FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri [2003] FCAFC 70

CORRIGENDUM

MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
v AKRAM OUDA MOHAMMAD AL MASRI
S202 of 2002
BLACK CJ, SUNDBERG AND WEINBERG JJ
15 APRIL 2003 (CORRIGENDUM 13 MAY 2003)
MELBOURNE (HEARD IN SYDNEY)

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **S202 OF 2002**

On appeal from a single judge of the Federal Court of Australia

BETWEEN:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **APPELLANT**
AND:	**AKRAM OUDA MOHAMMAD AL MASRI** **RESPONDENT**

JUDGES:	**BLACK CJ, SUNDBERG AND WEINBERG JJ**
DATE OF ORDER:	**15 APRIL 2003 (CORRIGENDUM 13 MAY 2003)**
WHERE MADE:	**MELBOURNE (HEARD IN SYDNEY)**

CORRIGENDUM

In the Reasons for Judgment of the Honourable Chief Justice Black and the Honourable Justices Weinberg and Sundberg on 15 April 2003:

1 In paragraph 4, at the reference to the *Convention Relating to the Status of Refugees 1951* replace "*2001*" with "*1951*".

I certify that this is a true copy of the corrigendum made to the Reasons for Judgment in this matter of the Honourable Chief Justice Black and the Honourable Justices Weinberg and Sundberg.

Associate:

Dated: 13 May 2003

FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri [2003] FCAFC 70

MIGRATION – mandatory detention of an unlawful non-citizen pending removal from Australia – whether continued detention authorised where no real likelihood or prospect of removal in the reasonably foreseeable future

INTERPRETATION OF STATUTES – presumption against curtailment of fundamental rights or freedoms – common law right to personal liberty – implied limitation on statutory power of detention

CONSTITUTIONAL LAW – power of the Commonwealth Parliament to legislate with respect to aliens – power of Executive to detain alien in custody – judicial power of Commonwealth – principle of statutory interpretation that Parliament does not intend to exceed limits of Constitution

INTERNATIONAL TREATIES – International Covenant on Civil and Political Rights – interpretation of statute consistently with established rules of international law and in accordance with Australia's treaty obligations

PRACTICE & PROCEDURE – competency of appeal – where applicant removed from Australia prior to determination of appeal – where outstanding controversy as to costs

Migration Act 1958 (Cth) ss 189, 196, 198, 200, 206, 253, 486C
Acts Interpretation Act 1901 (Cth) s 15A
Constitution s 51(xix), s 51(xxxix), Ch III

Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs (2002) 192 ALR 609 considered
Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 applied
NAMU of 2002 v Secretary, Department of Immigration & Multicultural & Indigenous Affairs [2002] FCA 907 referred to
Vo v Minister for Immigration & Multicultural Affairs (2000) 98 FCR 371 distinguished
R v Governor of Durham Prison; Ex parte Hardial Singh [1984] 1 WLR 704 considered
Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97 considered
Zadvydas v Davis 533 US 678 (2001) considered
Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1037 referred to
Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 1099 referred to
NAMU of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 401 followed
Minister for Immigration & Multicultural & Indigenous Affairs v VFAD of 2002 (2003) 196 ALR 111 followed
Koon Wing Lau v Calwell (1949) 80 CLR 533 applied
Kruger v The Commonwealth (1997) 190 CLR 1 considered
Cunliffe v The Commonwealth (1994) 182 CLR 272 considered
Plaintiff S157/2002 v Commonwealth of Australia (2003) 195 ALR 24 applied
Coco v The Queen (1994) 179 CLR 427 applied
Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 192 ALR 561 applied

Williams v The Queen (1986) 161 CLR 278 considered
Leachinsky v Christie [1946] 1 KB 124 referred to
Murray v Minister of Defence [1988] 1 WLR 692 referred to
Re Bolton; Ex parte Beane (1987) 162 CLR 514 referred to
Watson v Marshall and Cade (1971) 124 CLR 621 referred to
Kioa v West (1985) 159 CLR 550 followed
R v Home Secretary; Ex parte Khawaja [1984] AC 74 considered
Coalition of Clergy, Lawyers & Law Professors v Bush 310 F.3d 1153 (2002) referred to
R v Secretary of State for the Home Department; ex parte Saadi [2002] 4 All ER 785 considered
Thang Thieu Quyen v Director of Immigration (1997-98) 1 HKCFAR 167 considered
Park Oh Ho v Minister for Immigration and Ethnic Affairs (1989) 167 CLR 637 applied
van Alphen v The Netherlands (UNHRC Communication No. 305/88) considered
A v Australia (UNHRC Communication No. 560/93) considered
Johnson v Johnson (2000) 201 CLR at 501 considered
Commonwealth v Hamilton (2000) 108 FCR 378 considered
Chahal v The United Kingdom (1996) 23 EHRR 413 considered
Perez v Minister for Immigration & Multicultural Affairs (2002) 191 ALR 619 considered
Luu v Minister for Immigration & Multicultural Affairs [2002] FCAFC 369 distinguished
WAIS v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1625 considered
NAKG of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1600 considered
Daniel v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 196 ALR 52 considered
NAGA v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 224 considered
Al Khafaji v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1369 considered
Applicant WAIW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1621 considered
NAES v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 2 considered
SHFB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 29 considered
SHFB v Goodwin [2003] FCA 294 considered
SHDB v Goodwin [2003] FCA 300 considered

F.R Bennion, *Statutory Interpretation* (4th ed 2002)
Lord Steyn "The Intractable Problem of The Interpretation of Legal Texts" (2003) 25 Syd Law Review 4
Professor M. Nowak, *The UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 1993)

MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS v AKRAM OUDA MOHAMMAD AL MASRI
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GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY **S202 OF 2002**

On appeal from a single judge of the Federal Court of Australia

BETWEEN:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **APPELLANT**
AND:	**AKRAM OUDA MOHAMMAD AL MASRI** **RESPONDENT**

JUDGES:	**BLACK CJ, SUNDBERG AND WEINBERG JJ**
DATE OF ORDER:	**15 APRIL 2003**
WHERE MADE:	**MELBOURNE (HEARD IN SYDNEY)**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **S202 OF 2002**

On appeal from a single judge of the Federal Court of Australia

BETWEEN:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **APPELLANT**
AND:	**AKRAM OUDA MOHAMMAD AL MASRI** **RESPONDENT**

JUDGES:	**BLACK CJ, SUNDBERG AND WEINBERG JJ**
DATE:	**15 APRIL 2003**
PLACE:	**MELBOURNE (HEARD IN SYDNEY)**

REASONS FOR JUDGMENT

THE COURT:

2 The *Migration Act 1958* (Cth) ("the Act") provides for what is commonly known as mandatory detention. Section 196(1) of the Act requires and authorises that an unlawful non-citizen first detained under the separate "arrest" provisions of s 189 be kept in immigration detention until he or she is removed from Australia under ss 198 or 199, or deported under s 200, or granted a visa. Section 198(1) of the Act requires an officer to "remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed". The term mandatory detention is apt because the legislation contains no provision authorising the release of a person from detention on discretionary grounds; the way to release for a person in the position of Mr Al Masri, the respondent in this case, is by request in writing to the Minister under s 198(1) to be removed. When the trial judge made the orders appealed from that way seemed, however, closed since, as the judge found as a fact, it offered no real likelihood or prospect of removal within the reasonably foreseeable future: see *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 192 ALR 609.

3 The central issue in this appeal is whether the power and duty of the appellant Minister ("the Minister") to detain an unlawful non-citizen who has no entitlement to a visa but who has

asked to be removed from Australia continues during a time when there is no real likelihood or prospect of that person's removal in the reasonably foreseeable future. Put another way, the question is whether the Act authorises and requires the indefinite, and possibly even permanent, administrative detention of such a person. As will become apparent, the appeal involves the consideration of important questions of constitutional law and other important questions in the application of common law principles to the interpretation of statutes where fundamental rights and freedoms, in this case the right to personal liberty, are involved. All of the principles are well established, but their application to the issues in this case is, as the differing opinions expressed by judges in this Court show, a matter of difficulty.

4 The relevant facts, as found by the trial judge are, in summary, as follows. The respondent is a Palestinian from the Gaza Strip. He arrived in Australia on or about 5 June 2001 as an unlawful non-citizen and soon after his arrival was placed in detention and transferred to the Woomera Detention Centre in South Australia.

5 On 2 July 2001, whilst at Woomera, Mr Al Masri lodged an application for a protection visa, claiming to be a refugee. He sought protection on the ground that he was a non-citizen in Australia to whom Australia had protection obligations under the *Convention Relating to the Status of Refugees 1951* done at Geneva on 28 July 2001 as amended by the *Protocol Relating to the Status of Refugees 1967* done at New York on 31 January 1967. A delegate of the Minister made a decision not to grant Mr Al Masri a protection visa and on 5 December 2001 the Refugee Review Tribunal affirmed the delegate's decision.

6 Mr Al Masri did not seek to challenge the decision of the Tribunal. Rather, on the same day, he completed and signed a written request to the Minister to be returned to the Gaza Strip. He was informed by an officer of the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") that he was required to produce a valid passport before arrangements could be made for him to return to the Gaza Strip. By 10 December 2001 he was able to produce his passport.

7 Officers of the Department informed Mr Al Masri that arrangements had been made for his departure on 18 February 2002. When that day came Mr Al Masri had packed his belongings and was ready to depart from Woomera to return to the Gaza Strip. But he was then informed by officers that they were unable to return him because they could not get

permission for his entry. Mr Al Masri became "extremely distressed" at having to remain at the Woomera Detention Centre and at not being able to depart from Australia.

8 The Department continued with its attempts to obtain permission from Egypt or Jordan for Mr Al Masri to transit those countries to return to the Gaza Strip, but both refused. The Department then sought to obtain the permission of Syria for Mr Al Masri's removal to that country, but Syria also refused. The Minister sought to effect the removal of Mr Al Masri to Gaza through Israel but there was no indication of a real likelihood or prospect of Israel agreeing to alter its unequivocal refusal to permit that to occur.

9 The delay and uncertainty about Mr Al Masri's removal caused him to suffer anxiety and depression and also led to self-harm, resulting in him being admitted to hospital.

10 There was evidence, which does not appear to have been contested, that throughout the eight and a half month period from 5 December 2001 until 15 August 2002, Mr Al Masri made repeated enquiries about the prospects of his removal. There was no suggestion that he had sought permission to remain in Australia at any time after he had asked to be returned to the Gaza Strip.

THE PROCEEDINGS BEFORE THE PRIMARY JUDGE

11 On 21 May 2002, Mr Al Masri commenced a proceeding against the Minister in this Court. He sought an order in the nature of *habeas corpus* for release from immigration detention. The application was heard in Adelaide on 25 July 2002. Judgment was delivered on 15 August 2002, and the judge made orders for Mr Al Masri's immediate release from detention. Having regard to what his Honour held to be the continuing duty of the Minister to remove Mr Al Masri from Australia under s 198(1) of the Act, the judge made a further order requiring Mr Al Masri to provide his address and contact details to his solicitors and to the Minister's solicitors. He also ordered that:

> *"In the event that the applicant receives notice in writing from the Australian Government Solicitor or an officer of the Department of Immigration and Multicultural and Indigenous Affairs as to the arrangements made for his removal from Australia in accordance with s 198 of the* Migration Act 1958 *(Cth) he shall take all reasonable steps in his power to comply with those arrangements in order to facilitate his removal."*

The judge granted liberty to apply and ordered that the Minister pay Mr Al Masri's costs. It is from these orders that the present appeal is brought.

12 The trial judge held (at [38]) that the power under the Act to detain an unlawful non-citizen pending removal from Australia is impliedly limited to such time as:

(a) the Minister is taking all reasonable steps to secure the person's removal from Australia as soon as is reasonably practicable; and

(b) the removal of the person from Australia is "reasonably practicable" in the sense that there must be a real likelihood or prospect of removal in the reasonably foreseeable future.

13 In holding that there were these two implicit limitations upon the power to detain, the primary judge rejected the Minister's submission that the only limitation on the power was purposive. His Honour noted that the Act imposed a mandatory duty upon the Minister to remove an unlawful non-citizen from Australia in certain circumstances, with the consequence that it would be difficult to conceive of a situation in which, absent bad faith, the Minister would fail to hold the requisite purpose (at [40]). He observed that, accordingly, if the sole implicit limitation upon the duty to detain was that the detention be for the purpose of removal, the Act would almost certainly authorise not merely indefinite detention but even, possibly, permanent detention.

14 The judge based his reasoning in part on the decision of the High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ("*Lim*"), which confirms that a statutory provision conferring power on the Executive to detain an alien is valid, if it is properly characterised as an incident of the power to exclude, admit or deport aliens (see [19] of his Honour's reasons). His Honour referred to the observations of Beaumont J in *NAMU of 2002 v Secretary, Department of Immigration, Indigenous & Multicultural Affairs* [2002] FCA 907 ("*NAMU*") to the effect that the particular detention power considered by the High Court in *Lim* was held to be valid as a consequence of the express limitations imposed upon that power, and in particular the requirement that a person be removed from Australia as soon as practicable. He referred to passages in the judgments in *Lim* which he considered supported the proposition that the factors in favour of the validity of that detention power included the statutory time limits on the power to detain, and the obligation to effect removal as soon as practicable. The judge then observed that although,

standing alone, s 196(1)(a) might appear to authorise indefinite detention, when it was read together with s 198 – the provision for removal as soon as "reasonably practicable" – it was clear that an unlawful non-citizen was only to be detained until his or her removal "as soon as reasonably practicable" (at [21]).

