High Court decisions on stateless persons

Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs [2004] 78 ALJR 1056
Al-Kateb v Godwin [2004] 78 ALJR 1096
Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji [2004] ALJR 1156

By Linda Tucker

The prospect of a detention limbo for unsuccessful visa applicants in Australia has been confirmed by the High Court, which has upheld the system of mandatory detention even where it results in the possibility of indefinite incarceration.

Australia's right as a sovereign state to deport a non-citizen who does not have permission to enter or remain hits a snag where there is no country to which the person in question can be sent. In two recent cases,[1] the issue arose as, following their unsuccessful asylum applications with further review either exhausted or not pursued, both claimants had no state to where they could be returned.

Both claimants had written to the minister for immigration, multicultural and Indigenous affairs, asking to be removed but the Australian authorities were unable to do so. Given that both men were classified as 'unlawful non citizens',[2] the *Migration Act 1958* (Cth) required that they must be detained until they were either removed from Australia or granted a visa. As neither was considered eligible for a visa, the only avenue was removal but with no prospect of removal, could the Act's mandatory detention regime still apply?

In a third case heard at the same time as the above,[3] the appellant challenged the provisions in relation to whether they authorised the particular conditions of detention that prevailed at the relevant time at the Woomera Immigration Reception and Processing Centre. The conditions were claimed to be so harsh and inhumane as to be punitive and thus not detention as contemplated by the Act. As this matter dealt with issues narrower than the first two cases, it is discussed separately, below.

Al-Kateb and Al Khafaji

Mr Al-Kateb is a Palestinian who has lived most of his life in Kuwait and it was not contested that he was a 'stateless person' as there is no country in which he has a right to reside. He came to Australia in December 2000. His application for a protection visa was refused and his applications for review of that decision failed. He wrote to the minister in August 2002 asking to be returned to Kuwait or, if this was not possible, to Gaza.

In *Al Khafaji*, the appellant was an Iraqi who was held to have a right to reside in Syria. Mr Al Khafaji's application for a protection visa was refused despite him having a well-founded fear of persecution in Iraq, because it was held that he had effective protection in Syria. His application to the Refugee Review Tribunal for review of the decision was dismissed and he did not pursue judicial review of the decision. Once his visa application process ended, Mr Al Khafaji became an unlawful non-citizen and was detained and, in February 2001, he wrote to the minister seeking removal to Syria. While it may have been his right to reside in Syria that precluded him from successfully applying for protection in Australia,4 such right did not enable the Australian authorities to secure the agreement of Syria to receive him.

Asylum-seeker Abbas Mohammad Hasan al-Khafaji outside court in Adelaide, on 7 August 2004, after the High Court ruling that the Migration Act gave the Commonwealth Government power to hold detainees indefinitely in detention centres.
Photo: Michael Milnes / News Image Library

As the decision in *Al Khafaji* followed the reasons in *Al-Kateb*, the discussion of the two cases here refers only to *Al-Kateb*.

The High Court held, by majority,[5] that ss189, 196 and 198 of the *Migration Act 1958* (Cth) ('the Act') authorised the indefinite detention of asylum applicants designated 'unlawful non-citizens' pursuant to the Act.

Section 189(1) is unambiguous in its requirement that unlawful non-citizens are to be detained. It provides:

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

Section 196(1) concerns the duration of detention. It provides:

> An unlawful non-citizen detained under s189 must be kept in immigration detention until he or she is:
>
> (a) removed from Australia under s198 or 199; or
>
> (b) deported under s200; or
>
> (c) granted a visa.

The claimants argued, however, that the provision could not apply to indefinite detention, given the terms of s198 which provides, relevantly:

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

Given that there were no prospects of removal from Australia in the reasonably foreseeable future, the High Court considered whether the relevant sections could be construed to authorise indefinite detention. In the leading judgment, Hayne J set out the underlying constitutional questions for the court in this case and in *Al Khafaii* and *Behrooz*:

> whether, and to what extent, the statutory scheme requiring mandatory detention of unlawful non-citizens is consonant with the long-established principle that '[n]o part of the judicial power [of the Commonwealth] can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Ch III.[6]

As the power to detain, pursuant to the Act, can only be incidental to federal parliament's power to make laws with respect to aliens (s51(xix)) and immigration (s51 (xxvii)),[7] is there a point beyond which detention becomes punitive and thus a matter that is only for the judicial power?

As Hayne J noted,[8] referring to *Chu Keng Lim*, the purpose of the provisions determined whether or not they could be construed as punitive and thus beyond parliament's powers. As long as such provisions were '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' then they did not contravene Ch III.

