MINISTER FOR IMMIGRATION v AL MASRI [2003] FCAFC 70, delivered 15 April 2003 – summary by David Bitel

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The Full Bench constituted by Chief Justice Black and Justices Sundberg and Weinberg delivered a joint decision on 15 April dismissing the Minister's appeal with an order for costs against him.

The Court noted the central issue in the appeal to be whether the power and duty of the Minister to detain an unlawful citizen who has no entitlement to a visa but who was asked to be removed from Australia continues during a time when there is no real likelihood or prospect of that person's removable in the reasonably foreseeable future. Alternatively the question may be put as whether the Act authorizes and requires the indefinite and possibly even permanent administrative detention of such a person. The Court noted that the appeal involved consideration of important questions of constitutional law and 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.

The relevant facts briefly were that Al Masri, having arrived in Australia unlawfully, was detained at Woomera and his protection visa application was refused by the RRT on 5 December 2001. He then completed and signed a written request to the Minister to be returned to the Gaza Strip, he being a Palestinian from the Gaza Strip. Notwithstanding his written request the Department have been unable to effect 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.

Justice Merkel delivered a judgment on 15 August 2002 which was the subject of the appeal.

The grounds of appeal were that Justice Merkel had 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 relevant statutory provisions are Sections 196 and 198 of the Migration Act. Reference was also made to Section 189. The Court referred to the recent decision of the Full Court in *MIMIA v VFAD of 2002* (2003) 196 ALR 111 and noted that the effect of Section 189 and 196 is that no decision under the Act is required as a pre-condition 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 could be permanent. It was further noted that there is a distinction between detention for the purpose of removal and detention for the purpose of deportation of non-citizens who have committed serious crimes under Section 200.

The Court first looked at applicable constitutional principles and the presumption against exceeding the bounds set by the Constitution. It noted that 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 the trial judge found to be implied (para. 49).

It is well settled that the Parliament has the power to legislate for the detention of aliens for the purpose of their expulsion. See Lim's case ((1992) 176 CLR 1). The Court there held that Chapter 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 Chapter III designates. The judges then referred to comments of Justices Brennan, Deane and Dawson at pp. 30-32 in *Lim*:

"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".

And at p. 33:

"(The law is valid) 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 be properly be seen as an incident of the Executive powers to exclude, admit and deport an alien. In the event, they will be of a punitive nature and contravene Chapter III's insistence that judicial power of the Commonwealth be vested exclusively in the courts which it designates."

Thus, if the power to keep a person in detention is an incident of the Executive powers of exclusion, admission and deportation of aliens and is not by its nature part of the judicial power of the Commonwealth, it will be constitutionally valid.

The Court then referred to the earlier judgment of the High Court in *Lau v Calwell* (1949) 80 CLR 533 where the Court rejected a contention that indefinite or unlimited detention was valid. Chief Justice Latham noted that "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." Dixon J noted 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." Williams and Rich noted that "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."

The Court states that the judgments in *Lau v Calwell* all appear to involve an underlying assumption that deportation would in fact be capable of being affected within some foreseeable time frame (para. 70). Thus, unless the power and duty of detention conferred by 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. (para. 71) In the absence of such an implied limitation, the elements that save 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. These elements are a section with a practical capacity to bring about release from detention and the specific time limit on detention provided for in the scheme and under consideration. That element is wholly absent in the scheme first? mandatory detention currently in place.

The Court then referred to comments made by Justice Gummow in *Kruger v Commonwealth* (1997) 190 CLR 1 that *Lim* is authority for the proposition that whether a power to detain persons or to take them into custody was to be categorized as punitive in nature so as to attract the operation of Chapter III depended on whether those activities were reasonably capable of being seen as necessary for a legitimate, non-punitive objective. He noted that the categories of non-punitive involuntary detention were not closed. Thus, punitive detention is unlawful. (para. 74). 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 as to change the character of the detention so that it becomes essentially punitive in nature.

The Court then discusses the possibility that the mandatory detention scheme may be invalid under the Aliens Power (Section 51) (XIX) of the Constitution in certain situations. Although the Aliens Power is of wide amplitude, see *MIMA ex parte Te* (2002) 193 ALR 37, 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 Australia. There is a clear distinction between detention 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.

The conclusion is that constitutional considerations point strongly to the need and foundation for a limitation such as those found by Justice Merkel. However, the Court then notes it is unnecessary to decide whether without such a limitation, the provisions would be offensive to the Constitution because the central issue in the appeal can be determined by the application of the well-established principle of statutory construction concerning fundamental rights and freedoms.

Statutory Construction – The Presumption against the Curtailment of Fundamental Freedoms

The Court quotes Chief Justice Gleeson in *S157/202 v Commonwealth Australia* (2003) 195 ALR 24 at p. 30 that:

"Courts 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. ... 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'."