15 His Honour considered the decision of the Full Court in *Vo v Minister for Immigration & Multicultural Affairs* (2000) 98 FCR 371 ("*Vo*") that the length of detention pending deportation under ss 200 and 253(8) of the Act does not affect the lawfulness of that detention, but observed that the discretionary scheme for deportation considered in that case had no counterpart with respect to the mandatory duty to remove unlawful non-citizens from Australia "as soon as reasonably practicable" (at [22]-[23]). The judge held that the presence of this distinct duty operated to impose an implied limitation upon the power to detain for the purpose of removal (at [23]). This conclusion, he considered, was supported by the approach taken by courts to analogous statutory provisions in England, Hong Kong and the United States in *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 ("*Hardial Singh*"), *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 ("*Lam*") and *Zadvydas v Davis* 533 US 678 (2001) ("*Zadvydas*"). The judge observed that in the absence of a clear statutory indication of an intention to do so, the courts in those cases were not prepared to construe a general statutory provision for executive detention pending removal or deportation as authorising detention when there was no longer a reasonable likelihood or prospect of deportation or removal (at [35]).

16 On the construction of the Act preferred by the trial judge, if either of the two implicit limitations on the detention power was not met, the continued detention of the unlawful non-citizen who was to be removed would no longer be authorised by the Act (at [39]). His Honour held that where *habeas corpus* was sought it was for the applicant to adduce evidence that put in issue the legality of the continued detention but that when this was done the burden shifted to the respondent to establish on the balance of probabilities that the detention was lawful. He concluded that Mr Al Masri had adduced evidence that did put in issue the legality of his detention, and he therefore turned to consider whether the Minister had discharged the burden imposed upon him to show that the continued detention was lawful (at [41]).

17 The judge found that the Minister, through his officers, had indeed taken all reasonable steps

within his power to remove Mr Al Masri (at [42]). The critical issue raised by the evidence was, therefore, whether there was a real likelihood or prospect of Mr Al Masri's removal in the reasonably foreseeable future. His Honour found as fact that there was no such prospect or likelihood (at [53]) and there was no challenge to that finding on the hearing of the appeal.

SUBSEQUENT PROCEEDINGS

18 It is now necessary to say something about subsequent events, since they bear upon an objection to the competency of the appeal.

19 The Minister applied for a stay of the judge's orders pending an appeal but that application was refused on 15 August 2002: *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1037. Soon afterwards, however, the Department was able to finalise arrangements for the return of Mr Al Masri and other unlawful non-citizens to the Palestinian Territories and for this purpose, on Friday 30 August 2002, officers of the Department took Mr Al Masri into immigration detention once more. On 31 August, Mr Al Masri made an application to the Court for his release, pursuant to the liberty to apply granted by the trial judge. The judge heard limited submissions and evidence on that day and made interlocutory orders for Mr Al Masri's release pending an urgent final hearing, which took place on 2 September. On 6 September 2002, his Honour made orders dismissing the 31 August application for release and discharging his interlocutory order of that date: *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1099. Mr Al Masri surrendered himself into immigration detention on 9 September 2002, and was subsequently removed from Australia.

OBJECTION TO COMPETENCY OF THE APPEAL

20 A notice of motion for an order that the appeal be dismissed with costs was filed on behalf of the respondent. The grounds for the motion were not stated in the notice but it was supported by an affidavit that deposed to the fact of Mr Al Masri's removal from Australia. Although this might be taken to foreshadow a submission that there was no longer any controversy between the parties, and thus no "matter", senior counsel for the respondent did not make any such submission. He accepted that an extant issue as to costs could constitute a live controversy between the parties and hence a "matter". He referred to *Elders Pastoral Ltd v Bank of New Zealand* [1990] 3 NZLR 129 at 133-134, *Liebler v Air New Zealand Ltd* [1998]

2 VR 525 at 529-530, and *Veloudos v Young* (1981) 56 FLR 182 at 186 and 192 in support of that proposition. The Solicitor-General of the Commonwealth, who appeared with Mr Burmester QC and Ms Maharaj for the Minister, referred to additional authorities, including *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 123 CLR 490 and *Winthrop Investments Ltd v Winns Ltd* (1979) ACLC 40-554.

21 The submission put by senior counsel for Mr Al Masri in support of the motion to dismiss was that as the respondent had been removed from Australia, the Court should dismiss the appeal on discretionary grounds because its determination of the appeal would be of no practical significance. The Solicitor-General responded that where there was an adverse order as to costs and no way to resolve a controversy about costs other than by determining the merits of an appeal, an appellant was entitled to a hearing and the Court did not have any discretion to stay the appeal. He submitted that if there were a discretion even in the presence of a live controversy about costs, the present appeal was not an appropriate case for its exercise. This was because the appeal involved a very significant legal question and because it would be wrong and unfair to the Minister and his officers to allow the order for release to stand if it were in fact based on an erroneous view of the law. He added that the appeal had been pursued expeditiously and that its outcome would have significance for the Minister and his officers, not only in relation to this case, but more generally.

22 The motion to dismiss the appeal should be refused. Whilst cases can well be imagined in which a remaining issue about costs would not bring the substantive issues into sharp focus and a full argument about the case would lack any proportionate relationship to the amount in issue about costs, that is not the situation here. The Court heard this appeal concurrently with the appeal in *NAMU of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 401, which raised related issues about the Act, and the Court had the advantage of full argument over the course of a day. The circumstance that Mr Al Masri had already been removed from Australia, and thus released from detention, when the appeal was heard did not impact upon the way in which the issues were argued. Apart from the very important questions of principle to be considered in the appeal, and the finding of the trial judge that Mr Al Masri's continued detention was unlawful, the outstanding practical issue about costs must inevitably involve quite substantial sums of money, given the complexity and duration of the proceedings and the various interlocutory steps that were taken. Moreover, the issues are of continuing importance and there have been other applications to

the Court seeking orders for release in which the judgment of the trial judge in this case has been relied upon, discussed, and in some instances not followed. It is plainly convenient that this present appeal be determined.

PRELIMINARY ISSUE OF STANDING: SECTION 486C OF THE ACT

23 A question arose during the hearing of the appeal as to whether the standing of any party was affected by s 486C of the Act, which provides:

> *"(1) Only the persons mentioned in this section may commence or continue a proceeding in the Federal Court or the Federal Magistrates Court that raises an issue:*
>
> *(a) in connection with visas (including if a visa is not granted or has been cancelled), deportation, or removal of unlawful non-citizens; and*
> *(b) that relates to the validity, interpretation or effect of a provision of this Act or the regulations;*
> *(whether or not the proceeding raises any other issue).*
>
> *(2) Those persons are:*
>
> *(a) a party to a review mentioned in section 479; or*
> *(b) the Attorney-General of the Commonwealth or of a State or a Territory; or*
> *(c) a person who commences or continues the proceeding in performing the person's statutory functions; or*
> *(d) any other person prescribed by the regulations."*

24 The parties submitted, however, that s 486C did not operate to prevent the Minister bringing this appeal and we agree with the submission of the Solicitor-General that a decision about the lawfulness of detention, not involving any challenge to an action to remove, is not a proceeding that raises an issue in connection with removal within the meaning of s 486C(1). Section 486C does not operate to deny the Minister's standing to bring this appeal.

THE GROUNDS OF APPEAL

25 The Solicitor-General did not press the grounds of appeal in respect of his Honour's finding of fact that there was no real prospect of Mr Al Masri being removed from Australia in the reasonably foreseeable future. The grounds of appeal that were pressed were that his Honour erred in:

(a) holding that detention under s 196 of the Act was lawful only if the Minister was

taking all reasonable steps to secure removal of an unlawful non-citizen as soon as was reasonably practicable, and that there was a real prospect of removal;

(b) holding that in conformity with English, Hong Kong and United States authorities, implicit statutory limitations read into the detention powers in the equivalent legislation of the said jurisdictions ought to be read into s 196;

(c) misconstruing s 196 as it interacts with s 198;

(d) failing to hold that, as a matter of law, s 196 imports no limitation on the detention of an unlawful non-citizen other than that the detention be bona fide for one of the purposes identified in s 196(1).

THE STATUTORY SCHEME

26 The statutory scheme for the removal of what the Act terms unlawful non-citizens has at its centre ss 196 and 198. Although the two sections appear in different Divisions of the Act they are plainly part of the same scheme. Both are in Part 2 (entitled *Control of arrival and presence of non-citizens*); s 196 is in Division 7 (entitled *Detention of unlawful non-citizens*) and s 198 is in Division 8 (entitled *Removal of unlawful non-citizens*).

27 Section 196 provides:

> "196 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."*

Section 198(1) provides:

> "198 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.*
> *(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved)."*

28 Reference should also be made to s 189(1) under which, presumably, Mr Al Masri was detained upon his arrival in Australia. It provides:

> "189 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."*

29 The particular element of the scheme with which this case is concerned is of course that relating to unlawful non-citizens who have asked the Minister, in writing, to be removed from Australia, pursuant to s 198(1).

30 The statutory concept of "unlawful non-citizen" should now be explained. The Act distinguishes between lawful and unlawful non-citizens. Section 5 defines a non-citizen as a person who is not an Australian citizen. A lawful non-citizen is, relevantly, a non-citizen who holds a visa that is in effect (s 13) and an unlawful non-citizen is a non-citizen who is not a lawful non-citizen (s 14). A visa is a permission granted to a non-citizen by the Minister to travel to and enter Australia, and/or remain in Australia (s 29), upon valid application (s 46), and upon the Minister being satisfied that the applicant meets the statutory criteria for the grant of the visa (s 65). Section 5(1) contains definitions of some of the expressions used in the sections that comprise the statutory scheme: "detain", "officer", "immigration detention", "migration zone" and "remove".

31 The relationship between ss 189 and 196 was considered by this Full Court in another appeal: *Minister for Immigration & Multicultural & Indigenous Affairs v VFAD of 2002* (2003) 196 ALR 111 [149] to [152] ("*VFAD*"). We adopt what was said in that case and conclude that the sphere of operation of s 189 is complete once a person is detained in immigration detention and that thereafter continuing detention is provided for by s 196. We would not impute to the Parliament an intention such that if s 196 did not operate to render lawful the continued detention of an unlawful non-citizen, that consequence could be avoided by a succession of repeated actions to detain under s 189.

32 The effect of ss 189 and 196 is that no decision under the Act is required as a precondition to the power and duty to detain an unlawful non-citizen. Detention depends upon the status of

the person, and in that sense the detention regime is clearly administrative, mandatory, indefinite and, if the Solicitor-General's submissions are accepted, possibly even permanent.

33 The obligation to detain unlawful non-citizens is an obligation to do so pending the determination of a visa application with removal "as soon as reasonably practicable" thereafter, or pending deportation under s 200. This is made clear by s 196 and the various provisions of s 198 which, it should be noted, create powers and duties of removal in situations other than where there has been a request under s 198(1). Each is qualified by the expression "must remove as soon as reasonably practicable".

34 Regarding the operation of s 196(3), we adopt what we said in *NAMU,* in which this Full Court upheld the constitutional validity of that sub-section. We also adopt our observations in *VFAD* (at [142]), that consistently with *Lim*, s 196(3) presented no obstacle to the release of a person who is being detained unlawfully.

35 A person must be released from immigration detention if granted a visa (which could include a bridging visa pending determination of an application for a substantive visa), or if the person is in fact an Australian citizen: see s 191 and ss 196(2) and (3).

36 There is no power under the Act to decide against the removal of an unlawful non-citizen and so that where a sub-section of s 198 applies to an unlawful non-citizen the removal of that person would occur by force of law.

37 It will have been noted that s 196(1)(b) authorises the detention of a person subject to deportation under s 200. Deportation of non-citizens on the ground of criminal conviction and on other grounds is dealt with by Division 9 of the Act. Section 200 provides that the Minister may order the deportation of a non-citizen to whom the division applies. Under s 206, where the Minister has made an order for the deportation of a person, that person shall, unless the Minister revokes the order, be deported. Section 253 makes provision for the detention of a person who is the subject of an order for deportation. Such a person may be kept in immigration detention or in detention as a "deportee" but, by virtue of s 253(9), the Minister or the Secretary may at any time order the release, either unconditionally or subject to specified conditions, of a person who is in detention under s 253.

38 The change in terminology to draw a distinction between the removal of unlawful non-citizens and the deportation of those non-citizens who have committed serious crimes, resulted from amendments made by the *Migration Reform Act 1992* (Cth) which came into operation in 1993 and which introduced the current scheme of mandatory detention.

THE APPELLANT'S SUBMISSIONS

39 On behalf of the Minister the Solicitor-General submitted that the construction of the Act preferred by the trial judge was not supported by the language of the Act, or by the context of the provisions for mandatory detention and removal of unlawful non-citizens. With respect to the language of the Act, he submitted that the duty to remove a person as soon as reasonably practicable imposed a duty to seek to remove, but that the authority to detain was unaffected by the prospects of successful removal. The fact that the prospects of removal were, at a particular time, limited or even non-existent meant simply that the duty to remove could not operate to relieve the duty and authority to detain.

40 We understood the Solicitor-General to contend that the construction of the Act he advanced did not allow for release even if *bona fide* efforts were not being made to remove a detained person as soon as reasonably practicable. In that event, s 196(3) would not, it was said, permit a court to order release. But if reasonable efforts were not being made, a court could order by way of mandamus that reasonable efforts be made.

41 The suggested construction of ss 196 and 198 was consistent, it was said, with the constitutional limits upon the legislative power of the Commonwealth to provide for the detention of aliens by the Executive. The Solicitor-General described the duty imposed by s 198(1) as a limitation which connected the power of detention to what was "reasonably appropriate and adapted" for the purposes of migration processing and of securing the deportation or removal of an unlawful non-citizen. Read together, therefore, ss 196 and 198 provided for detention that was constrained by the purposes of migration processing and of effecting removal. It was the purpose of detention, and not its duration, that was determinative of validity.

