroversial where, as here, the relevant federal statutory provision (s 197A) was enacted after the ICCPR was signed and ratified by Australia[145]. The interpretive principle applies equally to customary international law and treaty law. The ICCPR is a particularly relevant source of international law because Australia has voluntarily accepted the obligations expressed in it, and in the Protocol. It must therefore be taken to have accepted the obligation to ensure that its enacted laws conform to the requirements of the ICCPR. It is also particularly relevant because Australia has submitted itself to the scrutiny of the UNHRC on alleged infractions of such obligations. Whilst the views of the

---

140 See *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 383-386 [95]-[101], 417-419 [166]-[167]; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 380-381 [68]; *Austin v The Commonwealth* (2003) 77 ALJR 491 at 543-544 [257]; 195 ALR 321 at 392.

141 Dating back to *Jumbunna Coal Mine* (1908) 6 CLR 309 at 363 per O'Connor J. See also *Kartinyeri* (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ.

142 *Teoh* (1995) 183 CLR 273 at 287; *Kartinyeri* (1998) 195 CLR 337 at 384 [97], 386 [101]; *AMS v AIF* (1999) 199 CLR 160 at 180 [50].

143 See, for example, *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 130 [292]; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 544-545 [150]; *Western Australia v Ward* (2002) 213 CLR 1 at 242 [566].

144 See Lacey, "Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere", (2004) 5 *Melbourne Journal of International Law* 108 at 127-129.

145 s 197A of the Act was inserted in 2001: *Migration Legislation Amendment (Immigration Detainees) Act* 2001 (Cth). See *Teoh* (1995) 183 CLR 273 at 288; *Plaintiff S157/2002* (2003) 211 CLR 476 at 492 [29].

UNHRC do not constitute decisions that are legally binding upon the "State party concerned"[146], they are entitled to close attention by courts such as this, as the Privy Council remarked in *Tangiora v Wellington District Legal Services Committee*[147].

128 Reflecting rights long recognised and protected by the common law and earlier recognised in the Universal Declaration of Human Rights[148], the ICCPR contains provisions relevant to the detention of "unlawful non-citizen[s]" under the Act[149] and the conditions in which (and time during which) such persons might be so detained. Relevant requirements are found in Art 9 of the ICCPR. This is concerned with the right to liberty and security of the person and the right to be exempt from arbitrary detention and to bring proceedings without delay in respect of the lawfulness of detention. Article 10(1) of the ICCPR contains the requirement that persons deprived of their liberty must "be treated with humanity and with respect for the inherent dignity of the human person". By Art 7 it is provided that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Both by the common law, and by force of such provisions of international law, infringement of these rights is not lawful in this country unless sustained by "a clear expression of an unmistakable and unambiguous intention" in valid legislation[150].

---

146 McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, (1994) at 151 [4.39].

147 [2000] 1 NZLR 17; [2000] 1 WLR 240 at 244-245. See also *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737 at 764 [148]; 206 ALR 130 at 167. Cases from other jurisdictions referring to the views of the UNHRC include: *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ 226 at 507, 578; *Kurt v Turkey* (1998) 27 EHRR 373 at 397-399, 414-415, 435-436; *Matadeen v Pointu* [1999] 1 AC 98 at 115-116; *Knight v Florida* 528 US 990 at 996 (1999); *Reyes v The Queen* [2002] 2 AC 235 at 255-256 [41]; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at 40-41 [66]-[67].

148 General Assembly Resolution 217(III)(A) of 10 December 1948. See also Charter of the United Nations, signed at San Francisco on 26 June 1945, Arts 1(3), 55, 56.

149 The Act, ss 189, 196.

150 *Coco v The Queen* (1994) 179 CLR 427 at 438; *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 562-563 [43] per McHugh J, 580-582 [103]-[106] of my own reasons.

129 When, therefore, in respect of unlawful non-citizens within Australia, the Act permits derogations from personal freedom, and authorises a form of administrative custody called "immigration detention", it will be presumed (in the absence of clear statutory provisions to the contrary[151]) that what the Parliament has provided for is, and is only, a form of "detention" that complies with the norms stated in the ICCPR, relevantly, Arts 7, 9 and 10.

130 *Application of ICCPR to the Act*: To take a clear example, the imposition of physical or mental torture as a regular incident of "immigration detention" could never be necessary or appropriate for administrative custody of that kind[152]. The fact that, if it existed, it would breach Art 7 of the ICCPR assists an Australian court such as this to arrive at that conclusion. Similarly, if the conditions of "detention" were to take on an attribute, or character, of retribution or punishment for the deterrence of other would-be "unlawful" aliens tempted to enter Australia without authority, this too would contravene the ICCPR. In default of a judicial order, the imposition of such *punitive* measures could not, conformably with the Constitution, exist based upon the operation of the Act so far as it provides for "immigration detention". The provisions of the ICCPR reinforce the conclusion to which, in any case, this Court's decision in *Lim* would lead. Immigration detention, as such, must not be punitive. Even more clearly, it must not involve conditions that are inhuman and intolerable[153].

131 The respondents themselves accepted that the Act did not authorise inhuman and intolerable conditions in immigration detention. That concession properly recognises the need to read the Act in a way that avoids an operation of federal law that would conflict with international law. However, once that concession is made, a party with a serious claim of a breach of international law must be in a position, on that basis and without delay, to contest the lawfulness of any detention alleged to contravene such standards[154]. As the appellant accepted, and HREOC submitted, the remedies for unlawful conditions of detention would not necessarily extend to release into the community. Instead, the appropriate remedy might be no more than removal from being subjected to the conditions of detention that were inhuman and intolerable. Or it might extend to providing, in a case such as the present, an answer to a criminal offence expressed in terms that assume that the "detention" is lawful.

---

151 See, for example, *B* (2004) 78 ALJR 737 at 765-766 [155]-[159]; 206 ALR 130 at 169-170.

152 *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111.

153 See *Tan Te Lam* [1997] AC 97 at 111.

154 ICCPR, Art 9.4.

132 The provision of a facility for judicial scrutiny of the true legal character of the "immigration detention" of the appellant at the time of his "escape", to allow examination of its alleged features as "arbitrary", "unlawful", involving inhuman and intolerable conditions without respect for the dignity of the human person and subjecting the appellant to "cruel, inhuman or degrading treatment or punishment"[155], would ensure the conformity of the Act under Australian law with the ICCPR. The alternative construction would not. This Court should adopt the meaning that most clearly conforms with the obligations that Australia has freely assumed under the ICCPR. It should avoid a construction that could occasion a breach of those obligations.

133 This conclusion confirms the reasonable arguability in law of the answer which the appellant wishes to give to the charge that he faces of an offence against s 197A of the Act. In this appeal, it affirms the correctness of the dissenting view of Bleby J in the Full Court.

Exhausting alternative remedies

134 *An absurd proposition*: But can it be said, as the respondents submitted, that the appellant has remedies under administrative law, by the law of torts and otherwise for any alleged derogations from humane and tolerable conditions in "immigration detention"? Should it be held that these, and these alone, are the remedies available to him and that, by their existence, they exclude any right to challenge the lawfulness of his "escape" from such conditions?

