IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M47 of 2018

BETWEEN:

Plaintiff M47/2018
Plaintiff

and

Minister for Home Affairs
First Defendant

The Commonwealth of Australia
Second Defendant

HIGH COURT OF AUSTRALIA
FILED
31 JAN 2019
THE REGISTRY SYDNEY

PLAINTIFF'S REPLY

Human Rights for All Pty Ltd
PO Box 391, Lindfield, NSW, 2070
Email: alison.battisson@hr4a.com.au

Telephone: +61(0)400635110
Fax: N/A
Ref: Alison Battisson / M47 2018

Part I: Publication on the internet

1. This submission is in a form suitable for publication on the internet.

Part II: Reply

2. ***Denying the obvious:*** The Commonwealth denies that even the *Al-Kateb* factual threshold is reached here (CS[3]). That threshold entails that: (i) on the *present* facts, (ii) there is *no real likelihood or prospect* (iii) of *removal* (as distinct from anterior developments that might lead to removal, eg substantiating the plaintiff's identity), (iv) in the *reasonably foreseeable future*, (v) although removal remains *possible*.[1] The facts support at least this inference (PS[13]-[14]).

3. *First,* viewed in light of the Department's extensive steps taken over many years (RSC[73]-[75]), any ongoing investigations into the identity of the plaintiff (CS[10]) currently enliven no real prospect of uncovering new identifying material sufficient to satisfy the Commonwealth (RSC[76]). As to the steps suggested at SCB 488, the Department's own analysis says only that it is "possible" that the "results" of certain investigative avenues "may generate further leads to verify or confirm" the plaintiff's identity (SCB 507). The Commonwealth also relies upon its continuing engagement with the Moroccan Embassy (CS[10].[2] Given that the Commonwealth's original fingerprint analysis request to Interpol Morocco made over 7 years ago apparently remains outstanding (see SCB 314, 365, 444); Moroccan Embassy officials have concluded that the plaintiff is not Moroccan following an interview with him in Arabic (SCB 327, 494[15]); and the Commonwealth can point to no avenue of inquiry likely to establish his identity (RSC[76]); the compelling inference is that no material progress in finding a country willing to receive the plaintiff is likely in the reasonably foreseeable future.

4. The suggestion that the plaintiff himself might realistically provide new information sufficient to prove his identity for the Commonwealth's purposes (CS[11]) is belied by the past 9 years' experience and by the Department's position that the plaintiff has so little credibility that "[a]ny determination as to his identity must be made exclusively on independently verifiable information" (SCB 507; 451). And there is no real prospect that an interview in Arabic between the plaintiff and Algerian Embassy officials could alter the position (cf CS[11]), given that Algeria could not confirm the plaintiff's identity or nationality even on the basis of documentation or a recording of the plaintiff speaking Arabic (SCB 328-330).

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[1] *SHFB v Goodwin* [2003] FCA 294 (***Al-Kateb FC***) at [21], [26] (von Doussa J); see also *Al-Kateb v Godwin* (2004) 219 CLR 562 (***Al-Kateb***) at [2], [18] (Gleeson CJ), [31], [33] (McHugh J), [105] (Gummow J), [145] (Kirby J), [230]-[231] (Hayne J), [295] (Callinan J).

[2] The Commonwealth's claim that the Moroccan Embassy "is considering" information provided to it by the Commonwealth concerning the plaintiff (CS [10]) is not established by the RSC.

5. *Second*, the claim that the plaintiff is not stateless (CS[12]) within art 1 of the Statelessness Convention[3] – despite the agreed fact that the Commonwealth has not identified a country willing to accept the plaintiff as a national or person with a right of entry (RSC[77]), and despite the facts found at first instance and applied on appeal in judicial proceedings to which the Minister was a party (SCB 275-6[2], [4], 368[1], 378[43], 384[74], 392[128]) – is unreal.

6. *Third*, it cannot be said that the Commonwealth's efforts to secure a country to which to remove the plaintiff (CS[13]) currently ground a real prospect, as distinct from a mere possibility, of removal – particularly in circumstances where the Commonwealth has been unable to reach any state of satisfaction about who the plaintiff is (see, eg, RSC[78.3]). In *Al-Kateb FC*, von Doussa J made his central factual finding notwithstanding that enquiries that might have secured the plaintiff authority to travel elsewhere remained outstanding (at [17], [19], [26]). For the same reason, any extant inquiries described at RSC[78] do not displace the inference described at [2] above.[4] Further, the present facts contrast starkly with *M76* (cf CS[14]), where the plaintiff had close relatives living in India and in another country with an established practice of offering substantial resettlement places, had been invited to approach those countries directly, and had not yet asked in writing to be removed to any country.[5]

7. The Commonwealth has been unable to identify any country that will take the plaintiff. The chance of a change in that position is no more than a theoretical possibility. It is a mere "hope" that should not "triumph … over present experience".[6] *At least* the inference drawn in *Al-Kateb* should be drawn here. However, the length of the plaintiff's detention, the extent of the Commonwealth's investigations, and the further complication of the problems in establishing the plaintiff's identity, justify the more extensive finding sought at PS[14]. *Al-Kateb* can be distinguished (cf CS[15]) on the basis that the majority did not squarely consider whether facts of that kind necessarily severed the connection between the detention of a non-citizen and the purpose of removing that non-citizen.[7] Alternatively, if the majority's reasoning would have been the same "even if there had been no real prospect of Mr Al-Kateb *ever* being removed" (CS[15]), that necessarily raises a constitutional problem ([12]ff below).