42 Turning to the provisions for mandatory detention and removal, the Solicitor-General submitted that the context for mandatory *removal* included the fact that removal of non-citizens might involve complex and sensitive discussions between governments, the existence

of often volatile political situations in the country proposed for return, and the need for a coordinated and strategic approach to removals. In enacting the mandatory *detention* scheme, Parliament clearly intended that unlawful non-citizens, some of whom might be regarded as posing a threat to national security, or the safety of others, should not be admitted into the Australian community. This object would be compromised by the release into the community of non-citizens whom Australia had difficulty in removing. The construction adopted by his Honour would, he submitted, have further results that were, clearly, not contemplated by the Parliament. They included requiring the courts to assess and to reach a conclusion about the course of negotiations between the Commonwealth and foreign powers and, in effect, causing the legality of detention to fluctuate in that the detention of a person might be found to be lawful or unlawful according to changes in circumstances.

43 The Solicitor-General submitted in the alternative that if the words "as soon as reasonably practicable" imported some limitation on the period of detention by reference to the prospects of removal at a particular time, they must be interpreted in the light of all the circumstances of a particular case, including the difficulties associated with a person's removal.

RESPONDENT'S SUBMISSIONS

44 Mr Tilmouth QC, senior counsel for the respondent, submitted that ss 189, 196 and 198 of the Act should be read together. He drew attention to features of the statutory regime for the mandatory detention and removal of unlawful non-citizens that he said supported the construction adopted by the trial judge. In particular, counsel relied upon the failure of Parliament to make any express provision allowing for delay in the removal of the unlawful non-citizen as support for an implied limitation on the power to detain that person. Counsel cited authority in other common law jurisdictions in support of this construction.

45 It was also submitted that if s 196 were construed to permit detention indefinitely or for an unreasonable period, it would be invalid on one or more of four quite separate grounds. These were that it would be contrary to the exclusive vesting of the judicial power of the Commonwealth in the courts designated by Chapter III of the Constitution; that it would not be supported by a head of power in s 51 of the Constitution; that it would be an impermissible ouster clause purporting to prevent the court from reviewing detention; and that it would be in breach of s 75(v) of the Constitution as a limitation on the power of the court to grant orders in the nature of *habeas corpus*.

HREOC'S SUBMISSIONS

46 The Human Rights and Equal Opportunity Commission ("HREOC") intervened by leave (which was not opposed). Counsel for HREOC submitted that constitutional limitations and principles of statutory construction all supported the implied temporal limitation on the power to detain pursuant to s 196 found by the trial judge.

47 The power to detain conferred by s 196 must, it was said, be read down by reference to constitutional limitations flowing from s 51(xix) and Chapter III's vesting of judicial power in designated courts. The executive or administrative powers conferred by the Act to detain a non-citizen would be constitutionally valid only for so long as they were limited to what was reasonably capable of being seen as necessary to effect the exclusion or deportation, or to consider the admission, of the person. Section 196 should be read down by reference to the statutory duty imposed by s 198 to remove an unlawful non-citizen as soon as practicable and the limitation derived from s 198(1) was crucial to the validity of the detention scheme, considered as a whole.

48 HREOC further submitted that the implied limitation upon the power to detain suggested by the trial judge was also supported by general principles of statutory construction derived from international law and the common law. With respect to international law, it was said that it was a long-established principle that a statute should be interpreted and applied, to the extent that its language allowed, in a manner that was consistent with established rules of international law and with Australia's treaty obligations. The Commission argued that ss 196(1)(a) and 198 of the Act should therefore be construed consistently with the rights conferred by the *International Covenant on Civil and Political Rights*. It submitted that the construction of the Act advanced by the Minister – that the only limit on the power to detain was the requirement that *bona fide* efforts be made to remove an unlawful non-citizen as soon as practicable – would be inconsistent with the *International Covenant on Civil and Political Rights*.

49 In relation to principles derived from the common law, HREOC submitted that authority in Australia and other common law jurisdictions required that there be clear words before a statute would be construed as removing a fundamental right or freedom. The relevant right in this instance was the right to personal liberty. HREOC also referred to the principle of legality – the assumption that the words of a statute are subject to fundamental human rights

in order to enforce minimum standards of procedural and substantive fairness.

CONSTITUTIONAL PRINCIPLES – THE PRESUMPTION AGAINST EXCEEDING THE BOUNDS SET BY THE CONSTITUTION

50 There is an initial presumption that the Parliament does not intend its laws to "pass beyond constitutional bounds". If the language of a statute is not so intractable as to be incapable of being consistent with that presumption, the presumption should prevail: see *Lim* at 14 per Mason CJ, citing what Isaacs J said in *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153 at 180. See also *Davies v The State of Western Australia* (1904) 2 CLR 29 at 43 and *Osborne v The Commonwealth* (1911) 12 CLR 321 at 336-337; and *Acts Interpretation Act 1901* (Cth), s 15A. Moreover, the Act has its own specific provision for the Act not to apply so as to exceed the Commonwealth's legislative power: see s 3A. Given the importance of constitutional limitations and the strength of the presumption, the starting point for discussion is whether the statutory scheme for mandatory detention in its application to a person in the respondent's position would exceed the limits on the legislative power if it were not subject to a temporal limitation of the type that the trial judge found to be implied.

51 It is well settled that the Parliament has power to legislate for the detention of aliens for the purpose of their expulsion. This was confirmed by the High Court in *Lim* where the Court considered a challenge to the validity of the scheme of mandatory detention introduced by the *Migration Amendment Act 1992* (Cth) ("the *Migration Amendment Act (No 1)"*). The challenge to the principal elements of the scheme failed but the case is nevertheless of critical relevance to the present appeal because of the clear preponderance of opinion in the judgments that Ch III of the Constitution may operate to impose limits upon the power to detain by reason of its insistence that the judicial power of the Commonwealth is vested exclusively in the courts that Ch III designates. The possibility of invalidity for Ch III reasons was necessarily and directly addressed, and the reasoning as to why the provisions of the earlier scheme were not offensive to the exclusive vesting of the judicial power of the Commonwealth in the courts is, in our view, directly and authoritatively in point here.

52 The scheme of detention introduced by the *Migration Amendment Act (No 1)*, which formed Div 4B of the Act at that time, operated only with respect to a class of non-citizen "boat people" falling within the definition of "designated person" in s 54J of the Act. That scheme

remains; but is now in Div 6 of Pt 2 of the Act (ss 176 – 187). Section 54L(1) provided that: "Subject to subsection (2)…a designated person must be kept in custody." Subsection (2) provided that: "A designated person is to be released from custody if, and only if, he or she is (a) removed from Australia under s 54P; or (b) given an entry permit…". Section 54P(1) was in essentially the same terms as the present s 198(1). It provided that: "An officer must remove a designated person from Australia as soon as practicable if the designated person asks the Minister, in writing, to be removed." Nothing turns, for present purposes, upon the change from "as soon as practicable" in s 54P(1) to "as soon as reasonably practicable" in s 198(1). There was also a provision, s 54Q(1), which provided for an outer limit of the period of detention. Section 54Q(1) provided:

> *"Sections 54L and 54P cease to apply to a designated person who was in Australia on 27 April 1992 if the person has been in application custody after commencement for a continuous period of, or periods whose sum is, 273 days."*

53 Section 54R provided: "A court is not to order the release from custody of a designated person." This section was held by a majority (Brennan, Deane, Dawson and Gaudron JJ, Mason CJ, Toohey and McHugh JJ dissenting) to be invalid.

54 In a joint judgment, Brennan, Deane and Dawson JJ explained (at 32) how the legislative power conferred by s 51(xix) of the Constitution encompasses the conferral upon the Executive of authority to detain, or to direct the detention of, an alien in custody for the purposes of expulsion or deportation. A limited authority to detain an alien in custody can be conferred on the Executive without the infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates for the reason that, to this limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth. When conferred upon the Executive, it takes its character from the executive powers to exclude, admit and deport, of which it was an incident. Their Honours said (at 30-32):

> *"...it has been consistently recognized that the power of the Parliament to make laws with respect to aliens includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorizing the Executive to restrain an alien in custody* ***to the extent necessary to make the deportation effective****. ... It can therefore be said that the legislative power conferred by s. 51(xix) of the Constitution encompasses the conferral upon the Executive of the authority to detain (or to*

> *direct the detention of) an alien in custody* ***for the purposes of expulsion or deportation****. Such authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of that executive power."* [Emphasis added.]

55 Their Honours then explained why such limited authority to detain an alien in custody can be conferred on the Executive without infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates. The reason is that to that limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth. Their Honours expressed the test to be applied to determine the validity of ss 54L and 54N (at 33):

> *"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 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 judicial power of the Commonwealth be vested exclusively in the courts which it designates****."* [Emphasis added.]

56 The way in which the test so stated was applied to the provisions in question in *Lim* is directly relevant to the question presently being considered, for the analysis then undertaken in the joint judgment shows what their Honours considered would *not* have been "reasonably capable of being seen as necessary for the purposes of deportation".

57 Their Honours commenced by noting that the powers of detention in custody conferred upon the Executive by ss 54L and 54N were limited by what they described as " a number of significant restraints imposed by other provisions…" (at 33). The provisions mentioned were s 54Q, which limited the total period during which a person could be detained in custody; s 54P(2) which required removal from Australia "as soon as practicable" in certain time-related circumstances and s 54P(3), which required removal from Australia "as soon as practicable" after the refusal of an entry application and the finalisation of appeals and reviews. Their Honours considered that these limitations upon the power to detain in custody went "a long way towards ensuring that detention … [was] limited to what [was] reasonably

capable of being seen as necessary for the purposes of deportation or to enable an entry application to be made and considered" (at 33). In other words, the provisions went a long way towards satisfying the test for validity previously stated in the joint judgment. But in circumstances where the legislation could authorise detention for a further 273 days of persons who had already been unlawfully held in custody for years before the commencement of the mandatory detention provision, the limitations "would not … have gone far enough", were it not for the provision of s 54P(1) (at 33). In the view of their Honours, it was this provision that set the context in which the other provisions of the Division, providing for detention, operated. As noted, s 54P(1) provided that an officer must remove a designated person from Australia as soon as practicable if the designated person requested to be removed.

58 Section 54P(1) does of course have a counterpart in s 198(1) within the general scheme for mandatory detention. Their Honours considered that s 54P(1) saved the scheme in *Lim* from Ch III invalidity because it always lay within the power of a designated person to bring his detention in custody to an end by requesting to be removed from Australia. Once such a request had been made, further detention in custody was authorised "only for the limited period involved, in the circumstances of a particular case, in complying with the statutory requirement of removal 'as soon as practicable'" (at 34).

59 Their Honours then concluded (at 34):

> *"In the context of that power of a designated person to bring his or her detention in custody under Div. 4B to an end at any time, the time limitations imposed by other provisions of the Division suffice, in our view, to preclude a conclusion that the powers of detention which are conferred upon the Executive exceed what is reasonably capable of being seen as necessary for the purposes of deportation or for the making and consideration of an entry application."*

60 It therefore followed that the powers of detention in custody conferred by ss 54L and 54N were an incident of the executive powers of exclusion, admission and deportation of aliens and were not, of their nature, part of the judicial power of the Commonwealth.

61 In applying the reasoning in the joint judgment to the present scheme, it will be immediately apparent that one of the "significant restraints" in the earlier scheme - the time limit upon detention in custody after the making of an application for an entry permit - is not present.

The importance of the time limit in the reasoning of the joint judgment is apparent from the reference to the limit in the passages referred to at 33 and in the explicit reference to the time limit in the passage just cited, in which their Honours expressed their conclusion.

62 The aspect of the legislation in the present case which, considered in the light of the joint judgment in *Lim*, gives rise to a question of possible invalidity is not just the absence of a time limit, important (perhaps critically important) though that might be. A serious question about the validity of the present scheme, interpreted without at least the second of the suggested limitations, arises because of the way in which s 54P(1) was seen by Brennan, Deane and Dawson JJ in *Lim* as having a practical operation to bring detention to an end. Its importance to validity lay not in the foundation it gave for an alien in custody to apply for mandamus to enforce performance of the duty the provision imposed; its importance lay in its presumed practical effect. The language used in the joint judgment is the language of practical reality:

> *"It follows that, under Div. 4B, it always lies within the power of a designated person to bring his or her detention in custody to an end…"*
>
> *"In the context of that power of a designated person to bring his or her detention in custody … to an end at any time…"* (both at 34).

63 To speak of the "power" of a person to bring detention to an end is to speak of something that has real effect. If further support were needed for this understanding of the sense in which the language was used, it is surely to be found in the context. That context included statutory time limits upon the period of detention which, with other elements, were considered not to have gone far enough to save the impugned sections from invalidity in the absence of s 54P(1).

64 On this understanding of the joint judgment in *Lim* the scales were tilted in favour of validity by s 54P(1) on the footing that the section would operate, as a practical matter, to enable detention to be brought to an end.

65 We have so far referred only to the joint judgment in *Lim*. We take the Chief Justice to have agreed with the joint judgment in respect of the validity of ss 54L and 54N (at 10) and Gaudron J to have agreed also (at 58).

66 Toohey J may not have seen s 54P(1) as critical to validity, but whatever weight his Honour attached to that provision it would appear to have been on the clear understanding that it would operate in a practical way to ensure that in fact "detention is not for any lengthy period …" (at 46). McHugh J would seem to have been far from satisfied that the scheme would have been invalid without s 54P(1), but his Honour's consideration of the effect of s 54P(1) also appears to have been on the understanding that it would operate in a practical way to end detention. McHugh J said (at 72):

> *"[E]ven if the provisions of ss 54L, 54N and 54R, standing alone, could be characterized as a punishment, the effect of s 54P(1) is that a designated person may release himself or herself from the custody imposed or enforced by those sections. ... That provision makes it impossible to regard Div. 4B in its ordinary operation as a punishment."*

McHugh J continued:

> *"But for the purpose of the doctrine of the separation of powers, the difference between involuntary detention and detention with the concurrence or acquiescence of the "detainee" is vital. A person is not being punished if, after entering Australia without permission, he or she* ***chooses to be detained*** *in custody pending the determination of an application for entry rather than to leave the country during the period of determination."* [Emphasis added.]