135 In *Whipple*[156], Houser J acknowledged the intuitive weakness of this argument although, in the circumstances of that case, involving escape of a convicted prisoner, held under judicial order, he felt obliged to give it effect:

> "In a remote mountain camp, far from the sheriff's office, what relief could [the prisoner] obtain by telling his custodian that he wanted to see the sheriff? If the defense could be admitted at all, it should not be conditioned upon the making of a plainly useless request."

136 The absurdity of restricting a person such as the appellant to collateral remedies is even more plain in this case than it was in *Whipple*. It is no answer to state that this appellant was represented by senior counsel (by inference acting *pro bono*). The overwhelming majority of asylum seekers who come to this Court are self-represented, and they are so because they lack the resources to

---

155 ICCPR, Art 7.

156 279 P 1008 at 1010 (1929).

retain counsel. People confined in immigration detention are ordinarily likely to be impecunious, powerless, with limited command of the English language and, in a place as remote as Woomera, with extremely restricted access to legal assistance (and that ordinarily focussed solely on pursuit of a protection visa). Such individuals are much less able even than persons not in detention to pursue expensive civil claims against the Commonwealth and its officials where they commonly stand in peril of costs orders if they fail.

137 In any case, by the time any such claims reached a court hearing, it would be likely that most of the persons bringing them would have been removed from Australia. The provision to them of a visa to return for the trial would be highly doubtful, to say the least. And, in any case, the Act provides only the smallest toehold for arguments affording substantive rights enforceable under administrative law. By way of contrast, the entitlement available to a person such as the appellant to resist a criminal prosecution based on an offence alleged against s 197A is a realistic one, capable of ready judicial determination. When a person is subjected to criminal process our law is usually tender to that person's right to defend himself or herself by a strict proof of every ingredient of the alleged crime. Even an animal, when cornered, is entitled to defend itself. Human beings have their human dignity, human rights and fundamental freedoms accorded by Australian and international law.

138 *Affording real remedies*: This Court should not answer the appellant's endeavour to defend himself from prosecution for such offence by alluding to his "rights" to legal redress that are devoid of any real content or protection. Doing so would involve the Court not only in refusing a forum to determine the "lawfulness of his detention" in a way critical to the determination of his actual legal position[157]. It would also involve a failure of the Australian judicature to address a serious complaint of official unlawfulness in a context where that issue is relevant to the disposition of an actual legal controversy.

139 The matter can be tested this way. Assume that the appellant was indeed subjected in "immigration detention" at Woomera to prolonged inhuman, intolerable, degrading and unhealthy conditions. Assume that there were no effective means of securing internal redress. Assume also that no effective remedies were available to him to repair serious affronts to his human rights and dignity. These are not unrealistic assumptions to make in today's world – even in respect of the modes of detention carried out by officials of "civilised" societies. In such circumstances, to deny the appellant the argument that he now propounds would, in practice, involve the Australian judiciary washing its hands of his case and of any unlawfulness that he could show in the conditions of his detention in answer to the criminal charge that his detainers now wish to bring against him.

---

157 ICCPR, Art 9.4.

In my view, this Court should answer the present case in a realistic way, informed by the preceding considerations that I have identified. We should not give a legal answer that future generations will condemn and that we ourselves will be ashamed of.

An arguable "defence" under the Act

140 The appellant therefore has a reasonably arguable answer to the prosecution brought against him under s 197A of the Act. It is not strictly a "defence". That is because it is for the prosecution to prove every element of the crime with which it has charged the appellant. However, in practical terms, having proved the uncontested facts that the appellant arrived in Australia as an "unlawful non-citizen", was taken into "immigration detention" and was detained at Woomera which he left otherwise than in accordance with the Act, the prosecutor would establish a prima facie case. To mount an answer to that case, challenging the character of the "detention", in terms of the Act, and the character of his departure as an "escape" from such "detention", the appellant would need to rely on evidence. Forensically, he would be bound to tender such evidence.

141 It was to that end that the appellant issued the witness summonses out of the Magistrate's Court. Because I reject the assertion that the answer to the charge alleging an offence against s 197A of the Act is unavailable to the appellant as a matter of law, I am of the view that the primary judge erred in setting aside the appellant's witness summonses. The majority of the Full Court erred in failing to correct the primary judge's error.

142 I agree with the Full Court's conclusion that the primary judge placed too high an onus on the appellant in suggesting that, before witness summonses would be allowed, he was bound to demonstrate that his proposed defence would succeed[158]. However, I do not accept the majority's conclusion that the appellant's complaints about the conditions of his "detention" could not, in law, afford an arguable answer to the charge, apt to respond to an extreme case. Nor do I believe that the theoretical availability of other civil remedies affords the *only* context in which the judiciary could respond to the appellant's complaints[159]. Such a hollow answer does not represent the law of Australia. It is contrary to the language of the Act, the requirements of the Constitution and the obligations assumed by Australia under international law. It is therefore one that I would reject.

---

158 *Behrooz* (2003) 84 SASR 479 at 480 [3].

159 *Behrooz* (2003) 84 SASR 479 at 480 [9].

The argument of oppression and remitter

143 *The notice of contention*: The foregoing conclusions require that the appeal be allowed. However, by a notice of contention, the first respondent submitted that the order of the Full Court should be sustained on the basis that the primary judge ought to have held that the witness summonses were oppressive and/or an abuse of process.

144 It will be remembered that this was one of the two substantive issues raised in the challenge brought to the Supreme Court against the order of the Chief Magistrate[160]. The materials sought in the witness summonses related to documents in the respondents' files concerning the appellant and other detainees at Woomera, past and present, together with incident reports and materials on medical histories and other confidential documents.

145 The first respondent, by affidavit read in the Supreme Court, suggested a number of reasons why the witness summonses were oppressive. In summary, these were: (1) that they imposed an unreasonable burden in collecting and identifying the voluminous materials sought; (2) that already a very heavy obligation had been imposed identifying relevant files, photocopying items and anonymising some of them for privacy and like reasons; and (3) that public policy objections would arise, together with privacy objections, that would consume undue time and expense to sort out.

146 The primary judge rejected this argument, finding that no error of principle had been demonstrated in the refusal of the Chief Magistrate to set the summonses aside upon this ground. There is no record that the respondents persisted with this point in the Full Court, by a notice of contention. The Full Court does not deal with it in its reasons.

147 The issue raised by the notice of contention in this Court was fully argued in oral and written submissions. It is fair to say, as the appellant did, that it would have been unlikely that any of the respondents would have secured special leave to appeal on this point, had it stood alone.