The Court then gives various examples of this principle in Australian law and in other common law countries and then at para. 86 notes that there can be no question that the right to personal liberty is amongst the most fundamental of all common law rights and universally recognized human rights. The court quotes various authorities for this principle stressing the common law's concern for the liberty of individual extends to those who are within Australia unlawfully (para. 89 – *Kioa v West* (1985) 159 CLR 550) and applying the English authority of *R v Home Secretary, ex parte Khawaja* [1984] AC 74 where Lord Scarman notes: "Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others".

The more serious the interference with liberty, the clearer the expression of intention to bring about that interference must be. Detention that is indefinite is especially onerous if for no other reason than it is detention with no end in sight. (para. 92) The Court then notes that indefinite detention is rarely invoked in sentencing regimes and is seen as oppressive even in the context of punishment.

In considering the issue, the Court then refers to authorities from other common law countries and in particular, the *Hardial Singh* principles where Justice Woolf noted:

"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 ... 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."

This doctrine was recently approved by the House of Lords in *R v Secretary of State of the Home Department, ex parte Saadi* (2002) 4 All ER 785. See also the Hong Kong Court of Final Appeal in Lam's case where the Court stated, "The *Hardil Singh* principles represent the proper approach to the statutory construction of any statutory power on administrative detention." The court then refers to a recent American authority.

Quoting Justice Deane in *Kiowa v West*:

"An alien who is unlawfully within this country is not an outlaw. Neither public officer not private person can physically detain or deal with his person ... without his consent except in accordance with the positive authority of the law".

The Court confirmed that 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 is not excluded because the subject matter of a statute is the detention of aliens. It is a principle of universal application (para. 114).

The critical question therefore 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. In other words, 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. (para. 115).

The manifestation of such an intention for detention to continue without foreseeable and irrespective of the age, gender, personal or family circumstance of the person, irrespective of the unlikelihood of a person absconding and irrespective of the absence of any threat presented to the Australian community of a person detained, must be established. In assessing this, general language is rarely sufficient to demonstrate such an intention to abrogate fundamental rights and the Court concludes that the terms of Section 196 taken alone or in context of the legislative scheme as a whole, does not suggest that 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. (para. 120)

The Court notes that the fact that a duty is placed on the Minister to remove an unlawful non-citizen as soon as reasonably practicable after request in writing by that person, gives a strong indication that there is an assumption that detention will come to an end. The intention to curtail the right of personal liberty has not been manifested by any unmistakable or unambiguous language in the legislation (para. 132).

The Court refers to *Park Oh Ho v MIEA* (1989) 167 CLR 637 to note that the Minister's purpose in detaining must be for the bona fide purpose of removal, otherwise the detention would not be lawful.

Construction in accordance with International Obligations

Interestingly, the Court then seeks justification for its decision in established rules of international law and notes that the Act should so far as language permits, be interpreted and applied in a manner consistent with established rules and international law and in a manner which accords with Australia's treaty obligations. Reference is then made to Article 9 of the International Covenant on Civil and Political Rights (ICCPR) and the view of the Human Rights Committee in *A v Australia* which considered the issue of arbitrary detention. Whilst the Court notes that 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 and receiving reports conciliating and considering claims that a State Party is not fulfilling its obligations. The Court also notes that it is appropriate to consider opinions expressed in works of scholarship and in the field of international law and then considers the jurisprudence of the European Court of Human Rights. Finally, in the section the Court refers to Article 37(b) of the Convention on the Rights of the Child 1989.

The Court then considers other Federal Court decisions. The cases of *Vo* and *Perez v Minister for Immigration* which relate to deportation are distinguished on the facts as is *Luu v MIMA* [2002] FCAFC 369. Other first instance decisions of judges since the consideration of Justice Merkel of the language of Section 196 are not followed. Four lines of such authority are noted:

a. The cases which consider that the language of Section 196 is intractable and that the power of detention can only come to an end by the occurrence of one of the 3

terminating events specified in the provision, namely removal, grant of a visa or deportation.

b. That it is inappropriate to rely on authority from other common law countries.

c. That an application for relief in the nature of habeas corpus is not available and that the appropriate way to proceed is an application for mandamus to compel an officer to perform the duty of removal.

d. That no constitutional invalidity arose.

In conclusion, the Court expressed some limitation to the implications of its decision, noting that it is for the applicant to adduce evidence that puts in issue the legality of the detention and when this is done, the burden shifts to the respondent minister to show that the detention is lawful, which burden may be discharged on the balance of probabilities. Further, the decision has no application to persons who seek to frustrate by their own act the process of removal and also does not relate to the circumstances of detention for the purpose of deportation, where the Minister retains a discretion to be exercised in accordance with the law to release a person from detention.

Thus, the implications of the decision may be less significant than the press would have the public believe. Clearly, as it is unlikely that the High Court would grant leave to consider an appeal given the fact that Al Masri is now out of Australia, unless the matter comes to the High Court through some other case, the government will be left with the only alternative of overcoming the ratio of the decision by legislation. In so doing, of course it must bear in mind the Constitutional issues which were the subject of considerable discussion in the case.