67 The judgments in the earlier case of *Koon Wing Lau v Calwell* (1949) 80 CLR 533 ("*Lau v Calwell*"), which was seen in *Lim* (at 31) as "the clearest example" of the High Court's recognition that the power of the Parliament to make laws with respect to aliens extends to authorising the Executive to restrain an alien in custody to the extent necessary to make the deportation effective, would also appear to proceed on the assumption that a power to detain pending deportation would not in fact involve a power to detain for an unlimited period.

68 One of the questions for determination in *Lau v Calwell* concerned the validity of s 7 of the *War-time Refugees Removal Act 1949* (Cth) which provided for the detention of deportees pending deportation and until placed on board a vessel for deportation, for detention on board that vessel until departure from the last port of call in Australia and for detention at Australian ports. (The detention was not mandatory in the sense now being considered since the legislation made provision for release upon the giving of security.) The contention that the section authorised indefinite or unlimited detention, and was on that account invalid, was rejected. Latham CJ, with whom McTiernan J agreed, and with whom Webb J agreed on the present question, said (at 556):

> *"Section 7 does not create or purport to create a power to keep a deportee in custody for an unlimited period. The power to hold him in custody is only a power to do so pending deportation and until he is placed on board a vessel for deportation and on such a vessel and at ports at which the vessel calls. If it were shown that detention was not being used for these purposes the detention would be unauthorized and a writ of habeas corpus would provide an immediate remedy."*

69 Dixon J also rejected the submission that there was nothing to prevent the Minister making a deportation order and giving a direction as to the custody in which the deportee was to be held and "leaving him there for life or indefinitely". The words "pending deportation" in s 7(1)(a) implied purpose, and together with s 5, the provisions meant that a deportee might be held in custody for the purpose of fulfilling the obligation to deport him until he was placed on board the vessel. His Honour continued (at 581):

> *"It appears to me to follow that unless within a reasonable time he is placed on board a vessel he would be entitled to his discharge on habeas."*

70 Williams J, with whom Rich J agreed, rejected the submission that a deportee could be kept in custody indefinitely and never deported. He observed that a deportee might only be kept in custody pending deportation and until placed on board a vessel for deportation. If it appeared that a deportee was being kept in custody, not with a view to his deportation but simply with a view to his imprisonment for an indefinite period, the custody would be illegal. He added, however, that the omission to fix a period within which the deportee must be placed on board a vessel for deportation was not sufficient to prevent s 7(1)(a) being a law with respect to aliens. Williams J concluded (at 586-587) by saying that each case must depend on its own facts but that a court was:

> *"... loath to see any person committed to gaol without trial, and would be on the alert to see that the power conferred on the Minister or an officer to keep a deportee in custody pending deportation was used for that purpose and no other purpose."*

71 The judgments in *Lau v Calwell* all appear to involve an underlying assumption that deportation would in fact be capable of being effected within some foreseeable time frame. The observation by Dixon J that unless "within a reasonable time [the deportee] is placed on board a vessel he would be entitled to his discharge on habeas" supports at least the presence of the underlying assumption to which we have referred, and may in fact be seen to go further and to suggest the presence of an implied temporal limitation upon the power conferred by

the section.

72 Whatever may be said about the assumptions made in *Lau v Calwell* and their relationship to the conclusion of validity, the reasoning of the majority of the High Court in *Lim* as to what was considered to be reasonably capable of being seen as necessary for the purposes of deportation, leads us to conclude that unless the power and duty of detention conferred by s 196 were subject to an implied temporal limitation broadly of the nature of the second limitation found by the trial judge, a serious question of invalidity would arise. Without such a limitation it may well be that the power to detain would go beyond what the High Court in *Lim* considered to be reasonably capable of being seen as necessary for the purposes of deportation.

73 In the absence of such an implied limitation, the elements that saved the sections under challenge in *Lim* from going beyond what was constitutionally permissible would seem to be absent from the present general scheme of mandatory detention. One such element was a section with a practical capacity (assumed) to bring about release from detention. That element would be missing if s 196 were to operate without limitation and where the equivalent of s 54P(1) in the scheme now being considered, s 198(1), did not have practical effect in a case such as that of Mr Al Masri. The other element, perhaps not critical, but certainly an element in the reasoning in *Lim,* is the specific time limit on detention provided for in the scheme then under consideration. That element is wholly absent in the scheme for mandatory detention at the centre of this case.

74 *Lim* was discussed in some of the judgments in *Kruger v The Commonwealth* (1997) 190 CLR 1 ("*Kruger*"), where the High Court rejected a contention that the power vested by the *Aboriginals Ordinance* 1918 (NT) in the Chief Protector of Aboriginals to remove and detain any Aboriginal or half-caste (sic) involved an invalid conferral of judicial power. Gummow J referred to *Lim* (at 162) as authority for the proposition that whether a power to detain persons or to take them into custody was to be characterised as punitive in nature, so as to attract the operation of Ch III, depended upon whether those activities were reasonably capable of being seen as necessary for a legitimate non-punitive objective. He added that the categories of non-punitive, involuntary detention were not closed. Gummow J, with whom Dawson J (at 62) and Gaudron J (at 109-10) relevantly agreed, concluded that the impugned provisions of the Ordinance were reasonably capable of being seen as necessary for a

legitimate non-punitive purpose rather than for the attainment of any punitive objectives. The non-punitive purpose was the welfare and protection of the persons who might be taken into custody and care. The importance, however, of the reasoning of a majority of the Court in *Lim* as to what was considered in that case to be reasonably capable of being seen as necessary for a legitimate non-punitive objective remains quite unaffected by what was later said in *Kruger*, or by the Court's conclusions in *Kruger* about the nature of the impugned provisions.

75 Our analysis of the reasoning in *Lim* has not involved us asking directly whether, without the limitations, the power to detain would extend impermissibly to authorise detention that was punitive in nature. But it seems to us that if the question is asked directly, the short answer may well be that in the absence of any real likelihood or prospect of removal being effected in the reasonably foreseeable future, the connection between the purpose of removing aliens and their detention becomes so tenuous, if indeed it still exists, as to change the character of the detention so that it becomes essentially punitive in nature. After all, in a matter of such fundamental concern to the common law as the detention of a person in custody, it would be strange indeed if the non-punitive character of detention were able to be maintained indefinitely on the basis that, some day, something must surely turn up to allow detention to come to an end.

76 There is also room for debate about the validity of the mandatory detention scheme, as an exercise of the aliens power under s 51(xix) of the Constitution if s 196(1) bears the construction for which the Solicitor-General contends. As noted earlier, the *Migration Amendment Act (No 1)* added to the Act a new Div 4B (entitled "Custody of certain non-citizens") which was challenged, but for the most part held valid, in *Lim*. The *Migration Amendment Act (No 3) 1992* (Cth) introduced into the Act new parts 2A ("Migrations agents and immigration assistance") and 2B ("Offences relating to decisions under Act"). In the 1994 consolidation these were renumbered as Pts 3 and 4.

77 The validity of the new Pt 2A was unsuccessfully challenged in *Cunliffe v The Commonwealth* (1994) 182 CLR 272 ("*Cunliffe"*). Part 2A established a scheme for the registration of "migration agents" and limited the advice or assistance which might be given to applicants for visas, entry permits or refugee status by persons other than such agents. The plaintiffs, solicitors with an extensive immigration practice, argued that the scheme was

invalid. As Pt 2A did not operate directly on "aliens", but on persons wishing to provide advice and assistance to "aliens", it was argued that, if it was to be characterised as a law with respect to "aliens", this must be by virtue of the incidental power under 51(xxxix) of the Constitution. Adopting the approach taken by Mason CJ in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, it was argued that reliance on the incidental power must depend on the "purpose" of the law. Hence it would depend upon whether the law was appropriate and proportionate to that purpose. It was claimed that the law was wholly disproportionate both in its restrictions on assistance offered by voluntary helpers, and in its restrictions on assistance given by lawyers.

78 The High Court rejected this argument based on the incidental power because, on ordinary principles of characterisation, Pt 2A was to be characterised as a law with respect to aliens without any need to resort to the incidental power. It is possible, however, that counsel for the respondent is correct in his submission that the power to detain unlawful non-citizens pending removal requires recourse to the incidental power in order to sustain validity. That submission requires an acceptance of the contention that the power of the Executive to detain persons who have a particular status is in some way dependent upon the express incidental power in s 51(xxxix). It is clear that Commonwealth criminal law rests primarily for its validity upon that power (*The King v Kidman* (1915) 20 CLR 425), and it can be argued that the power to detain pending removal is, in some respects, analogous. If that argument were accepted, *Cunliffe* might be regarded as distinguishable.

79 It is, however, unnecessary to pursue the characterisation issue. On any view, *Lim* approached the question of constitutional validity in relation to the Ch III issues in a broadly similar way as some of the cases decided over the past decade which have approached problems of characterisation in the context of purpose. Many of those cases concerned the "implied freedom of political communication". They raised the question whether the legislation under challenge could be regarded as "appropriate and adapted", but included within that question considerations of proportionality arose: *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; and, in the context of s 122 of the Constitution (the territories power), and an alleged "implied right to freedom of movement and association for political, cultural and familial purposes": *Kruger*.

80 We have referred to *Kruger* and the High Court's rejection of any Ch III-related invalidity and the Court's conclusion that the impugned power, having been conferred to promote the welfare of Aboriginal people and to protect them from harm, was reasonably capable of being seen as necessary for a legitimate non-punitive object. There are no considerations of that kind in relation to the power to detain unlawful non-citizens under s 196(1). Although the aliens power is of wide amplitude, as discussed by Gummow J in *Re Minister for Immigration and Multicultural Affairs; ex parte Te* (2002) 193 ALR 37 at 60-61 *("Te")*, there was no suggestion that merely because a particular provision could be described as a law with respect to aliens it could operate to require their detention for reasons unconnected with their removal from this country. There is a clear distinction between detention which is directed in a genuine, and realistic, sense towards removal, and detention in the hope that, at some unknown point in the future, removal will be possible.

81 It is sufficient, however, for present purposes to observe that we find it difficult to accept that a provision that carries the meaning for which the Solicitor-General contends can be regarded as reasonably appropriate and adapted to an end sufficiently linked to the aliens power, particularly if considerations of proportionality are taken into account.

82 It follows from what we have said that we consider that constitutional considerations point very strongly to the need and foundation for a limitation such as the second of those found by the primary judge. We have concluded, however, that it is unnecessary to decide whether, without such a limitation, the provisions would be offensive to the Constitution because we consider that the central issue in the appeal can be determined by the application of a well-established principle of statutory construction concerning fundamental rights and freedoms. It is to this principle that we now turn.

STATUTORY CONSTRUCTION – THE PRESUMPTION AGAINST THE CURTAILMENT OF FUNDAMENTAL FREEDOMS

83 In *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 at [30] *("Plaintiff S157")* Gleeson CJ said:

> *"...[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or*

> *freedoms in question, and has consciously decided upon abrogation or curtailment* (Coco v The Queen *(1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ). As Lord Hoffmann recently pointed out in the United Kingdom (*R v Home Secretary; Ex parte Simms *[2000] 2 AC 115 at 131), for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be "subject to the basic rights of the individual" (see also* Annetts v McCann *(1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ). "*

84 There are many examples of the application of this principle, in Australia and in other common law countries. One of the most important recent examples is the decision of the High Court in *Coco v The Queen* (1994) 179 CLR 427 ("*Coco*") referred to by Gleeson CJ in the passage we have cited from his judgment in *Plaintiff S157.* The facts in *Coco,* and the legislation considered in that case, provide a striking example of the strength and importance of the principle. In their joint judgment, Mason CJ, Brennan, Gaudron and McHugh JJ observed (at 437-438) that "curial insistence on a clear expression of an unmistakable and an unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights", although they cautioned that the need for a clear expression of an unmistakable and an unambiguous intention did not exclude the possibility that the presumption against statutory interference with fundamental rights might be displaced by necessary implication.

85 The principle was applied by the High Court very recently in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561 in the construction of s 155 of the *Trade Practices Act* 1974 (Cth): see esp McHugh J at [43]. The fundamental right that the Court found not to be abrogated by s 155, with its insistence in s 155(5) that a person shall not "refuse or fail to comply with a notice under this section to the extent that a person is capable of complying with it", was the common law right or immunity of legal professional privilege. Other examples of the principle's application by the High Court are *Baker v Campbell* (1983) 153 CLR 52; *Bropho v Western Australia* (1990) 171 CLR 1; and *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

86 The principle is also well entrenched in English law: *R v Home Secretary; ex parte Simms* [2000] 2 AC 115 at 131; *R v Special Commissioner and Anor; ex parte Morgan Grenfell &*

Co Ltd [2002] UKHL 21. See generally F.R. Bennion, *Statutory Interpretation* (4th ed 2002) at 714-717 and Lord Steyn "The Intractable Problem of The Interpretation of Legal Texts" (2003) 25 Syd Law Review 4 at 19.