148 *Remitter to the Full Court*: Nevertheless, although this Court will sometimes dispose of appeals on the basis of a notice of contention, even one raising arguments never advanced in the courts below[161], my own view is that such a course should be reserved for a truly exceptional case. Ordinarily, where necessary, such points should be dealt with by the intermediate court. Any other

---

160 These reasons, above at [68].

161 See *Gattellaro v Westpac Banking Corp* (2004) 78 ALJR 394; 204 ALR 258.

course may unjustly deprive a party of the opportunity of further appellate reconsideration of a decision on the point.

149 I cannot say that the complaint of oppression by the very wide terms of the witness summonses is unarguable. On the contrary, I can understand the opinion which Callinan J expresses in his reasons concerning the scope of the summonses[162]. As my disposition of this appeal is a minority one, I will not delay over this issue. It is sufficient to say that, for the establishment of the answer which the appellant wishes to bring to the charge against him under s 197A of the Act, much more precisely drawn summonses would have sufficed.

150 Had this been the only objection to the witness summonses, practical considerations might well have encouraged negotiations between the parties and identification by the appellant of the essential evidence that he demanded. In the way the appeal was argued this issue was not ultimately refined. It is not suitable for decision by this Court.

Orders

151 The appeal should be allowed with costs. The order of the Full Court of the Supreme Court of South Australia should be set aside. In lieu of that order, there should be substituted an order granting leave to appeal against the orders of the primary judge. Those orders should be set aside. The proceedings should be returned to the Full Court of the Supreme Court of South Australia to dispose of the questions raised in the notice of contention filed by the first respondent in this Court. The costs of the appeal to the Full Court of the Supreme Court of South Australia should abide the final disposition of the application to that Court, made consistently with the decision of this Court.

---

162 Reasons of Callinan J at [224].

152 HAYNE J. The *Migration Act* 1958 (Cth) ("the Act") requires that unlawful non-citizens be kept in immigration detention until one of three events occurs (the non-citizen is removed or deported from Australia or is granted a visa). The appellant is, and since before 18 November 2001 has been, an unlawful non-citizen. He has not been removed from Australia and has not been granted a visa. "Immigration detention" means, among other things, being held in a detention centre established under the Act. The appellant was being held at the Woomera Immigration Reception and Processing Centre ("Woomera"), a place which had been established as a detention centre. Section 197A provides that a person detained must not escape from immigration detention. The penalty prescribed is imprisonment for five years. It is alleged that the appellant escaped from Woomera.

153 This appeal raises two issues. First, could the conditions in which persons were held be so bad that the place of detention ceased to be a detention centre? These reasons will seek to demonstrate that, contrary to the appellant's submissions, the conditions under which a person is held at a detention centre are irrelevant to whether the detention from which the person escaped was "immigration detention".

154 The second issue, which would arise only if the appellant succeeded on the first issue, concerns the breadth of summonses to witnesses issued on the appellant's behalf requiring the production of documents which it is alleged may show what were the conditions under which the appellant was detained at Woomera.

The proceedings below

155 The appellant was charged in the Port Augusta Magistrates Court with escaping from immigration detention. The particulars given of that offence were that on or about 18 November 2001 the appellant, being a detainee at Woomera, escaped. The appellant obtained the issue of witness summonses under the *Magistrates Court Act* 1991 (SA) (s 20), one of which was directed to the proper officer of the Department of Immigration and Multicultural and Indigenous Affairs. Similar summonses were issued to the proper officer of the third and fourth respondents. Each summons required the production of any document which had come into existence since 1 December 1999 and met one or more of the descriptions set out in nine paragraphs. It is enough to describe the documents that were sought as being concerned with conditions and complaints about conditions at Woomera. The Secretary of the Department and the third and fourth respondents each applied to set aside the witness summonses on the ground that each summons was oppressive and an abuse of process. In substance two matters were identified as requiring that conclusion. First, it was said that "the issue to which all of the documents may be relevant is an issue upon which, for constitutional reasons, the [appellant] cannot possibly succeed". Secondly, each summons was said to be too wide.

156 The Chief Magistrate of South Australia, Mr Moss, dismissed the application to set aside the summonses. Pursuant to s42 of the *Magistrates Court Act*, the Secretary of the Department and the third and fourth respondents appealed to the Supreme Court of South Australia. At first instance, Gray J allowed the appeals[163] and ordered that the summonses be set aside. By majority (Lander and Besanko JJ; Bleby J dissenting), the application of the appellant (and two other men charged with him, but since removed from Australia) for leave to appeal to the Full Court of the Supreme Court of South Australia was dismissed[164]. The majority of the Court held[165] that it was not "reasonably arguable that [the primary judge] erred in concluding that the [appellant] had not identified a defence known to law". Their Honours went on to say[166]:

> "We cannot see how it can be said that the harshness of the conditions at [Woomera] can lead to the conclusion that the [appellant and the others then party to the proceeding] were no longer detainees or in some way they were no longer being held in immigration detention.
>
> We do not accept that harshness of conditions in a detention centre means that a detention centre ceases to have the character of a detention centre by reason that the harshness of conditions is contrary to the power of detention in the Act."

By special leave the appellant now appeals to this Court. The third and fourth respondents took no active part in the proceedings in this Court. This appeal was heard at the same time as the appeals in *Al-Kateb v Godwin*[167] and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*[168].

---

163 *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Behrooz* (2002) 84 SASR 453.

164 *Behrooz v Secretary, Department of Immigration, Multicultural and Indigenous Affairs* (2003) 84 SASR 479.

165 (2003) 84 SASR 479 at 480 [4].

166 (2003) 84 SASR 479 at 480 [7]-[8].

167 [2004] HCA 37.

168 [2004] HCA 38.

The contentions

157 There was no evidence in the courts below which would permit any finding of fact about what the conditions at Woomera were at any time, whether on or before 18 November 2001 or since. The application which gives rise to the present appeal concerned summonses to witnesses. There has been no trial of the proceeding brought against the appellant. There has been no occasion for the courts below, and there is, therefore, no occasion for this Court, to make any finding about those conditions. This appeal must be decided by reference to possibilities: *could* the conditions at Woomera have been so bad that it ceased to be a detention centre?

158 The appellant submitted that the Act only authorised, and could only validly authorise, detention that is reasonably capable of being seen as necessary for migration control purposes. Detention in what the appellant described as "inhumane conditions" was not, and could not validly be, authorised by the Act. So much followed, it was submitted, from the Act's definition of "detain" and from a constitutional inhibition on the infliction of punishment under federal legislation except in the exercise of the judicial power of the Commonwealth. Although the two branches of the argument (one about the construction of the Act, and the other about constitutional limitations) overlapped, it is desirable to begin considering them by dealing with the question of statutory construction.

Construction of the detention provisions

159 The scheme of the Act's provisions for the mandatory detention of unlawful non-citizens is described in my reasons in *Al-Kateb*[169]. I will not repeat that description here. It is necessary in this matter, however, to say more about both the Act's definition of "immigration detention" and its definition of "detain". "Immigration detention" is defined, in s 5 of the Act, as meaning:

> "(a) being in the company of, and restrained by:
>
> (i) an officer; or
>
> (ii) in relation to a particular detainee—another person directed by the Secretary to accompany and restrain the detainee; or
>
> (b) being held by, or on behalf of, an officer:
>
> (i) in a detention centre established under this Act; or

---

169 [2004] HCA 37 at [199], [210]-[211].