Detention under the Migration Act is not punishment for an offence; it is incidental to the aliens and immigration heads of power, being for the purpose of exclusion of a non-citizen from the Australian community.[9] McHugh J referred to his earlier judgments in which he had described the power conferred on parliament to make laws with respect to aliens under s51(xix) as unlimited as long as such law has aliens as its subject.[10]

'No derring-do'

While in the case of Mr Al-Kateb who, being a stateless person, could be subject to indefinite detention, it was not for the High Court to strike down constitutionally valid provisions. Hayne J noted, 'if Australia is unwilling to extend refuge to those who

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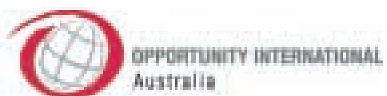

have no country of nationality to which they may look both for protection and a home' then detention continues as it does not impinge on the separation of powers.[11] Or, in the words of Judge Learned Hand, cited by Hayne J,

> 'Think what one may of a statute ... If ... society chooses to flinch when its principles are put to the test, courts are not set up to give it derring-do.'[12]

Interpretation of the provisions

The court also dismissed the contention that parliament could not have intended for the provisions to result in indefinite detention or that the provisions should be interpreted consistently with Australia's international obligations. McHugh J described the words of the three relevant sections as 'too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights'.[13] Callinan J also held that the language of the provisions left no room for implication.[14]

McHugh J v Kirby J

Disagreement over two aspects of the decision - in relation to the executive's power to detain aliens and the role of international law in the interpretation of the Constitution – resulted in a fiesty exchange of views within the judgments of McHugh J and Kirby J.

Kirby J's statement in his reasons, that 'indefinite detention at the will of the executive ... is alien to Australia's constitutional arrangements',[15] was soundly dismissed by McHugh J as 'not true'.[16] McHugh J went to some lengths to dismiss Kirby J's contention.[17] His Honour cited regulations authorising the detention of persons, considered disloyal or otherwise a threat in the First World War and Second World War, and the High Court decisions in both wars, that unanimously upheld the validity of such provisions.

Kirby J responded by referring to cases such as the wartime High Court judgments cited by McHugh as 'being viewed with embarrassment'.[18]

McHugh J then proceeded to describe as 'heretical' Kirby J's view concerning interpretation of the Constitution with reference to provisions of international law accepted after its enactment.[19]

Kirby J's response to this criticism began with: 'I cannot agree with much of what McHugh J has written in his reasons...'.[20]

Behrooz

In *Behrooz*, the appellant had escaped from Woomera and was subsequently charged under s197A of the Act. The issue was not whether s196(1) of the Act, which mandates continued detention, is valid, but whether there could be valid detention at Woomera given the conditions that prevailed there. The appellant argued that, given the conditions at Woomera, the detention was not authorised and thus he could not be prosecuted for escaping from immigration detention.

The High Court, by majority,[21] dismissed the appeal. The detention itself remains constitutionally valid (as set out in the reasoning in *Al-Kateb*), irrespective of the conditions imposed.[22] An unlawful citizen still has recourse to civil remedies and the protection of criminal law if subjected to inhumane conditions or assault. Such actions do not alter the nature of the detention, however, which remains the deprivation of liberty as incidental to the executive's power to exclude unlawful non-citizens from the Australian community.[23]

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1 *Al-Kateb v Godwin* [2004] 78 ALJR 1096; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] ALJR 1156.

2 Section 14(1) *Migration Act 1958* (Cth).

3 *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] 78 ALJR 1056.

4 Section 36(3) of the Act provides:

> Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently ... any country apart from Australia...

5 Hayne, McHugh, Callinan, Heydon JJ.

6 At [212], citing *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.

7 In *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, detention without judicial intervention can be valid: per Gaudron Jat 55; Brennan, Deane and Dawson JJ, at 33.

8 At [251]-[252].

9 Hayne J at [256], [261]-[263].

10 At [41].

11 At [268].

12 *United States v Shaughnessy* 195 F 2d 964 at 971 (2nd Cir 1952), cited by Hayne J at [269].

13 [33].

14 [297]-[298].

15 [146]

16 [55].

17 [55]-[61].

18 [163].

19 [63].

20 [152].

21 Gleeson CJ; McHugh, Gummow, Heydon JJ; Hayne J; Callinan J.

22 Hayne J at [175]-176].

23 See Gleeson CJ at [21], and McHugh, Gummow, Heydon JJ at [50]-[53].