LIBERTY AND THE COMMON LAW

87 The principle against the imputation of an intention to curtail fundamental rights is sometimes criticised on account of uncertainty about the rights to which it applies. This may be so at the margins, but there can be no question that the right to personal liberty is among the most fundamental of all common law rights: *VFAD* at [108]-[112]- and [159]. It is also among the most fundamental of the universally recognised human rights. In *Williams v The Queen* (1986) 161 CLR 278, Mason and Brennan JJ spoke of the right to personal liberty in the following terms (at 292):

> *"The right to personal liberty is, as Fullagar J described it, 'the most elementary and important of all common law rights'. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without sufficient cause' ... He warned:*
>
> > 'Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper… there would soon be an end of all other rights and immunities.'
>
> *That warning has been recently echoed. In* Cleland v The Queen*, Deane J. said:*
>
> > 'It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed.'
>
> *The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes."* [Footnotes omitted.]

88 When *Christie v Leachinsky* [1947] AC 573, was before the Court of Appeal, Scott LJ referred to "the momentous significance" of the normal rule of personal freedom within the law: *Leachinsky v Christie* [1946] 1 KB 124 at 127. In *Murray v Minister of Defence* [1988] 1 WLR 692 at 703, Lord Griffiths said that the law attached "supreme importance" to the liberty of the individual. These were cases of arrest, but the concern of the common law with liberty is pervasive and finds expression in cases in the many areas of the law in which

questions of liberty can arise. For example, in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, a case concerning extradition, Brennan J said, at 523:

> *"The law of this country is very jealous of any infringement of personal liberty ... and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right..."*

89 Even apparently minor deprivations of liberty are viewed seriously by the common law, as cases concerning false imprisonment show. Professor Fleming, in *The Law of Torts* (9th ed, 1998) at 33 notes that mere restraint in a public street was held to constitute imprisonment, and to be actionable, as far back as 1348. In *Watson v Marshall and Cade* (1971) 124 CLR 621, where an unrepresented plaintiff obtained a judgment in the High Court of Australia for damages for trespass to the person in connection with his conveyance to a psychiatric hospital, Walsh J observed that the failure to prove any actual financial loss did not mean that the plaintiff should recover nothing and observed that: "any interference with personal liberty even for a short period is not a trivial wrong" (at 632).

90 The common law's concern for the liberty of individuals extends to those who are within Australia unlawfully. In *Kioa v West* (1985) 159 CLR 550, Deane J said (at 631):

> *"An alien who is unlawfully within this country is not an outlaw. Neither public officer nor private person can physically detain or deal with his person ... without his consent except under and in accordance with the positive authority of the law. ..."*

This statement of the law was confirmed by Brennan, Deane and Dawson JJ in *Lim* (at 19):

> *"Under the common law of Australia and subject to qualification in the case of an enemy alien in time of war, an alien who is within this country, whether lawfully or unlawfully, is not an outlaw. Neither public official nor private person can lawfully detain him or her or deal with his or her property except under and in accordance with some positive authority conferred by the law."*

91 In *R v Home Secretary; Ex parte Khawaja* [1984] AC 74, Lord Scarman, speaking of the protection offered by *habeas corpus*, asked whether it was really limited to British nationals. The case law, his Lordship said, answered the question with an emphatic "no". He continued (at 111):

> *"Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been the*

> *law at least since Lord Mansfield freed 'the black' in* Sommersett's Case *(1777) 20 St. Tr. 1"*

92 Lord Scarman's observation that every person "within the jurisdiction" enjoys the equal protection of our law finds some support in *Oates v Attorney-General (Cth)* [2003] HCA 21 at [13]. That observation has a particular current significance in the light of the detention of suspected Al Queda members at Guantanamo Bay. There, however, it has been held that there are special considerations based upon the territorial status of Guantanamo Bay. Thus, in *Coalition of Clergy, Lawyers & Law Professors v Bush* 310 F. 3d 1153 (2002) it was held by the United States Court of Appeals for the Ninth Circuit, following the decision of the Supreme Court of the United States in *Johnson v Eisentrager* 339 US 763 (1950), that *habeas corpus* would not issue in circumstances where neither the custodians of the detainees, nor the detainees themselves, were within the sovereign territory of the United States. The same conclusion was reached by the United States District Court for the District of Columbia in *Rasul v Bush* 215 F.Supp. 2d 55 (2002), which was upheld on appeal as *Al Odah v United States of America* 2003 U.S. App. LEXIS 4250 (11 March 2003) by the United States Court of Appeals for the District of Columbia. As we understand it, an appeal to the Supreme Court from these decisions has been foreshadowed.

93 In considering the application of the principle of construction it is appropriate to take into account not only the fundamental nature of the right that may be abrogated or curtailed, but also the extent to which, depending upon the construction adopted, that may occur. Although all interferences with personal liberty are serious in the eyes of the common law, it may be said that the more serious the interference with liberty, the clearer the expression of intention to bring about that interference must be. Where the right in issue is the fundamental right of personal liberty, it is appropriate to consider the nature and duration of the interference. Here, the nature of the interference is by way of administrative detention and, if no limitation is to be implied, the duration may be indefinite and for a very long time. Theoretically at least, detention might continue for the rest of a person's life and the Solicitor-General did not shrink from that possibility, whilst contending that in the real world such a thing would not happen**.** But whether long or short in duration, detention that is indefinite is especially onerous if for no other reason than it is detention with no end in sight.

94 It is no doubt for reasons of this nature that indefinite detention is rarely invoked in

sentencing regimes and is seen as oppressive even in the context of punishment (see generally *Veen v The Queen (No 1)* (1979) 143 CLR 458 at 482, 494-495; *Veen v The Queen (No 2)* (1988) 164 CLR 465; *The State of South Australia v O'Shea* (1987) 163 CLR 378 at 414), and more recently, *Lowndes v the Queen* (1999) 195 CLR 665 at 670-671; *Thompson v R* (1999) 165 ALR 219 at 220-221 and *McGarry v R* (2001) 184 ALR 225 at 234, 241-242, 256). In *Chester v The Queen* (1988) 165 CLR 611 at 619 indeterminate detention was described as a stark and extraordinary punishment, only to be imposed upon a convicted person against whom there was cogent evidence showing that he would be a constant danger to the community. In *R v Moffatt* [1998] 2 VR 229 Hayne JA (as his Honour then was) analysed the history of habitual offender and preventive detention provisions and concluded, at 255, that although indefinite sentences did not violate the principles enunciated in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, they were to be sparingly used.

95 It can therefore be seen that if, on its true construction, the legislation in question here were to provide for mandatory administrative detention, irrespective of personal circumstances, for a period that had no reasonably foreseeable end and might last for a very long time, it would indeed have the potential to curtail to a very severe extent the fundamental common law right to liberty.

96 To say this is not to express criticism of the policy but, rather, to demonstrate the impact of the construction contended for by the appellant and to do so for the purpose of asking whether such an intention should be imputed to the Parliament.

AUTHORITIES FROM OTHER COMMON LAW COUNTRIES

97 The sufficiency of statutory authority to support the detention of aliens pending their deportation has been addressed by courts of the highest authority in other parts of the common law world. The trial judge referred to the most important of these decisions as indicative of the approach taken by courts in the common law tradition to the construction of statutes providing for administrative detention. His Honour explicitly recognised the textual differences between the provisions considered in those cases and the legislation in the present case. His approach was analogical.

98 The trial judge's starting point was the decision of Woolf J, as the Lord Chief Justice then was, in *Hardial Singh*, a decision which has provided the foundation for what have been

referred to by the Privy Council, the House of Lords and other courts as the *Hardial Singh* principles.

99 Hardial Singh was an Indian national who was held in detention in the United Kingdom after a deportation order had been made against him on account of serious criminal offences he had committed in the United Kingdom. The relevant provision of the *Immigration Act 1971* (Schedule 3 para 2(3)) read:

> *"(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State* ***pending his removal or departure****... (and if already detained by virtue of .... (2) above when the order is made, shall continue to be detained unless the Secretary of State directs otherwise)*." [Emphasis added.]

100 Mr Singh was held in deportation detention for some time because he had lost his passport and there was delay on the part of the Indian High Commission. He sought a writ of *habeas corpus* in the Queen's Bench Division. Woolf J held that, although the power to detain was not subject to any express limitation of time beyond the phrase 'pending his removal', the power was nevertheless otherwise limited. His Lordship said (at 706):

> *"...Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out,* ***I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case****. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.*
>
> *In addition****, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.****"*** [Emphasis added.]

101 Woolf J granted an adjournment of only three days to give the Home Office an opportunity to place evidence before the court. His Lordship explained (at p 709):

> *"... In taking that course, I have in mind that if it is shown to this court that the applicant is due to be removed within a very short time indeed, then it would be proper for him to remain in detention for that short time.* ***But if, when the matter comes before me in three days' time there is no intimation given to me on behalf of the Home Office that he will be so removed, this is a case where he should be released unless, having taken advantage of the adjournment, the Home Office are in a position to put before the court evidence which reveals a wholly different situation from that indicated by the evidence which is at present before me.*** *Therefore, in those circumstances, I grant that limited adjournment, taking the view that a very short additional period of further detention will not result in such an injustice to the applicant as requires me to refuse the Home Office an opportunity to file further evidence, bearing in mind that they can reasonably say that the late service upon them has not given them proper time to put their case in order."* [Emphasis added.]

102 *Hardial Singh* has been followed in other cases, including *Liew Kar-Seng v Governor in Council* [1989] 1 HKLR 607; *Re Phan Van Ngo and ors* [1991] 1 HKLRD 499; *Re Wasfi Mahmood* [1995] Imm AR 311; *Klinsman v Secretary for Security & Anor* [1999] HKLRD (Yrbk) 430; *R (on the application of I) v Secretary of State for the Home Department* [2002] EWCA Civ 888; *R (on the application of Vikasdeep Singh Lubana) v The Governor of Campsfield House* [2003] EWHC 410. It received the approval of the Privy Council in *Lam* and, since the hearing of this appeal, the approval of the House of Lords in *R v Secretary of State for the Home Department; ex parte Saadi* [2002] 4 All ER 785 at 793 ("*Saadi*").

103 *Lam* concerned the construction of s 13D of the *Immigration Ordinance* (*Laws of Hong Kong*, 1981 rev., c. 115) which conferred a power to detain "pending … removal from Hong Kong". The applicants, Vietnamese nationals of Chinese ethnicity who had been refused refugee status, had been in detention for varying periods when they applied to the High Court of Hong Kong for orders in the nature of *habeas corpus*. The applications came before Keith J. It was argued for the applicants that "pending removal" in s 13D of the Ordinance did not permit detention if the detainee's removal was impossible or could not be achieved within a reasonable time. It was said that it was in fact impossible to return the applicants to Vietnam because the authorities there had a policy under which that country would not accept the repatriation of those they considered to be non-Vietnamese nationals. Therefore, the argument was, there was no possibility of the applicants' removal from Hong Kong under a scheme for compulsory repatriation which had been agreed to between the Hong Kong and Vietnamese authorities.

104 Keith J applied *Hardial Singh*. He concluded that the length of the detention was reasonable, but found that the return of three of the applicants (identified as A 9, A 10 and A 11) was impossible because they would not be accepted by Vietnam. He therefore ordered that those applicants be released, because their continued detention was not 'pending removal' and was not authorised by s 13D of the Ordinance.

105 The Hong Kong Court of Appeal considered the approach of Keith J to be in error, and held that the detentions were lawful if they were for the purpose of repatriation and that purpose was not spent. There was no burden on the respondent director of the detention centre to show that it was more likely than not that Vietnam would accept the applicants for repatriation; it was enough for the director to show that attempts were being made to effect repatriation.

106 On appeal to the Privy Council (constituted by Lord Keith of Kinkel, Lord Browne-Wilkinson, Lord Mustill, Lord Steyn and Sir Brian Hutton) their Lordships were unequivocal in their disagreement with the Court of Appeal about the application of what their Lordships referred to as the *Hardial Singh* principles. Their Lordships said (at 111):

> *"Section 13D(1) confers a power to detain a Vietnamese migrant 'pending his removal from Hong Kong.'* ***Their Lordships have no doubt that in conferring such a power to interfere with individual liberty, the legislature intended that such power could only be exercised reasonably*** *and that accordingly it was implicitly so limited. The principles enunciated by Woolf J. in the* Hardial Singh *case [1984] 1 WLR 704 are statements of the limitations on a statutory power of detention pending removal.* ***In the absence of contrary indications in the statute which confers the power to detain 'pending removal' their Lordships agree with the principles stated by Woolf J.*** *First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal.* ***Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorised.*** *Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time.*
>
> *Although these restrictions are to be implied where a statute confers simply a power to detain 'pending removal' without more, it is plainly possible for the legislature by express provision in the statute to exclude such implied restrictions. Subject to any constitutional challenge (which does not arise in this case) the legislature can vary or possibly exclude the* Hardial Singh *principles. But in their Lordships' view the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory*

> *provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances."* [Emphasis added.]

107 The Privy Council found it unnecessary to reach a conclusion about the length of detention because the appeal succeeded on the ground that the detention was not lawful in circumstances where the applicants would not be accepted back by Vietnam. The conclusion of Keith J that the detention of A 9, A 10 and A 11 was unlawful was affirmed. Their Lordships said (at 116):

> *"In all circumstances their Lordships can see no sufficient reason to overturn the finding of the judge that it is the policy of the Vietnamese Government not to accept repatriation of non-Vietnamese nationals. In these circumstances, it is not contended that these applicants are being detained 'pending removal.' Accordingly, the decision of Keith J. to order their release was correct."*

108 The *Hardial Singh* principles were considered by the Hong Kong Court of Final Appeal in *Thang Thieu Quyen & Ors v Director of Immigration & Anor* (1997-98) 1 HKCFAR 167. The Court held that the detention of Vietnamese nationals pending removal to mainland China was lawful, but the *Hardial Singh* principles were endorsed by the majority. Li CJ, with whom Litton PJ, Ching PJ and Sir Anthony Mason J agreed, said (at 35-6):

> *"The [*Hardial Singh*] principles represent the proper approach to the statutory construction of any statutory power of administrative detention ..."*

109 It remains to refer to the recent decision of the House of Lords in *Saadi*, in which *Hardial Singh* was referred to with approval by Lord Slynn of Hadley, with whom Lord Nicholls of Birkenhead, Lord Mustill, Lord Hutton and Lord Scott of Foscot agreed. His Lordship observed (at [26]) that statutory powers of detention must be exercised reasonably by government, in any event in the absence of specific provisions laying down particular time scales for administrative acts to be performed. He referred to what he described as "an analogous application" of the principle in the judgments dealing with detention and cited the passage in the judgment in *Hardial Singh* (at 706) where Woolf J had said that since the power of deportation was given in order to enable the machinery of deportation to be carried out, the power was impliedly limited to a period which was reasonably necessary for that purpose.