(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or

(iii) in a police station or watch house; or

(iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel—on that vessel; or

(v) in another place approved by the Minister in writing;

but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b)."

160 It will be seen that the definition is in two, disjunctive, parts. The first (dealt with in par (a)) turns upon the identity of the person effecting the restraint. The person, in whose company the detainee must be and by whom the restraint is effected, must be an officer or another person directed by the Secretary to accompany and restrain that detainee. The second part of the definition (par (b)) refers to being held by or on behalf of an officer at any of five kinds of place, of which one is "a detention centre established under this Act".

161 Section 273 of the Act authorises the Minister, on behalf of the Commonwealth, to "cause detention centres to be established and maintained". A "detention centre" is defined, for the purposes of s 273, as "a centre for the detention of persons whose detention is authorised" under the Act. Although s 273 permits the making of regulations to "make provision in relation to the operation and regulation of detention centres", no regulations have been made about those subjects.

162 One of the elements of the offence of escaping from immigration detention is, of course, the demonstration that there was an escape from what the Act identifies as immigration detention. For present purposes, it may reasonably be anticipated that the case to be made against the appellant is that he escaped from being held by, or on behalf of, an officer in a detention centre established under the Act. One necessary element in the proof of that case would be that Woomera was a detention centre established under the Act. May the appellant answer that case by pointing to the conditions which existed at Woomera? (When I say "pointing to" I leave aside any question there may be about which side would bear an onus of proof about the matter and any question about the standard of proof.)

163 The appellant's statutory construction argument focused upon the Act's definition of "detain". "Detain" is defined, in s 5, as meaning:

"(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so."

164 "Detain" is used in s 189 of the Act. Among other things, that section obliges an officer to "detain" a person who the officer knows or reasonably suspects to be an unlawful non-citizen in the migration zone. "Detain" is not used in s 197A, which provides that "[a] detainee must not escape from immigration detention". But "detained" is used in the Act's definition of "detainee" as meaning "a person detained". It follows that, subject as always to any contrary intention appearing, the definition of "detain" informs the meaning of "detainee"[170].

165 The appellant submitted that the words "as are reasonably necessary to do so", appearing at the end of the definition of "detain", govern all that precede them in the definition. In particular, so it was submitted, the detention and conditions of detention permitted and required by those provisions of the Act which used "detain", or one of its parts of speech, were limited to detention reasonably necessary for migration control purposes. Although the argument necessarily directed attention to the *conditions* of detention, it was framed as an argument which would mark both the temporal and the physical boundaries of permissible detention by reference to what was "reasonably necessary".

166 The immediate answer to this aspect of the appellant's contentions is that the words of the definition of "detain" do not bear the meaning asserted. The phrase "as are reasonably necessary to do so" qualifies the expressions "taking such action" and "using such force". Those expressions, in turn, amplify what is meant by "take into" immigration detention and "keep, or cause to be kept" in immigration detention. It is to those actions which "to do so" refers. The phrase "as are reasonably necessary to do so" does not qualify what is meant by "immigration detention". That latter term is, as has earlier been pointed out, a defined term. One of its meanings is being held by, or on behalf of, an officer at a particular kind of place. The conditions that exist at that place form no part of the statutory identification of what is "immigration detention".

A constitutional limitation?

167 Is there, as the appellant contended, a constitutional reason to confine the statutory meaning of immigration detention to detention in such conditions as are reasonably capable of being seen as necessary for migration control purposes? Is there a constitutional reason to conclude that the appellant's detention would cease to be immigration detention if the conditions of confinement passed

---

170 *Acts Interpretation Act* 1901 (Cth), s 18A.

beyond what was reasonably capable of being seen as necessary for migration control purposes?

168 In the courts below, the appellant explicitly disavowed any contention based on doctrines of necessity. He did not seek to make such a case in this Court. Thus he may be taken to have disclaimed any argument that his departure (to use a designedly neutral term) from Woomera was necessary to preserve his life or limb. No argument was advanced by analogy with the prisoner who leaves a gaol because it is on fire and, to stay within the prison boundaries, would be to risk death or serious injury[171]. Rather, the appellant's argument depended upon identifying "immigration detention" in a way that not only permitted, but required, consideration of the conditions experienced by the detainee.

169 The first and second respondents (the Secretary of the Department and the Attorney-General of the Commonwealth) accepted that the Act does not authorise detention in inhumane conditions. But they submitted that the conditions under which the appellant was detained are irrelevant to whether he escaped from "immigration detention".

170 Central to the appellant's contentions was that there is no "meaningful" (presumably in the sense of legally relevant) distinction to be drawn between detention and the conditions of detention. The appellant submitted that there can be no detention without conditions of detention, and that detention, and the manner of detention are one and the same thing. Thus, so the argument proceeded, the Act can only validly authorise detention under conditions that are reasonably capable of being seen as necessary for migration control purposes.

171 The appellant's argument founded upon what was said in the joint reasons of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*[172]. There, their Honours said, of what were the then provisions of ss 54L and 54N of the Act, that those sections:

> "will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene

---

171 Hale, *The History of the Pleas of the Crown*, (1736) (1971 reprint), vol 1 at 611.

172 (1992) 176 CLR 1 at 33.

> Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates."

As is apparent from my reasons in *Al-Kateb*[173], I consider that the line which their Honours drew between the valid authorisation of executive detention and punitive detention is difficult to identify with certainty. Further, the distinction which was drawn in *Chu Kheng Lim* does not take into account that a law requiring the detention of unlawful non-citizens until they are removed, deported or granted a visa, would be a valid law of the Commonwealth to the extent to which it provided for the exclusion of an unlawful non-citizen from the Australian community which he or she did not have permission to join. Whether or not there are these difficulties about the distinction drawn in this passage in *Chu Kheng Lim*, its application would not lead to the conclusion asserted by the appellant about the relevance of conditions of detention to the charge of escape which has been laid against him.

172 The appellant accepted that there were cases in which detention of non-citizens was reasonably necessary for migration control purposes. The particular mode of immigration detention permissible was said to depend on the particular circumstances of individual cases. To detain non-citizens in conditions harsher than those reasonably necessary for migration control purposes was said to be punitive. Because it was punitive it could not validly be authorised except as a consequence of the exercise of the judicial power under Ch III of the Constitution.

173 The Act, in terms, authorised the appellant's detention at any of a number of identified places. By its definition of "detain", the Act permitted taking such action and using such force as was reasonably necessary to keep the appellant at one of those places of detention. Otherwise, the Act was silent about how the appellant might be treated while at a place of detention.

