



## HIGH COURT OF AUSTRALIA

28 November 2023

NZYQ v MINISTER FOR IMMIGRATION, CITIZENSHIP  
AND MULTICULTURAL AFFAIRS & ANOR  
[2023] HCA 37

On 8 November 2023, the High Court answered questions of law reserved for its consideration in a special case to the effect that ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) ("the Act"), on their proper construction, authorised the plaintiff's detention as at 30 May 2023 and 8 November 2023, but the sections are beyond the legislative power of the Commonwealth Parliament insofar as they applied to the plaintiff as at those dates. The order was announced as having been agreed to by "at least a majority" of the Court. Today, the High Court published its unanimous reasons for that order.

Section 189(1) imposes a duty on an "officer" (as defined under the Act) to detain a person who the officer "knows or reasonably suspects ... is an unlawful non-citizen". The duration of detention required by s 189(1) is governed by s 196(1), which provides that an unlawful non-citizen "must be kept in immigration detention until" the occurrence of one of several specified events, relevantly the grant of a visa or removal from Australia under s 198.

The plaintiff is a stateless Rohingya Muslim born in Myanmar. In 2012, he arrived in Australia by boat and was taken into immigration detention under s 189 of the Act. In 2014, he was granted a bridging visa and released from immigration detention. In 2016, he pleaded guilty to a sexual offence against a child and was sentenced to five years' imprisonment with a non-parole period of three years and four months. Upon his release from criminal custody on parole in 2018, the plaintiff was taken again into immigration detention under s 189(1) of the Act. In 2020, a delegate of the first defendant found the plaintiff to be a refugee in respect of whom Australia had protection obligations, but refused his application for a protection visa. Officers were then obliged under s 198 of the Act to remove the plaintiff from Australia as soon as reasonably practicable. The plaintiff also requested to be removed to another country. As at 30 May 2023, there was no real prospect of his removal from Australia in the reasonably foreseeable future.

The plaintiff commenced proceedings in the original jurisdiction of the High Court claiming that his continuing detention was not authorised by ss 189(1) and 196(1) of the Act. He argued that to be the result of the proper construction of those provisions ("the statutory construction issue"), and alternatively that those provisions contravened Ch III of the *Constitution*, which vests in Ch III courts the exclusively judicial function of adjudging and punishing criminal guilt ("the constitutional issue"). The plaintiff sought leave to reopen this Court's decision in *Al-Kateb v Godwin* (2004) 219 CLR 562, which held, by majority, that: ss 189(1) and 196(1) applied to require the continuing detention of an unlawful non-citizen in respect of whom there was no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future; and those sections as so applied did not contravene Ch III of the *Constitution*.

The High Court unanimously held that the plaintiff failed on the statutory construction issue but succeeded on the constitutional issue. The Court declined to reopen the statutory construction holding in *Al-Kateb*. The Court reopened and overruled the constitutional holding in *Al-Kateb*. The Court held that ss 189(1) and 196(1), as applied to the plaintiff, contravened Ch III of the *Constitution* because the plaintiff's detention was not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose in circumstances where there was no real prospect of the removal of the plaintiff from Australia becoming practicable in the reasonably foreseeable future.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*