110 The trial judge also referred to the recent decision of the Supreme Court of the United States in *Zadvydas v Davis* 533 US 678 (2001) ("*Zadvydas*") where the Court considered

applications for *habeas corpus* filed by aliens detained indefinitely. The issue before the Court was whether a United States statute providing for the detention of aliens pending removal authorised the Attorney General to detain indefinitely a removable alien, who no other country would accept, beyond a 90-day removal period.

111 The majority (Breyer, Stevens, O'Connor, Souter and Ginsburg JJ) held that, read in light of the constitutional demands of the due process clause of the 5th Amendment, the post-removal-period detention statute implicitly limited the detention of an alien to a period reasonably necessary to bring about the alien's removal from the United States. The statute did not, therefore, permit indefinite detention (at 689).

112 In the view of the majority, freedom from imprisonment "lies at the heart of the liberty" that the due process clause protects. The majority noted that the Supreme Court had previously held that government detention violates the due process clause unless the detention is ordered in a criminal proceeding, with appropriate procedural protections, or in certain special non-punitive circumstances (at 690).

113 The proceedings before the Court in this instance, however, were civil in nature, and the majority concluded that the two regulatory goals of the statute did not constitute "sufficiently strong special justification… for indefinite civil detention". These goals were not dissimilar to those referred to by the Solicitor-General in submissions before this Court: to ensure the appearance of aliens at future immigration proceedings and to prevent danger to the community (at 690 – 691). The majority concluded that it could not find:

> *"… any clear indication of congressional intent to grant the Attorney-General the power to hold indefinitely in confinement an alien ordered removed…if Congress had meant to authorise long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."* (at 697)

114 The majority held that the application of the implicit "reasonable time" limitation was subject to federal court review (at 699) and that deportable aliens held for removal must be released if a reviewing court finds no significant likelihood of removal in the reasonably foreseeable future (at 701).

115 Subject to any relevant constitutional restraints or prohibitions which limit the exercise of the legislative power, the Parliament may make laws which impose burdens or obligations on

aliens which could not be imposed on other persons: *Te* per Gummow J. There can, however, be no doubt that the principle of construction outlined at the beginning of this section of our reasons is applicable to the construction of provisions that provide for mandatory detention. Since aliens who are unlawfully within Australia are not outlaws but enjoy, in common with every other person in Australia, the equal protection of Australia's laws, the principle of construction to which we have referred is not to be excluded simply because the subject matter of a statute is the detention of aliens. It is a principle of universal application. There was no suggestion to the contrary in argument in this case. There is equally no doubt that courts of the highest authority have applied that principle, or similar principles, to read into legislation providing for detention implied limitations upon the power. The critical question that remains is whether there is a clear indication that the legislature has directed its attention to the right of liberty and has consciously decided upon its curtailment.

STATUTORY CONSTRUCTION - CONCLUSIONS

116 The application of the principle to the statutory scheme of mandatory detention involves asking whether there is disclosed a clearly manifested intention to keep in detention a person who has sought liberty by taking the only course provided to him/her by the law to do so (a request in writing to the Minister to be removed), but for whom there is nevertheless no realistic prospect of removal and thus no real likelihood or prospect of any end to detention at any time in the reasonably foreseeable future.

117 The manifestation of such an intention must be such as to show clearly, and unmistakably, that the detention is to continue for as long as may be necessary and might even (as a theoretical possibility) be permanent, that it is intended that detention should continue without foreseeable end irrespective of the age, gender, personal or family circumstances of the person, irrespective of the unlikelihood (if such be the case) of a person absconding and irrespective of the absence (if such be the case) of any threat presented to the Australian community of a person detained.

118 The outline in the preceding paragraph of the extent to which personal liberty may be curtailed, depending upon the construction adopted, is not (as we have noted earlier) put forward by way of criticism of, or commentary upon, Parliament's policy of mandatory detention. It is put forward to make plain what is involved in the submission that the scheme of mandatory detention is subject to no limitation other than the continued existence of the

purpose of removal of an alien from Australia. It is appropriate and indeed necessary to point to the circumstance, perhaps very unlikely indeed in the real world, but nevertheless conceded as a theoretical possibility, that the detention authorised by the scheme may even be permanent, and thus even for the rest of a person's life. The submission that the scheme allows of no limitation other than one of purpose requires that such a possibility be squarely confronted.

119 With these considerations in mind, we turn first to the language of s 196(1), putting to one side for a moment the structure of the scheme as a whole. The word that bears the principal load of the effect contended for on behalf of the Minister is, simply, "until". Nowhere in the section, or elsewhere in the scheme, is it stated that a person is to be kept in detention in circumstances when there is no real prospect of removal in the reasonably foreseeable future. When it is recalled that the statements of principle frequently include the observation that general language is rarely sufficient to demonstrate an intention to abrogate fundamental rights, and the right in question here is unquestionably amongst the most fundamental of all rights, we conclude that "until" is not powerful enough to do the work asked of it by the appellant. We observe, in passing, that there seems to be little or no difference between "until" and the expression "pending" considered in *Hardial Singh* and some of the other cases.

120 Gleeson CJ observed in *Plaintiff S157*, at [30], that a conclusion that there is an intention to curtail or abrogate fundamental rights requires "a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment". The requirements, so expressed, are cumulative. See also *Coco* at 437. The Parliament has indeed directed its attention to the curtailment of the right to personal liberty for the purpose of removal, but to raise the matter in that way is to avoid addressing the real question here. The question now is whether the Parliament has directed its attention to the possibility that the scheme of mandatory detention would extend to circumstances where none of the three "until" events specified in s 196 would occur, so that it has consciously decided that the right to liberty is to be curtailed by detention which, in an extreme case, may even be of potentially unlimited and permanent in duration.

121 In our view, the language of s 196, either taken alone or in the context of the scheme as a whole, does not suggest that the Parliament did turn its attention to the curtailment of the

right to liberty in circumstances where detention may be for a period of potentially unlimited duration and possibly even permanent. On the contrary, the textual framework of the scheme suggests an assumption by the Parliament that the detention authorised by s 196 will necessarily come to an end. Section 196 contemplates a "period of detention", and that is how the section is headed. Whilst one purpose of the section is indisputably to authorise the detention of unlawful non-citizens, another purpose is to specify the circumstances in which the period of detention is to come to an end. The latter purpose assumes that the detention will have an end. The assumption is that the detention of unlawful non-citizens will come to an end by the actual occurrence of one of three events: removal, deportation or the grant of a visa.

122 The language of s 198(1) supports the conclusion that Parliament proceeded on an assumption that detention would, in fact, end rather than upon an understanding that detention might possibly be of unlimited duration. By the placing of a duty upon the Minister to remove an unlawful non-citizen as soon as reasonably practicable after a request in writing by that person, a strong indication is again given of an assumption that detention will come to an end. Indeed, as we have noted, the assumption made by members of the High Court about the scheme considered in *Lim* was that it had an element, the equivalent of the present s 198(1), that gave a person what was effectively a power to bring detention to an end: see our discussion at [61] to [63] above.

123 Although the expression "reasonably practicable" in s 198 does not imply immediacy, the conferral upon a person detained of the power to enliven the mechanism for removal, and the duty to engage that mechanism, suggests again that Parliament was working on the assumption that s 196 and s 198 would together operate to bring detention to an end, and that it was not acting upon the very different understanding that they would operate together even where there was no real prospect of removal and thus no real prospect of detention coming to an end within any reasonably foreseeable timeframe.

124 Section 196(3) does not take the matter any further. As we observed in *NAMU*, that subsection does no more than restate the proposition that the Court does not have the power to direct the release of persons lawfully detained (at [10]). The subsection cannot operate to prevent the release of those who are not lawfully detained and it does not speak as to the duration of circumstances under which lawful detention may continue.

125 Despite these considerations, the specification of three matters, and only three matters, as operating to bring detention to an end remains, at first sight, a powerful indication that the detention is not otherwise to come to an end and that the liberty of an individual is to be correspondingly curtailed. The nature of the three matters: grant of a visa, deportation or removal, suggests a system without qualification or limitation. The absence of any provision for an unlawful non-citizen (as defined, and thus a person without any visa) to be otherwise than in a state of detention may be a powerful indication that no other such state is contemplated.

126 Yet, if it were to appear that the Parliament did not turn its mind to the possibility that detention would **not** come to an end, the force of that consideration would be greatly diminished. On this footing the apparently closed system, providing for only three possibilities, would have no need to provide for any circumstance that any other possibility would require to be addressed.

127 The gaps in the legislative scheme, which were put forward in support of a construction that involves no implied limitation, also take on a different aspect if it is concluded that the scheme was formulated upon the assumption that ss 196 and 198 would, in fact, operate to bring detention to an end.

128 The contention that it could never have been intended that an unlawful non-citizen could be released from detention otherwise than by removal, and that therefore indefinite detention must have been intended, similarly loses force if the assumption upon which the Parliament proceeded was that the scheme would always operate to bring detention to an end.

129 Apart from the question of assumption, though, the circumstance that the limitations found by the trial judge could result in a person who has no right to be in Australia, and no visa, being free within this country does point to an intention that such a person should remain in detention until such time, if ever, as removal becomes possible. The force of this consideration is, however, diminished by the circumstance that such a release does not involve the person released having any right to be, much less to remain, in Australia. The trial judge correctly proceeded upon that basis. The consequence of the limitations that, in a particular case, a person might be released into the community does not mean that that person would have any right at all to remain in Australia. The trial judge correctly proceeded

upon the footing that there was no such right and that the duty to remove remained, even during the time for which the operation of s 196 was impliedly limited. The power and duty to detain would be enlivened again when there was a real likelihood or prospect of removal in the reasonably foreseeable future, as Merkel J ultimately held had occurred in the case of Mr Al Masri: see *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1099 at [24]. It was not suggested in argument that, in the special circumstances of such cases, there could not appropriately be imposed a qualification (in the form, for example, of court-imposed conditions for reporting) upon the normally absolute right to be released from detention that no longer has lawful justification. We should add that there would seem to be no reason why legislative provisions to regulate such a situation could not validly be made with respect to aliens who are to be removed from Australia.

130 It is true that implied limitations such as were found by the trial judge would give rise to uncertainty as to the legality of detention, dependent upon an assessment of external circumstances rather than upon the presence or absence of indisputable facts. It may be accepted that uncertainty of this nature is undesirable and that it points to an intention not to create it. In practical terms, however, the difficulty is likely to be more apparent than real. The recent endorsement of the *Hardial Singh* principles by the House of Lords and by the Privy Council, many years after their formulation in 1984, suggests that the less stringent and more flexible concept of reasonableness which lies at the centre of those principles has not caused undue difficulty; and this is hardly surprising since reasonableness is a concept that the courts are accustomed to deal with in many situations, and not least in situations where personal liberty is in issue. Moreover, when the demands of certainty and liberty come into conflict, the tradition of the common law is to lean towards liberty.

131 Concerns relating to the conduct of the affairs of state were put forward as reasons why the Parliament must have intended a scheme of detention without either of the limitations found by the primary judge. It was said that if there were any such limitations, the consequences would include the possibility of interference with complex and sensitive discussions between governments about the removal of non-citizens; that there might be volatile political situations overseas; and that the need for a coordinated and strategic approach to removals might be impaired. These considerations do not individually or together provide a compelling reason to reject an implied limitation on the power to detain. For one thing difficulties of this nature cannot be said to be the inevitable and direct consequence of such a

limitation. These difficulties may or may not occur, but if they were to occur they would no doubt be dealt with by the court with appropriate regard to the requirements of confidentiality, the expertise of those who have the responsibility for the conduct of Australia's international relations and a due appreciation as well of the practical difficulties involved in such matters. The same may be said of the objection that a court might have to make its own assessment of the course of negotiations with other governments. We do not understand any issue of justiciability to have been raised.

132 Similarly, the submission that a construction that involved limitations upon the power to detain might lead to the release into the community of persons who pose a threat to the safety of others, or to national security, is by no means decisive in favour of a conclusion that the Parliament intended to curtail the right in question. The danger, in any event, is likely to be more apparent than real. It would only arise in circumstances where a person who posed such a threat was within the exceptional category of persons to whom the limitations might ever apply, and where such a person could not otherwise be detained. If such a person had committed an offence in Australia, he or she would no doubt be dealt with according to law and detained according to law. If the person was, for example, an alleged terrorist, but not otherwise liable to detention, the chances are that he or she would be wanted by one or more of the many countries with which Australia has extradition arrangements, and under which it might be expected that the person would be liable to detention pending extradition. Some countries now claim universal jurisdiction in relation to offences of this type. Nothing we have said, of course, suggests that it would be beyond the power of the Parliament to enact specific provisions to address problems of this nature, whether under the aliens power or upon some broader foundation. Indeed, provisions presently exist for the deportation of certain non-citizens who are considered a threat to national security, and such persons would be subject to detention pending deportation: see s 202 of the Act and *Australian Security Intelligence Organisation Act 1979* (Cth), s 37.