174 If it is assumed, for the purposes of argument, that it could be shown that those kept at a place of detention were treated harshly, the lawfulness of such treatment may very well be open to challenge. The detaining authority owes duties of reasonable care to those whom it detains[174]. To use more than such force as is reasonably necessary to keep someone in detention would constitute an assault. So the examples could be multiplied. But the place at which the person is detained would remain one of the places identified by the Act where to be held by or on behalf of an officer would mean being in "immigration detention". And any want of valid legislative authority to commit those acts or

---

173 [2004] HCA 37 at [258].

174 *Howard v Jarvis* (1958) 98 CLR 177 at 183.

make those omissions, which together are said to render the conditions of detention harsh or punitive, denies the lawfulness of those acts and omissions. It does not deny the lawfulness of detention at the place identified in the Act.

175 The question which the appellant sought to pose – can the appellant's detention at Woomera, in the conditions he experienced, be seen as reasonably necessary for migration control purposes? – cannot be confined to an inquiry about conditions of detention. As was pointed out in argument, the logical consequence of this contention (that detention could be permitted only for migration control purposes) was that s 189 of the Act was invalid in so far as it provided for the mandatory detention of *all* unlawful non-citizens. Necessarily, the question posed would permit the answer that, in a particular case, no restraint of any kind on the liberty of the non-citizen was necessary. That is, the question is one which challenges not only the conditions in which detainees are held, it challenges the validity of those provisions requiring mandatory detention of unlawful non-citizens. For the reasons I give in *Al-Kateb*, I consider that those provisions of the Act which provide for the mandatory detention of unlawful non-citizens for the period described in s 196 of the Act are valid laws of the Commonwealth.

176 Once that conclusion is reached, it follows that the inquiry about conditions of detention must be irrelevant. What the Act fastens upon is the *place* of detention, not the conditions experienced while at that place. The limitation on power of the kind to which the appellant points affects the lawfulness of what is done and not done at that place. It does not deny the applicability of the statutory description "immigration detention" to being kept at such a place. It is unnecessary, therefore, to confront the formidable difficulties which an inquiry about conditions would present for identifying when, exactly, detention passed from lawful to unlawful[175].

The summonses

177 The material sought by the witness summonses relating only to the conditions of detention at Woomera, the summonses should have been set aside. Because an appeal to the Full Court against the orders of Gray J would, therefore, have failed, the Full Court's order refusing leave to appeal to that Court should not be disturbed.

178 It is, therefore, unnecessary to reach the second, subsidiary, issue which was raised: whether the witness summonses were too wide. The summonses required the identification of documents which came into existence between

---

175 *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58; *Prisoners A–XX Inclusive v New South Wales* (1995) 38 NSWLR 622.

1 December 1999 and 18 November 2001. The evidence adduced at the hearing of the application to set aside the summonses suggested that it would be necessary to examine more than 3,000 files, more than 1,500 electronic documents and about 6,000 incident reports. About 745 hours had already been spent by at least 47 officers in identifying and locating files and it was estimated that completion of the process would be likely to take more than a further 1,000 hours. The task to be undertaken was, therefore, very large.

179 Without first identifying the issue in the case to which such material may be relevant, it is not possible to conclude, from those figures alone, that the summonses were oppressively wide. Further, these being criminal proceedings, in which procedures for discovery of documents were not available, the drawing of analogies between the obligations imposed by the witness summonses, and those which would arise under processes of discovery, are not conclusive of whether the summonses should be set aside as an abuse of process.

180 Summonses to witnesses requiring the production of documents or other materials are not to be used for purposes other than requiring production of those documents and materials to the court[176]. That the documents sought by these witness summonses included documents created nearly two years before the date of the appellant's alleged offence, taken with the breadth of subjects covered by the specification of documents made in the summonses, may well suggest strongly that the summonses were not issued for the purpose of production of the documents to the court, so much as for the purpose of permitting the appellant's advisers to trawl through what was produced in the hope of generating lines of inquiry not otherwise available to support the case which it was sought to make. To decide whether that is so, however, would require a much closer analysis of the categories of documents sought, *by reference to a relevant legal issue*. Having concluded that the issue which the appellant seeks to raise is irrelevant, that inquiry cannot be made.

181 The appeal must be dismissed with costs.

---

176 *Commissioner for Railways v Small* (1938) 38 SR(NSW) 564 at 574; *National Employers' Mutual General Association Ltd v Waind & Hill* [1978] 1 NSWLR 372 at 378-379.

182 CALLINAN J. The principal question in this appeal is whether harsh conditions of detention of illegal entrants to this country may constitute punishment of a kind which may only be imposed by courts in the exercise of judicial power.

Facts

183 Mr Behrooz is the sole appellant. Two other appellants, who were granted special leave in this matter, have been removed from Australia and the criminal charges against them dropped. Special leave in their favour was rescinded by the Court at the hearing.

184 The appellant was charged on information that:

> "On or about the 18th day of November 2001 being a detainee escaped from Immigration Detention contrary to section 197A of the *Migration Act* 1958."

185 Particulars were provided:

> "On or about the 18th day of November 2001 the defendant being [a detainee] at the Woomera Immigration [Reception and Processing] Centre escaped."

186 Section 197A of the *Migration Act* 1958 (Cth) ("the Act") provided:

> "A detainee must not escape from immigration detention.
>
> Penalty: Imprisonment for 5 years."

187 For some time prior to 18 November 2001, the appellant had been in immigration detention at the Woomera Immigration Reception and Processing Centre ("Woomera"), a centre established pursuant to the Act.

The Magistrates Court

188 On 10 January 2002, on the appellant's application, the Magistrates Court at Port Augusta issued summonses to the Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA"), Australasian Correctional Management Pty Ltd and Australasian Correctional Services Pty Ltd. The summonses sought the production of material as follows:

> "Evidentiary Material
>
> …
>
> The documents to be produced are any documents which came into existence since 1st December 1999 and which:

1. contain or refer to complaints or concerns about conditions in Woomera;

2. contain or refer to protests about conditions in Woomera;

3. contain recommendations or requests for improvement of the conditions in Woomera;

4. contain reports on:

   (a) protests by detainees at Woomera;

   (b) the physical health of detainees at Woomera;

   (c) the psychological health of detainees at Woomera;

5. comprise records or reports of incidents or disturbances at Woomera reportable under or covered by Incident Reporting Procedures or Emergency Procedures detailed in Operational Orders;

6. contain a record or report concerning any of:

   (a) Davood Hossein Amiri

   (b) Saed Mohamed Abdarahmani

   (c) Javad Rajabi

   (d) Mahmood Gholani Moggaddam

   (e) Mehran Behrooz

   (f) Ali Ayad Shoani;

7. contain or refer to the services, facilities, activities and programs designed to meet the individual needs of each of:

   (a) Davood Hossein Amiri

   (b) Saed Mohamed Abdarahmani

   (c) Javad Rajabi

   (d) Mahmood Gholani Moggaddam

   (e) Mehran Behrooz

   (f) Ali Ayad Shoani;

8. contain or refer to the policy or procedures at Woomera regarding:

   (a) professional visits to detainees;

   (b) social visits to detainees;

   (c) visits to detainees by humanitarian or welfare groups;

9. contain concerns of or criticisms by:

   (a) United Nations High Commissioner for Refugees;

   (b) Human Rights and Equal Opportunity Commission;

   (c) Amnesty International

   regarding the conditions of detention at Woomera."