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[3] See PS [13], and UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (30 June 2014) at [23]-[24], [37] (where a state treats an individual as a non-national even though the individual would meet its nationality criteria, that practice "rather than the letter of the law" is determinative for the purposes of the definition of statelessness).

[4] See, analogously, *Plaintiff M47/2012 v D-G of Security* (2012) 251 CLR 1 at [147]-[148] (Gummow J), [524] (Bell J) (dissenting on this issue).

[5] *Plaintiff M76/2013 v MIMAC* (2013) 251 CLR 322 (***M76***) at [147] (Crennan, Bell and Gageler J).

[6] *Al-Kateb* at [124] (Gummow J).

[7] See *Al-Kateb* at [231] and [227], [229]-[230] (Hayne J), [295] (Callinan J).

8. ***2005 amendments:*** Putting aside the weak status of the presumption relied upon at CS[37],[8] and the full context of the extrinsic material,[9] CS[36]-[41] ignores the radical change to the meaning of "immigration detention" within s 196(1) effected by the 2005 Act (PS[36]-[38]). It is no longer the case that detention consisting of restraint in custody is mandated by s 196(1) "until removal, or deportation, or the grant of a visa".[10] Relevantly, s 196(1)'s "mandate" would be satisfied by releasing the plaintiff into the community on condition under s 197AB. Nor is it now beyond the Act's contemplation that there may be "a category of non-citizen ... who can live and work in the Australian community though they do not have a visa permitting them to do so" (cf CS[25]): this is precisely the effect of Div 7 Subdiv B.

10 **9.** Thus, the plaintiff's construction neither "leave[s] a gap" in, nor "does violence to", the statutory scheme (cf CS[25]). And as to the *Al-Kateb* majority's statements that s 196's text is intractable, Div 7 Subdiv B and s 195A create a flexibility that justifies construing ss 189, 196 and 198 so that restraint in custody – the form of detention at the heart of both the *Lim* principle and the principle of legality's respect for liberty[11] – must not continue where removal is unlikely as a matter of reasonable practicability.[12] That mandamus cannot compel release under those provisions does not alter the analysis (cf CS[41]): the *legality* of the plaintiff's current detention is not determined by the *relief* available to him. But the absence of that relief illustrates the arbitrary character of custodial detention under ss 196 and 198. In practice, unlike the discretionary regime contemplated by Gleeson CJ in *Al-Kateb* (at [22]), it is difficult to identify

20 any fetters on the Minister's power to choose between immigration detention in custody and immigration detention by release into the community for every detainee (PS[43]; cf CS[38]).

10. ***Statutory text:*** The analysis at CS[26]-[29] ignores a critical element of the interaction between ss 189, 196 and 198. The word "until" in s 196(1) does more than signify a temporal limit. It establishes a purposive connection. Unless removal under the Act is available as a real prospect, the detention lacks the character of being detention for the purposes of, or "until", removal. No "implication" is involved (cf CS[30]): one simply gives effect to the statutory text.

11. ***Principle of legality:*** Where constructional choices are open in respect of the power to detain in custody, the principle of legality requires that the law be construed in a manner that

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[8] See *Flaherty v Girgis* (1987) 162 CLR 574 at 594 (Mason ACJ, Wilson and Dawson JJ).
[9] See PS[37]; Minister's second reading speech, *Hansard* (House of Representatives), 21 June 2005 at 55 (noting that the Bill was "landmark legislation and far-reaching in both its scope and importance"); cf CS fns 27, 56.
[10] *Al-Kateb* at [241] (Hayne J). Pt 8C is irrelevant (cf CS[40]); it says nothing about when detention under the Act is permissible.
[11] See PS[37]; *Williams v The Queen* (1986) 161 CLR 278 at 292, 297 (Mason and Brennan JJ), 304 (Wilson and Dawson JJ).
[12] See *Al-Kateb* at [14], [19], [22] (Gleeson CJ), [117], [122] (Gummow J).

minimises intrusions on personal liberty (cf CS[34]). It is immaterial that a non-citizen's right to enter and remain in Australia is purely statutory: a non-citizen is entitled to personal liberty except if detained pursuant to lawful authority. The fact that the detention in custody is a deprivation of personal liberty and, in the absence of valid statutory authority, would constitute tortious conduct, is sufficient to engage the principle: see PS[55.5]. Further, recognising that the scheme of the Act is to regulate permission to enter and reside in Australia, and that the Act strikes a balance between competing interests, does not provide a warrant to adopt an expansive reading of limited powers of detention. Nor does the appeal to convenience at CS[32].