133 In these circumstances, we conclude that an intention to curtail the right of personal liberty to the extent discussed has not been clearly manifested. It has not been manifested by any unmistakable or unambiguous language. There is no indication by clear words or by necessary implication that the legislature has directed its attention to, or that it has consciously decided upon, the curtailment of a fundamental common law right to the extent contended for by the Solicitor-General. The principle accordingly requires that no such

intention be imputed to the Parliament.

THE LIMITATIONS

134 The authorities from other common law countries, and in particular those that discuss the *Hardial Singh* principles, show that the implication of limitations upon a statutory power of detention is orthodox. It remains to consider the judge's formulation of the limitations. The appellant's case did not focus on formulation; it was directed to the existence of any limitation beyond such as might be related to purpose. Neither the respondent nor HREOC argued for more stringent or for more flexible limitations, such as a limitation confining detention to what is "reasonably necessary" for the purposes of deportation or removal as in the *Hardial Singh* principles, or a limitation defined by reference to notions of arbitrariness, such as might find support in international law.

135 The first of the two limitations found by the trial judge was that s 196 was limited in operation to such time as the Minister was taking all reasonable steps to remove a detained person from Australia as soon as reasonably practicable. This limitation emerged from a reading of the power to detain in s 196(1) as subject to the duty imposed upon the Minister by s 198(1) to remove as soon as reasonably practicable. Although the two provisions are part of the same scheme, we would not read them together in this way. If the Minister were not fulfilling his duty under s 198(1) to remove as soon as reasonably practicable the detention would, in our view, still be lawful and the appropriate remedy would be an order in the nature of mandamus to compel the Minister to take the steps required for the performance of his duty.

136 The Minister's purpose in detaining, however, must be the *bona fide* purpose of removal. Otherwise the detention would not be lawful. If the Minister were to hold a person in detention without such a purpose, then the detention would be unlawful and the person entitled to relief in the nature of *habeas corpus*. This conclusion is consistent with the decision of the High Court in *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637, where the Court held that s 39(6) of the Act (the legislative precursor to s 196(1)) authorised the detention of a deportee during such time as was required for the implementation of the deportation order, but not for any ulterior purpose such as keeping him available to be a witness in a pending criminal prosecution. The Court held that a declaration that the detention was unlawful ought to have been granted. It was not necessary to consider

whether an order for *habeas corpus* should have been made since the detainees had been released prior to their application to the Federal Court. It would seem, however, from the orders made by the Court that *habeas corpus* would have been granted if required.

137 The second limitation found by the trial judge, a limitation upon the power to detain under s 196(1)(a) to circumstances where there is a real likelihood or prospect of the removal of the person from Australia in the reasonably foreseeable future, is of course temporal in nature. His Honour formulated the limitation in the light of the duty imposed by the Parliament on the Minister in s 198(1) to effect removal "as soon as reasonably practicable". Although we consider that this provision does not, of itself, limit the power in any purposive way, it does inform the content of the limitation the principles we have discussed would point to. Some such limitation is, in our view, required by these principles and the second of the limitations found by the trial judge has support from the language of an integral part of the scheme, and it maintains, clearly, the connection between the power to detain and the purpose of removal. We see no reason to disagree with it.

138 We should add that we do not intend our observations to give any support to a contention that a person who has made a request in writing under s 198(1), might by their own act in frustrating the process of removal, make their continued detention unlawful. For the purposes of the implied limitation, if such a person were, for example, to refuse to sign a consent required by a country otherwise prepared to take him, that person would not (ordinarily at least) be held in circumstances where there was no reasonable likelihood of his removal.

CONSTRUCTION IN ACCORDANCE WITH INTERNATIONAL OBLIGATIONS

139 In our joint reasons for judgment in *VFAD*, we said that we were fortified in our conclusion about the construction of s 196(3) of the Act by reference to the principle that s 196 should, so far as the language permits, be interpreted and applied in a manner consistent with established rules of international law and in a manner which accords with Australia's treaty obligations (at [114]). We referred to statements of the principle in *Polites v The Commonwealth* (1945) 70 CLR 60 per Latham CJ at 68-69, Dixon J at 77, and Williams J at 80-81; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 per Mason CJ and Deane J at 287 and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 per Gummow and Hayne JJ at [97]. The principle is not new - it was already well established

nearly a hundred years ago when O'Connor J referred to it in one of the High Court's early cases: *Jumbunna Coal Mine, No Liability v Victorian Coalminers' Association* (1908) 6 CLR 309 at 363. We now turn to consider the application of this principle to the present case to see whether, as contended by the respondent and by HREOC, it supports the conclusion that there are limitations upon the power to detain.

140 Australia is a party to the *International Covenant on Civil and Political Rights* ("the ICCPR"), having ratified it on 13 August 1980. Australia has thus undertaken an obligation under Article 2(2) to "take necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." The relevance of the provisions under consideration in the present appeal is clear since they were enacted subsequent to Australia's ratification of the ICCPR: see per Dawson J in *Kruger* at 71.

141 Although not incorporated into domestic law, the nature and subject matter of the ICCPR, the universal recognition of the inherent dignity of the human person (recited in its preamble) as the source from which human rights are derived, and the reference to and relevance of its principles in domestic law gives the ICCPR a special significance in the application of the principle of statutory construction now being considered. As to the ICCPR and domestic law, see *Crimes (Torture) Act* 1988 (Cth), ss 3(1) and (2); *Evidence Act* 1995 (Cth), s 138(3)(f); *Australian Law Reform Commission Act* 1996 (Cth), ss 24(1) and (2); *Human Rights and Equal Opportunity Act* 1986 (Cth), ss 3, 11, Schedule 2; *Disability Discrimination Act* 1992 (Cth), s 12(8).

142 Article 9 of the ICCPR relevantly provides:

> *"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
>
> ...
>
> *4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."*

143 The question for consideration now is whether, as submitted by HREOC, the construction of the mandatory detention provisions contended for by the Minister should be rejected because, so construed, the legislation would authorise and require detention that is in truth arbitrary, contrary to the right under Art 9(1) not to be subjected to arbitrary detention. A further question is whether the construction contended for is contrary to Australia's obligations under Art 9(4) in that it does not satisfy the requirements of necessity and proportionality and it avoids the requirement that a State should not detain a person beyond the period for which it can provide appropriate justification. HREOC's submission was that the construction preferred by the trial judge, which did not have those consequences and which was permitted by the language of the legislation, should therefore be preferred.

144 In construing Art 9(1) it should first be noted that the right not to be subjected to arbitrary detention is, textually, in addition to the right not to be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Professor Manfred Nowak, in his authoritative commentary on the ICCPR, *The UN Covenant on Civil and Political Rights: CCPR Commentary*" (N.P. Engel, publisher, 1993) at 172 [28], notes this additional limitation and observes that it is not enough for the deprivation of liberty to be provided for by law; the law itself must not be arbitrary.

145 The history of the second sentence of Art 9(1) supports the conclusion pointed to by the text and supports, as well, a broad view of what constitutes arbitrary detention for the purposes of Art 9. Professor Nowak reviews the travaux préparatoires at 172, [29] and observes that the prohibition of arbitrariness was adopted as an alternative to an exhaustive listing of all the permissible cases of deprivation of liberty. It was based on an Australian proposal that was seen as highly controversial, and although some delegates were of the view that the word arbitrary ("arbitraries") meant nothing more than unlawful, the majority stressed that its meaning went beyond this and contained elements of injustice, unpredictability, unreasonableness and "unproportionality".

146 Having considered the history of Art 9 Professor Nowak concludes that "the prohibition of arbitrariness is to be interpreted broadly" and that " [c]ases of deprivation of liberty provided for by law must not be manifestly unproportional, unjust or unpredictable…" (at 172-173). Other commentators have expressed much the same view: see, for example, "The

International Covenant on Civil and Political Rights: Cases, Materials and Commentary", Joseph, Schultz and Castan, Oxford (2000). See also the extensive summary of the travaux in "Guide to the *Travaux Préparatoires* of the International Covenant on Civil and Political Rights", Bossuyt and Humphrey, Martinus Nijhoff (1987), at 193–202.

147 In applying Art 9 in the performance of its functions under the ICCPR, the Human Rights Committee ("the Committee") established under Art 28 has also interpreted the provision broadly and as containing an important element additional to, and beyond, compliance with the law. So, in *van Alphen v The Netherlands* (UNHRC Communication No. 305/88) the Committee considered whether the detention of a Dutch solicitor, whose detention was in accordance with the applicable Code of Criminal Procedure, was nevertheless arbitrary and in breach of Art 9(1). The Committee concluded (at [5.8]):

> *"The drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime."*

148 In its conclusion in the later case of *A v Australia* (UNHRC Communication No. 560/93) the Committee used very similar language. Whilst it agreed with Australia that there was no basis for the claim that it is *per se* arbitrary to detain individuals requesting asylum and said that it could not find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary, the Committee considered that every decision to keep a person in detention should be open to review periodically so that the grounds justifying detention could be assessed. It agreed that there might be factors particular to individuals "such as the likelihood of absconding and lack of cooperation" (at [9.4]) which might justify detention for a period but without such factors detention may be considered arbitrary. Since Australia had not, in the view of the Committee, advanced any ground particular to A's case that would justify his detention for four years, it concluded that his detention was arbitrary within the meaning of Art 9(1). In several other cases the Committee has expressed concern about the extended detention of asylum seekers: see Joseph, Schultz and Castan at 217 [11.16].

149 Although the views of the Committee lack precedential authority in an Australian court, it is

legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects by performing functions that include reporting, receiving reports, conciliating and considering claims that a State Party is not fulfilling its obligations. The Committee's functions under the *Optional Protocol to the International Covenant on Civil and Political Rights*, to which Australia has acceded (effective as of 25 December 1991) are particularly relevant in this respect. They include receiving, considering and expressing a view about claims by individuals that a State Party to the *Protocol* has violated covenanted rights. The conclusion that it is appropriate for a court to have regard to the views of such a body concerning the construction of a treaty is also supported by the observations of Kirby J in *Johnson v Johnson* (2000) 201 CLR 488 at 501-502, and of Katz J in *Commonwealth v Hamilton* (2000) 108 FCR 378 at 387, citing some observations of Black CJ in *Commonwealth v Bradley* (1999) 95 FCR 218 at 237. See also *The Queen v Sin Yau-Ming* [1992] 1 HKCLR 127 at 141. It is appropriate, as well, to have regard to the opinions expressed in works of scholarship in the field of international law, including opinions based upon the jurisprudence developed within international bodies, such as the Committee.

150 The jurisprudence of the European Court of Human Rights concerning Art 5(1) of the *European Convention on Human Rights* ("the ECHR") provides a degree of further support for the conclusion that Art 9(1) of the ICCPR is concerned not only that deprivation of liberty is according to law, but also that the law itself is not arbitrary and that its application in a given case is not arbitrary.

151 Article 5 of the ECHR follows a different pattern to Art 9 of the ICCPR in that it sets out, as exceptions to the general principle, the cases in which a person may be deprived of liberty. Art 5(1) provides:

> *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...*
>
> > *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."*

Article 5(4) provides:

> *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be*

> *decided speedily by a court and his release ordered if the detention is not lawful."*

152 Consistently with the approach taken to the admittedly different provisions of the ICCPR, the European Court of Human Rights in *Chahal v The United Kingdom* (1996) 23 EHRR 413 (at [118]) held:

> *"Where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness."*

See also *Amuur v France*, 25 June 1996, *Reports of Judgments and Decisions,* 1996-III, at [50]; *Case of Dougoz v Greece*, 6 March 2001, unreported, Application no. 40907/98, at [55]. There are other cases to the same effect.

153 In these circumstances we conclude that the text of Art 9, read as is permissible and appropriate in the light of the travaux préparatoires, requires that arbitrariness is not to be equated with "against the law" but is to be interpreted more broadly, and so as to include a right not to be detained in circumstances which, in the individual case, are "unproportional" or unjust.

154 Since the interpretation contended for by the Solicitor-General requires detention irrespective of the foreseeable prospects of removal and irrespective of the personal circumstances of the individual and, particularly, irrespective of the likelihood or otherwise of the individual absconding, it is a compelling conclusion that detention of that nature would be arbitrary detention within the meaning of Art 9(1). The conclusion is stronger where, as here, the circumstances are such that the person detained has sought asylum, has been refused and has then exercised a statutory right to request removal as soon as practicable.

155 Submissions were not addressed to the Court about construction in conformity with Australia's obligations under the *Convention on the Rights of the Child*, 1989, to which Australia is a party, having ratified in December 1990. We therefore express no view on that matter other than to draw attention to Art 37(b).

156 We are therefore fortified in our conclusion that s 196(1)(a) should be read subject to an

implied limitation by reference to the principle that, as far as its language permits, a statute should be read in conformity with Australia's treaty obligations. To read s 196 conformably with Australia's obligations under Art 9(1) of the ICCPR, it would be necessary to read it as subject, at the very least, to an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention. It follows from our earlier discussion that we consider the language of the statute in question does permit the implication of such a limitation

FEDERAL COURT DECISIONS

157 In reaching our conclusions, we have not accepted the Minister's submission that the earlier Full Court decision in *Vo*, stands against any limitation upon the unqualified power and authority to remove. The Solicitor-General referred also to the later decision of Allsop J in *Perez v Minister for Immigration & Multicultural Affairs* (2002) 191 ALR 619 ("*Perez*").