189 In March and April 2002 applications were made by the respondents to set aside each of the summonses on the following grounds:

"1) The witness summons ... involves a matter arising under the Constitution or involving its interpretation.

2) The witness summons ... is oppressive and an abuse of the process of the Court because:

   (a) the issue to which all of the documents may be relevant is an issue upon which, for constitutional reasons, the [appellant] cannot possibly succeed;

   (b) in any event:

      i) the volume of material sought is excessive;

      ii) the subpoena is indirectly seeking discovery and, in particular, it requires elaborate exercises of judgment by the [respondents]; and

      iii) the subpoena refers to production of documents for time periods when the [appellant was] not in detention and seeks documents in relation to minors when the [appellant is an adult]."

190 The respondents sought these orders:

"1 That proceedings in respect of the summons be stayed pending compliance with the provisions of section 78B of the *Judiciary Act 1903*.

2 That the summons be set aside.

3 Any other orders that the Court sees fit."

191 The applications were heard on 6 and 7 May 2002. The Chief Magistrate (Moss CM) delivered reasons on 24 May 2002 foreshadowing his proposed orders. At the request of the respondents, the Chief Magistrate refrained from pronouncing orders, and adjourned the matter for one week, to allow the Commonwealth to consider the making of an application to remove the application to this Court. No application was in fact made. On 31 May 2002 the Chief Magistrate again refrained from pronouncing orders and adjourned the matter for another week to allow the Commonwealth to formulate a case for the Chief Magistrate to state to the Supreme Court of South Australia. On 7 June 2002 the Chief Magistrate rejected the Commonwealth's application to state a case and pronounced his orders.

192 In his reasons, the Chief Magistrate noted the submissions of counsel for the appellant:

"... even though detention for the purposes of [the] Migration Act was capable of being valid detention, if the conditions of detention were so obviously harsh as to render them punitive, then the detention went beyond that which was authorised by the Act and was necessarily illegal. In effect [counsel for the appellant] argues that if the detention is in fact punitive, then it must necessarily be illegal.

... it is the very nature of the detention which determines whether it is lawful or unlawful. If the detention is in fact punitive detention, then it is not detention which is authorised by the Act, notwithstanding that the sections are a valid constitutional enactment and hence the detention is unlawful. If follows that escape from such detention does not amount to an offence."

193 He concluded:

"I am of the view that [the appellant's] argument is a powerful one. At this stage, however, I do not have to decide the issue. It will be for the magistrate who hears the case and that may not be me, to make a decision upon the law that relates to the charges. It would be embarrassing for that magistrate if I were to now try to determine that legal issue in advance. For the purpose of those applications to set aside the subpoena, I must decide whether or not the [appellant's] outlined defence has, in a legal sense, any prospect of success. I do not agree with the arguments of the

> learned Solicitor General that the [appellant's] defence must necessarily fail upon legal grounds. On the contrary I think it has a perfectly good chance. It therefore follows that the applications cannot succeed on this point."

194 The Chief Magistrate generally rejected the respondents' submissions as to the oppressive nature of the subpoena. After hearing the cross-examination of one of the respondents he found:

> "the Department will be perfectly up to the task of sifting through the documents and producing those which may, at the end of the day, be critically relevant to the [appellant's] proposed defence."

195 He made one exception:

> "only insofar as to exempt documents which relate to periods outside the period of 23 months prior to 18 November 2001 or which relate solely to minors."

The Supreme Court of South Australia

196 The respondents appealed to the Supreme Court of South Australia (Gray J). In the alternative, to meet the possibility that an appeal might not lie as of right, the respondents sought leave to appeal, and judicial review in the nature of certiorari and mandamus pursuant to s 17 of the *Supreme Court Act* 1935 (SA) and r9 of the Supreme Court Rules. No issue arises in this Court as to the appropriateness of the procedure adopted and as to the jurisdiction of the Supreme Court of South Australia to deal with the matter.

197 A major submission advanced by the appellant was that his detention at Woomera went beyond anything that could reasonably be regarded as necessary for the purposes of the Act. His detention was not a form of detention authorised by law. A detainee who escaped from Woomera was not therefore escaping from immigration detention. The appellant accordingly had a defence against each of the charges.

198 The appellant did not contend that he had a defence of necessity. No foundation was laid for a submission that the appellant's escape was excusable because of any grave predicament with which he was confronted. Nor was it claimed that the appellant was compelled to escape from Woomera by threat or danger: nor was it suggested that there was any threat that was "present and continuing" in the sense that it effectively neutralised his will when he escaped.

199 After referring to the provisions of the Act relating to immigration detention and cases in Australia and the United Kingdom, Gray J concluded as follows[177]:

> "The [appellant has] not established that the material sought by the summonses has evidentiary value in the proceedings. The material does not directly establish the conditions of the [appellant's] detention. The material does not raise an arguable case of punitive detention. The material does not establish a link between the conditions of detention at [Woomera] and the [appellant's] alleged escape.
>
> The [appellant's] detention is authorised by the *Migration Act*. The [appellant has] not identified a defence known to the law. The [appellant's] complaint raises allegations about the conditions of [his] lawful detention. Those complaints cannot as a matter of law make the detention unlawful. The [appellant does] not seek relevant material. The summonses are set aside."

200 Although it was not necessary for him to do so, his Honour also decided a further argument advanced by the respondents, that in its width, absence of particularity, intrusion upon confidentiality, and irrelevance to the appellant's situation in detention, each summons was oppressive, and should for that reason be set aside. His Honour would not however have been prepared to set aside the summonses on that ground.[178]

201 The appellant sought leave to appeal to the Full Court of the Supreme Court of South Australia (Lander, Bleby and Besanko JJ). Lander and Besanko JJ disposed of the application in this way[179]:

> "Gray J decided the matter against the [appellant] on two grounds. First, assuming for the purpose of considering this point that the [appellant has] identified a defence known to law, he held that the material the [appellant] put forward was not, as a matter of fact, sufficient to establish that the documentary material sought by the subpoenas was evidentiary material: ss 3 and 20(1) of the *Magistrates Court Act* 1991 (SA).

---

177 *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Behrooz* (2002) 84 SASR 453 at 473 [72]-[73].

178 *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Behrooz* (2002) 84 SASR 453 at 477-478 at [90].

179 *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2003) 84 SASR 479 at 479-480 [2]-[7].

We think it is arguable that his Honour erred in this respect in that he placed too high an onus on the [appellant]. It is reasonably arguable that, although the court must be satisfied that the subpoenas do not involve a fishing expedition or have not been issued for an improper or collateral purpose, the [appellant does] not have to establish a prima facie or arguable case that the proposed defence will succeed before subpoenas will be allowed. We think it is arguable that what is required will depend on the circumstances of the particular case, but that in this case his Honour erred in his statement of the level of proof or satisfaction required from the [appellant].