12. ***Invalidity:*** *Lim* holds that "laws authorising … the detention in custody by the executive of non-citizens, being laws with respect to aliens within s 51(xix) … , will not contravene Ch III … *only if* … 'the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purpose of deportation or necessary to enable an application for an entry permit to be made and considered'."[13] Seeking to extract from *Lim* a higher-level premise as to the distinction between punitive and non-punitive purposes of detention (CS[46]-[47]), the Commonwealth contends that "segregat[ion] … pending removal" is a constitutionally permissible purpose for detention even where there is no "real prospect" of removal in the reasonably foreseeable future (CS[48]-[49]). That would expand the concept of detention for the purpose of *removal* to encompass detention for the purpose of ensuring *availability for removal* when (*if ever*) removal becomes reasonably practicable (CS[49]).

13. The Court should reject the claim that segregation-pending-possible-removal is a valid purpose of executive detention in custody. *First*, the proposition that the Executive may detain aliens for the purpose of segregating them from the Australian community should be rejected. It is inconsistent with the constitutional holding in *Lim* ([12] above), and with the reasoning in *Koon Wing Lau v Calwell*,[14] on which *Lim* was expressly based.[15] In *Calwell*, the validity of s 7 of the *War-Time Refugees Removal Act 1949* (Cth) was challenged on the basis that it was "a law with respect to unlimited incarceration and the Commonwealth has no power to make such a law" (at 538) and left "the Minister (or 'an officer') entirely at large as to how long a person is to be kept in custody" (at 539). The Court held[16] that s 7 was valid under s 51(xix)

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[13] *M76* at [138] (Crennan, Bell and Gageler JJ, emphasis added), citing *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (***Lim***) at 33 (Brennan, Deane and Dawson JJ); see also *Plaintiff S4/2014 v MIBP* (2014) 253 CLR 219 (***S4***) at [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 (***M96A***) at [21] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).
[14] (1949) 80 CLR 533 (***Calwell***).
[15] *Lim* at 31-32 (Brennan, Deane and Dawson JJ).
[16] At 555-6 (Latham CJ, McTiernan J agreeing), 581 (Dixon J), 586-7 (Williams J, Rich J agreeing).

because it did not purport to create a power to keep a deportee in custody for an unlimited period, but was confined to the purpose of deportation. That holding is inconsistent with segregation being a purpose capable of justifying indefinite detention under a s 51(xix) law.

14. Nor did such a proposition form part of the reasoning of a majority of Justices in *Al-Kateb*. Whilst it underpinned the reasoning of Hayne J[17] (Heydon J agreeing) and McHugh J[18] on the validity of ss 196 and 198, Callinan J did not need to decide if this was correct.[19] That represents a material difference between the reasons of the majority on validity (cf CS[19]). In the minority, Gleeson CJ and Gummow J (Kirby J agreeing) understood *Lim* in terms that did not include segregation as a permissible purpose.[20] The minority's understanding in that regard aligns with this Court's reasoning in *S4* at [25]-[26] and in *M96A* at [21]-[22] (PS[60]).

15. *Second*, where there is no real prospect of removal, the Commonwealth's purported purpose reduces to the impermissible purpose of *segregation* itself. *Third*, if segregation is not a constitutionally permissible purpose, and removal is not a practically available purpose, then segregation-pending-possible-removal becomes a vehicle by which the Executive's "intention" to remove displaces the Court's function of determining, at any time, whether the duration of the detention can be characterised as necessary for the purpose of removal.[21]

16. *M96A* is not to the contrary (cf CS[49], [51]). There, objectively determinable criteria governed the duration of transitory persons' detention – including the cessation of a need to be in Australia for medical treatment.[22] Conversely, in circumstances where there is no real prospect of removing the plaintiff – and no identifiable avenue likely to succeed in establishing key facts that could facilitate his removal (RSC[76], [78.3]) – the only concrete factum that could terminate his detention in custody in the reasonably foreseeable future is the "unconstrained, and unascertainable, opinion of the Executive"[23] that he should be released.

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R Merkel QC
(03) 9225 6394
ronmerkel@vicbar.com.au

L T Livingston
(02) 9151 2065
livingston@newchambers.com.au

E Nekvapil
(03) 9225 6831
emrys@vicbar.com.au

C G Winnett
(02) 8915 2673
cwinnett@sixthfloor.com.au

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[17] At [245]-[247], [267]-[268]. See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 (***Woolley***) at [222] and [227] (Hayne J).
[18] At [45]-[49], [74]. In *M76*, Hayne J adhered to his *Al-Kateb* reasoning (at [129]); Kiefel and Keane JJ apparently considered ss 189 and 196 to be validly supported by the purpose of segregation (at [183], [207]).
[19] At [289]. See also *Woolley* at [264] (Callinan J).
[20] *Al-Kateb* at [4] (Gleeson CJ) and [110] (Gummow J, Kirby J agreeing at [146]). See also Gummow J at [126]-[134], [139]-[140] and again in *Woolley* at [149]-[151].
[21] *Woolley* at [149]-[151] (Gummow J); *M96A* at [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).
[22] See *M96A* at [27], [32] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).
[23] *M96A* at [31] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).