158 *Vo* was a deportation case. The Full Court upheld a decision of a single judge to dismiss Mr Vo's application for review of a decision by a delegate of the Minister to continue his detention under s 253 of the Act. The ground for the application was that the Minister's delegate had failed to give sufficient weight to the length of time he would spend in detention while waiting for the deportation order to be carried out, because of unreasonable delays in negotiations between the Australian and Vietnamese Governments about his entering Vietnam. The primary judge dismissed the application. He found that it could not be said "on the evidence, that at the time the decision was made there was no prospect of effecting the deportation within a reasonable period": *Vo v Minister for Immigration and Multicultural Affairs* [1999] FCA 1845 at [10]. To the contrary, the evidence referred to the fact that arrangements were being made for the issue of travel documentation by the Vietnamese Government, and deportation was expected to occur within a couple of months. On appeal, Mr Vo argued that his detention could not be considered to be "pending deportation" by reason of the unreasonable delays in the negotiations. He relied on passages of *obiter dicta* in a decision of Madgwick J in *Perez v Minister for Immigration & Multicultural Affairs* (1999) 94 FCR 287, where his Honour refused an application for review of a decision to make a deportation order. Madgwick J said, at 293:

"Subsections (8) and (9) must be read with the foregoing principles in mind.

> *In subs (8) there is, in the context of the subject matter, a clear implication that there must be a real chance of a reasonably imminent deportation, as distinct from a merely theoretical or insubstantial possibility of a deportation or a deportation that can only occur at some time far into the future. ...*
>
> *On a different view, s 253 of the Act may operate to diminish, or even to extinguish, the force of the interpretation to which I have referred in respect of ss 200 and 201 [ie that if the prospect is that such detention will be detention for a long period or an unknown period that is not acceptably short, this may possibly go to the validity of the deportation order, but in any case it will certainly affect the merits of the decision] ... Whatever the effect on the validity of a deportation order of the likelihood of indeterminate detention consequent upon such an order, such likelihood is, in my opinion, clearly an important matter affecting the merits of the decision to make such an order."*

159 The Full Court in *Vo* set out this passage, and then commented (at [12]):

> *"Whilst we respectfully agree with his Honour that these matters go to the merits of a decision under s 253(9) considering whether to release a deportee, we cannot accept that the length of detention can of itself destroy the legal validity of the detention. In our view, the statutory scheme is explicitly to the contrary ..."*

160 Their Honours went on to refer to s 206(2), which "squarely addresses the question of delay". They added that the words "pending deportation" in s 253(8)(a) refer to the requirement for detention in s 253(1) that the deportation order be "in force". (The Minister may revoke a deportation order under s 206(1)).

161 The observation by the Full Court that the statutory scheme was "explicitly to the contrary" of the notion that "the length of detention can of itself destroy the legal validity of the detention" is very important. The Full Court did not conclude that the expression "pending deportation" was incapable of carrying an implicit limitation in some other context; the Full Court rejected any such implication because it was denied by an express provision. This was the way in which the trial judge dealt with the matter in the present case. He observed at [23] that the discretionary scheme concerning deportation considered in *Vo*, which was regarded by the Full Court as structured to deal with the special circumstances in which deportation is to apply, had no counterpart in respect to the mandatory duty to remove unlawful non-citizens from Australia "as soon as reasonably practicable" under ss 196(1)(a) and 198.

162 The Solicitor-General argued that the material differences between the discretionary regime for deportation and the mandatory regime for removal supports the absence of any limitation

where no discretion is provided for. In our view, however, when the question is whether implications should be drawn against the curtailment of a fundamental common law right, the lack of any discretion points the other way.

163 In *Perez,* also a deportation case, Allsop J applied what had been said by the Full Court in *Vo*. The application in that case was sought on the ground that s 253(8) had limits that had been exceeded in the circumstances of the case, because (it was argued) Mr Perez's deportation to Cuba was not going to be possible within a reasonable period of time. His Honour held that the reasons of the Full Court in *Vo* "mandate, it seems to me, the view that the scope of the power granted by s 253(8) has not been exceeded here": at [108]. The evidence before his Honour included a minute to the Minister (for the purposes of a parallel decision whether to revoke the deportation order) that, his Honour was satisfied, provided a basis for concluding that deportation would, or could, be effected: at [67]. The decision also illustrates an important limitation on the authority of *Vo*. Allsop J granted the application for review of the decision not to release Mr Perez from detention because he found that the delegate had failed to "approach the task by reference to a framework, or perspective or prism dictated or moulded by the reasonable connection with deportation, that is, with the likelihood, and timing, of the execution of the deportation order": at [128], see [127]-[131]. His Honour's decision takes up and applies the observation of the Full Court in *Vo* that the limitations to which Madgwick J referred in the earlier *Perez v Minister for Immigration & Multicultural Affairs* (1999) 94 FCR 287 are relevant when considering the exercise of power under s 253(9).

164 Questions concerning the limitation on the power to deport were considered recently by a Full Court in *Luu v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 369 ("*Luu*"). In that case, the Court upheld a decision of a single judge dismissing an application for review of decisions by the Minister refusing to revoke the deportation order applicable to Mr Luu, and refusing to release him from detention. Mr Luu argued that because of the uncertainty about whether his deportation was possible, and if so at what time, the Minister could not be said to have been holding him in detention *bona fide* for the purposes of his deportation (at [63]). In fact, the Minister had been able to give Mr Luu a reasonably specific approximation of when he was likely to be deported (at [13] and [22]). In these circumstances, the Full Court rejected Mr Luu's contention, and said (at [64]):

> *"It does not follow from the fact that the time when deportation will be effected may not, at a particular time, be identifiable with precision that the purpose of the detention is not for the purpose of deportation. At the time of detention under s 253(1) it will generally be unlikely that the time at which deportation will be effected will be known with any precision ...[ss 253(2) and (8)] do not indicate that the detention power may be exercised only when arrangements are in place to effect the deportation, so that the time of deportation is known. They contemplate detention pending deportation, and whilst deportation arrangements are put in place and are executed."*

165 Their Honours commented that this view was reflected in the decision of the Full Court in *Vo,* especially at [12]–[13].

166 The Full Court in *Luu*, however, clearly did not regard the decision of the Full Court in *Vo* as foreclosing the conclusion that the length of a period of detention "and the prospects of effecting deportation in any reasonable time frame" might in all the circumstances of a particular case lead to the conclusion that the purpose of the detention was no longer "pending deportation". The Court noted that the appellant's application to present such a contention had been refused and that it would therefore be inappropriate to speculate about the sort of evidence that might lead to a conclusion that the Minister no longer had the purpose of detaining a deportee pending deportation: at [66]. Moreover, although the Court decided in the circumstances that it should not determine the question, it noted an argument put by HREOC, which had been given leave to intervene in the appeal, that the power to detain and the power to maintain detention should be construed with some "upper limit" on the length of the detention: at [68].

167 It is of great importance that a Full Court should follow a decision of an earlier Full Court unless convinced that the earlier Full Court is plainly wrong, the earlier Full Court decisions to which we have referred do not preclude a conclusion that the materially different provisions of the Act now being considered are subject to an implied limitation. Neither *Vo* nor *Luu* involved detention which was in truth mandatory, or indefinite, in the way it is contended that s 196(1) provides for. The fact that the Minister was able to order release from detention, as a matter of discretion pursuant to s 253(8) and (9), and that his power to do so was itself subject to judicial review, means that the cases do not stand as authority against the decisive application of the principles of construction which we regard as fundamental to the disposition of the present appeal. See generally *VFAD* at [121]-[129].

SUBSEQUENT DECISIONS AT FIRST INSTANCE

168 As we have noted in a different context, since the judgment of the trial judge in the present case was delivered applications of the same or a similar nature as that brought by Mr Al Masri have been heard by single judges of this Court. In some of those cases judges have followed the decision of the trial judge, whilst noting that the points involved were difficult and about which views might well differ. In some others, judges have expressed serious reservations about the reasoning of the trial judge and, in some instances, judges have declined to follow the first instance decision in this case.

169 In some of the cases, judges have concluded that the language of s 196 is intractable and the power of detention can only come to an end by the occurrence of one of the three terminating events specified in the provision – removal, the grant of a visa or deportation. On this view, there is no room for the application of any principles of construction that would result in the implication of a limitation on the power to detain. An example of this approach is the judgment of French J in *WAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1625, at [56]. In *SHFB v Goodwin* [2003] FCA 294 and *SHDB v Goodwin* [2003] FCA 300 von Doussa J agreed with French J, and added that in his opinion there was no lacuna in the legislative scheme for the detention of unlawful non-citizens. He concluded that there was no room for an implication that Parliament had overlooked the plight of a stateless person who had no country of nationality to which he could be readily returned. In *WAIS* French J did not have to reach a final conclusion, however, since he held that even if there were an implied limitation the case was not made out on the facts (see at [57]-[62]). As we have sought to explain, the language of s 196 is not, in our view, intractable. It is not sufficiently "unambiguous" or "unmistakable" as to authorise mandatory administrative detention for a period that has no reasonably foreseeable end, irrespective of the circumstances, including the personal circumstances, of the person detained.

170 Another criticism has concerned the trial judge's use of cases from other common law countries. Some judges have considered that his Honour's reliance upon authority from other common law countries was wrong since the language of the relevant provisions was materially different, and others have considered that his Honour's analysis of the cases was erroneous: see, for example, Jacobson J in *NAKG of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1600, at [52]; Whitlam J in *Daniel v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 196 ALR 52 at [32] and [35];

Emmett J in *NAGA v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 224 at [65]-[66]; cf Mansfield J in *Al Khafaji v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1369 at [32]; and Finkelstein J in *Applicant WAIW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1621 at [8]. We do not agree with these criticisms. The trial judge recognised the differences between the relevant provisions and treated the cases appropriately as indicative of the approach of the common law in construing statutes providing for administrative detention and the curtailment of fundamental rights.

171 It has also been said that an application for relief in the nature of *habeas corpus*, such as was made here, is fundamentally misconceived and that the appropriate way to proceed was by way of application for *mandamus* to compel an officer to perform the duty of removing an applicant or removing an applicant as soon as reasonably practicable: see, for example, Beaumont J in *NAES v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 2 at [11]; Whitlam J in *Daniel v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 196 ALR 52 at [37]; Selway J in *SHFB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 29 at [18]; Emmett J in *NAGA v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 224 at [68]). We are unable to agree with this criticism. In *Lau v Calwell*, considered earlier, some of the applications considered by the High Court were for *habeas corpus* which had been sought on the basis that the provision justifying detention in custody pending deportation was invalid. The applications were dismissed, but Latham CJ expressly referred to *habeas corpus* as providing an immediate remedy (at 556):

> *"The power to hold [a deportee] in custody is only a power to do so pending deportation and until he is placed on board a vessel for deportation and on such a vessel and at ports at which the vessel calls. If it were shown that detention was not being used for these purposes the detention would be unauthorized and* ***a writ of habeas corpus would provide an immediate remedy****."* [Emphasis added.]

172 Dixon J proceeded on the same basis (at 581); see also Williams J at 586. And see generally *Park Oh Ho v Minister for Immigration & Ethnic Affairs* (1989) 167 CLR 637.

173 It would seem, too, that Mason CJ had the same view about possible remedies when, in *Lim* (at 11-12) he observed that what initially began as lawful custody might "cease to be lawful

by reason of the failure of the Executive to take steps to remove a designated person from Australia" in conformity with the relevant part of the Act. A failure to remove a designated person from Australia "as soon as practicable" pursuant to s 54P(1) would, in the view of Mason CJ, have deprived the Executive of legal authority to retain that person in custody (see at 12). This is not the language of mandamus; the remedy that this language suggests is, to recall the language of both Latham CJ and Dixon J in *Lau v Calwell*, *habeas corpus* to provide an immediate remedy.

174 The constitutional validity of ss 196 and 198 of the Act was addressed by the recent decision of Emmett J in *NAGA v Minister for Immigration & Multicultural & Ethnic Affairs* [2003] FCA 224. His Honour concluded that no constitutional invalidity "[arose] from construing the relevant provisions as authorising continued detention of an unlawful non-citizen at a time when there is no real prospect of removing that person from Australia in the foreseeable future" (at [60]). His Honour's conclusion is based upon an analysis of *Lim* with which, for the reasons we have given, we differ, although we have not found it necessary to reach a final conclusion regarding the validity of the scheme.

CONCLUSION IN THE APPEAL

175 It follows that the appeal should be dismissed with costs.

176 Having regard to the prominence in the learned Solicitor-General's argument of practical concerns about a construction that would deprive the scheme of mandatory detention of the absolute certainty which he submitted it required, we would point out that the second limitation found by the trial judge, which we have upheld, is not likely to have a frequent operation. The limitation is not encountered merely by length of detention and it is not grounded upon an assessment of the reasonableness of the duration of detention. This is illustrated by the decision of French J in *WAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1625 where an applicant who sought to rely upon the reasoning of the primary judge in the present case failed to satisfy the threshold requirements for a finding that his continued detention was unlawful. We, of course, make no criticism of the decision in that case insofar as it turned upon the facts peculiar to it but it does illustrate that the conclusion that there is no real likelihood or prospect of removal in the reasonably foreseeable future is one that will not be lightly reached.

177 As the trial judge pointed out, it is for the applicant to adduce evidence that puts in issue the legality of detention, and then the burden shifts to the respondent to show that detention is lawful, and may be discharged on the balance of probabilities. We have referred earlier to the inapplicability of our observations to a person who seeks to frustrate by their own act the process of removal. It will have been apparent that our reasons are not directed to the significantly different circumstances of detention for the purposes of the deportation where the Minister retains a discretion, to be exercised according to law, to release a person from detention.

I certify that the preceding one hundred and seventy-six (176) numbered paragraphs are a true copy of the reasons for judgment herein of the Court.

Associate:

Dated: 15 April 2003

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Date of Hearing:	2 October 2002
Date of Judgment:	15 April 2003