However, we do not think it is reasonably arguable that his Honour erred in concluding that the [appellant] had not identified a defence known to law. This is fatal to the [appellant's] application irrespective of the outcome of the first point.

The [appellant seeks] to argue that [his] detention at [Woomera] was unlawful because of the harshness of the conditions at [Woomera]. The status of the [appellant] as [an] unlawful non-citizen is not challenged. The fact that in the first instance [he was] lawfully detained, pursuant to s 189 of the *Migration Act* 1958 (Cth), is not disputed. The [appellant does] not question the validity of any section of the *Migration Act* particularly s 196 of the Act.

Thus, it is not disputed that in being detained [the appellant was] in immigration detention. There is no dispute that [Woomera] was established as an immigration detention centre pursuant to the Act.

We cannot see how it can be said that the harshness of the conditions at [Woomera] can lead to the conclusion that the [appellant was] no longer [a detainee] or in some way [he was] no longer being held in immigration detention."

202 Bleby J was of a different view[180]:

"I would grant leave to appeal. In my opinion, the [appellant has] an arguable case on both the grounds on which Gray J decided the appeal from the magistrate. The issues concerned are of importance, of course, in the operation of the *Migration Act*. For those reasons I would grant leave."

---

180 *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2003) 84 SASR 479 at 480 [11].

The appeal to this Court

203 Before dealing with the arguments of the parties I should set out, as at the date of the appellant's escape from Woomera, the relevant provisions of the Act. Section 4 should be noted first:

"**Object of Act**

(1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

(2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.

(3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.

(4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act."

204 Section 5 defined what it meant to "detain" a person:

"***detain*** means:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention

… ."

205 The same section defined "immigration detention" as follows:

"***immigration detention*** means:

...

(b) being held by, or on behalf of, an officer:

(i) in a detention centre established under this Act; or

...

(v) in another place approved by the Minister in writing;

… ."

206 Section 36 of the Act provided as follows:

"**Protection visas**

(1) There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa.

Protection obligations

(3) 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.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

(a) a country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act."

207 Section 176 referred to detention, but not to detention under Div 7 of the Act:

"**Reason for Division**

This Division is enacted because the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in immigration detention until he or she:

(a) leaves Australia; or

(b) is given a visa."

208 Section 182 referred to temporal limitations but applied only to certain aliens:

"**No immigration detention or removal after certain period**

(1) Sections 178 and 181 cease to apply to a designated person who was in Australia on 27 April 1992 if the person has been in application immigration detention after commencement for a continuous period of, or periods whose sum is, 273 days.

...

(6) If:

(a) an entry application for a designated person has been refused; and

(b) apart from this subsection, section 178 would cease to apply to the person; and

(c) the person begins court or tribunal proceedings in relation to the refusal;

that section applies to the person during both these proceedings and the period of 90 days after they end, whether or not this subsection has applied to that entry application before."

209 Section 189 in Div 7 of the Act was expressed in mandatory language:

"**Detention of unlawful non-citizens**

(1) 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.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force."

210 Section 196 provided as follows:

"**Period 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.

(2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.

(3) 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."

211 Section 198 was very comprehensively expressed and provided as follows:

"**Removal from Australia of unlawful non-citizens**

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

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the ***original decision***) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to

the Minister about revocation of the original decision – either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-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;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and

(c) either:

(i) the non-citizen has not been immigration cleared; or

(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone."

212 The appellant's argument relied to a substantial extent upon the decision and some statements made in this Court in *Chu Kheng Lim v Minister for Immigration*[181]. There, the detainees had argued that the purpose of the Act was, invalidly, to authorize, indeed compel members of the Executive to arrest and detain by imprisoning them, persons otherwise than by order of a court exercising judicial power: that the detention was in short therefore punitive. By a majority the Court held that the relevant provision of the Act, s 54R, was invalid because it purported to direct the courts about the manner of exercise of their judicial power.

213 Here the appellant argued that his detention was unlawful by reason of the conditions of it, allegedly of squalor, deprivation, overcrowding and harshness, and amounting therefore to punishment. I should immediately point out that these allegations are denied and have not been the subject of any forensic contest. It should also be observed that much of the material upon which the appellant would wish to rely may not be admissible in evidence, both as to form and

---

181 (1992) 176 CLR 1.

substance. It is not entirely clear whether the appellant was also seeking to make a case of the same kind as the non-governmental parties in *Al-Kateb v Godwin*[182] and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*[183], that indefiniteness of detention deemed their detention unlawful. Nothing was however proved about the prospects or otherwise of deportation of the appellant to some other country, and accordingly the arguments advanced in those cases have no application to him. If they did I would reject them for the same reasons as I do in those cases.

214 The statements in *Lim* upon which the appellant based his case need to be put in context. That context includes this statement as to the breadth of the aliens power in the joint judgment of Brennan, Deane and Dawson JJ[184]:

> "The legislative power conferred by s 51(xix) with respect to 'aliens' is expressed in unqualified terms. It prima facie encompasses the enactment of a law with respect to non-citizens generally. It also prima facie encompasses the enactment of a law with respect to a particular category or class of non-citizens, such as non-citizens who are illegal entrants or non-citizens who are in Australia without having presented a visa or obtained an entry permit. Such a law may, without trespassing beyond the reach of the legislative power conferred by s 51(xix), either exclude the entry of non-citizens or a particular class of non-citizens into Australia or prescribe conditions upon which they may be permitted to enter and remain; and it may also provide for their expulsion or deportation.[185]"

215 Passages to and upon which the appellant points and relies are as follows[186]:

> "There are some qualifications which must be made to the general proposition that the power to order that a citizen be involuntarily confined

---

182 [2004] HCA 37.

183 [2004] HCA 38.

184 (1992) 176 CLR 1 at 25-26.

185 See, eg, *Robtelmes v Brenan* (1906) 4 CLR 395 at 400-404, 415, 420-422; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 83, 94, 108, 117, 132-133; *O'Keefe v Calwell* (1949) 77 CLR 261 at 277-278, 288; *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555-556, 558-559; *Pochi v Macphee* (1982) 151 CLR 101 at 106.

186 (1992) 176 CLR 1 at 28-29, 33.

> in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts. The most important is that which Blackstone himself identified … namely, the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts. Such committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power. Even where exercisable by the Executive, however, the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts, including the 'ancient common law' jurisdiction, 'before and since the conquest', to order that a person committed to prison while awaiting trial be admitted to bail[187]. Involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power. Otherwise, and putting to one side the traditional powers of the Parliament to punish for contempt[188] and of military tribunals to punish for breach of military discipline[189], the citizens of this country enjoy, at least in times of peace[190], 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.
>
> ...
>
> In the light of what has been said above, the two sections will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an

---

187 See Blackstone, *Commentaries*, 17th ed (1830), bk 4 par 298.

188 See *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 626.

189 See *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 626-627.

190 It is unnecessary to consider whether the defence power in times of war will support an executive power to make detention orders such as that considered in *Little v The Commonwealth* (1947) 75 CLR 94.

incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates."

216 The next passage upon which the appellant relies should be set out[191]:

"The powers of detention in custody which are conferred upon the Executive by ss 54L and 54N are limited by a number of significant restraints imposed by other provisions of Div 4B. Section 54Q effectively limits the total period during which a designated person can be detained in custody under Div 4B to a maximum total period of 273 days after the making of an application for an entry permit. For the purposes of that maximum period, time does not run while events beyond the control of the Department, such as delay in the supply of information or delay in court or tribunal proceedings, are preventing the finalization of the entry application. Section 54P(2) requires that a designated person be removed from Australia as soon as practicable after he or she has been in Australia for at least two months (or a longer prescribed period) without making an entry application. Section 54P(3) requires the removal of a designated person from Australia as soon as practicable after the refusal of an entry application and the finalization of any appeals against, or reviews of, that refusal. Those limitations upon the executive powers of detention in custody conferred by ss 54L and 54N go a long way towards ensuring that detention under those powers is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or to enable an entry application to be made and considered. Nonetheless, in circumstances where the facts of the present case demonstrate that Div 4B could authorize detention in custody for a further 273 days of persons who had already been unlawfully held in custody for years before the commencement of the Division, those limitations would not, in our view, have gone far enough were it not for the provision of s 54P(1)."

217 It is upon the next paragraph however that the appellant seeks to place the greatest emphasis[192]:

"Ours is a Constitution 'which deals with the demarcation of powers, leaves to the courts of law the question of whether there has been any excess of power, and requires them to pronounce as void any act

---

191 (1992) 176 CLR 1 at 33.

192 (1992) 176 CLR 1 at 36. See also at 10 per Mason CJ, 58 per Gaudron J, 65 and 71 per McHugh J.

> which is ultra vires'[193]. All the powers conferred upon the Parliament by s 51 of the Constitution are, as has been said, subject to Ch III's vesting of that judicial power in the courts which it designates, including this Court. That judicial power includes the jurisdiction which the Constitution directly vests in this Court in all matters in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party[194] or in which mandamus, prohibition or an injunction is sought against an officer of the Commonwealth[195]. A law of the Parliament which purports to direct, *in unqualified terms*, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid. Moreover, even to the extent that s 54R is concerned with the exercise of jurisdiction other than this Court's directly vested constitutional jurisdiction, it is inconsistent with Ch III." (emphasis added)

218 It is the appellant's principal submission that if the conditions of his detention can be shown to be inhumane in fact, the detention is in substance punitive no matter how it is described, and indeed, regardless of any expressed purpose. As to this, the respondents' argument should be accepted: that the appellant's submission conflates two separate issues, of the unlawful authority to detain, on the one hand, and of the conditions within detention on the other. The constitutional requirement of the exercise of judicial power by the judiciary is only infringed if the conferral of authority to detain does not fall within an exceptional class not of a punitive character. The question whether the law authorizing detention (and saying nothing about the conditions of it) is reasonably capable of being seen as necessary for a legitimate purpose within the aliens power, cannot be concerned with a qualitative assessment of the conditions of detention. It is concerned with the purpose of the law authorizing detention.

219 The appellant accepts that the Act and the detention under it do not deprive him of his right to sue in tort or to pursue other causes of action generally available to citizens and others in the community. Similarly, it may be that remedies would be available for infringement of, or failure to comply with, regulations or guidelines (if any) governing or affecting immigration detention.

---

193 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 165 per Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

194 Constitution, s 75(iii).

195 Constitution, s 75(v).

The Act certainly provides no charter for detention in brutal conditions[196]. As Gray J said[197] in his reasons, "[t]he custodians of detainees are legally accountable."

220 This Court has not been called upon to correct, or to compel compliance with any arrangements whether made by regulation or otherwise, for the humane detention of aliens. This can be compared and contrasted with the decision of the Supreme Court of the United States in *Bell v Wolfish*[198] (a case of pre-trial detention) upon which the appellant relied. There, the Court left open the possibility of habeas corpus to review and correct conditions of confinement in breach of constitutional guarantees of that nation, but not to permit release from detention. The Court said[199]:

> "[t]the parties concede that to ensure their presence at trial, these persons legitimately may be incarcerated by the Government prior to a determination of their guilt or innocence ... it is the *scope of their rights during this period of confinement* prior to trial that is the primary focus of this case." (emphasis added)

221 It is unnecessary to decide the extent to which the reasoning and decision in that case were influenced by constitutional guarantees of that country of a kind not to be found in the Australian Constitution, and its jurisprudence in relation to them. The case here is of a quite different kind in any event. The appellant seeks to strike down, or at least read down, s 198 of the Act on constitutional grounds, for infringement of Ch III of the Constitution.

222 What was said by Lord Bridge of Harwick in *R v Deputy Governor of Parkhurst Prison; Ex parte Hague*, although a case of imprisonment by judicial order, is of some relevance here[200]:

---

196 To the extent to which detention centres established under the Act are located in a Commonwealth place, State laws will be applied as Commonwealth laws by virtue of the operation of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth).

197 *Secretary, Department of Immigration and Multicultural and Indigenous Affairs v Behrooz* (2002) 84 SASR 453 at 472 [70].

198 441 US 520 (1979).

199 441 US 520 at 523 (1979).

200 [1992] 1 AC 58 at 165.

> "... the proposition that the conditions of detention may render the detention itself unlawful raises formidable difficulties. If the proposition be sound, the corollary must be that when the conditions of detention deteriorate to the point of intolerability, the detainee is entitled immediately to go free. It is impossible, I think, to define with any precision what would amount to intolerable conditions for this purpose. ... The law is certainly left in a very unsatisfactory state if the legality or otherwise of detaining a person who in law is and remains liable to detention depends on such an imprecise criterion and may vary from time to time as the conditions of his detention change."

223 Conditions of detention cannot invalidate the grant and exercise of the power to detain in immigration detention.

224 I would also conclude that the summonses should be set aside on the ground of oppression as the meaning of that ground has been explained in *The Commissioner for Railways v Small*[201]. On their face the appellant seeks an enormous amount of material. The width is breathtaking, for example: any documents "which contain or refer to complaints or concerns about conditions in Woomera" or "contain concerns of or criticisms by [various bodies who have no authority under Australian law to prescribe conditions of detention in this country] regarding the conditions of detention at Woomera". The summonses are imprecise in their terms. What is sought goes far beyond what might legitimately be sought as part of, or even as leading to a train of inquiry. The summonses are of a fishing nature. They assume matters, for example that there are documents in existence in relation to, and that there have been or there should have been, programmes designed to meet the separate needs of the appellant and other detainees. Having regard to their multiple deficiencies, it would not be for this Court to seek to salvage something from them that could properly be the subject of a valid summons. For these further reasons the summonses should have been wholly set aside.

225 The appeal should be dismissed with costs.

---

201 (1938) 38 SR (NSW) 564 at 574-575 per Jordan CJ.