

The following case notes, written as part of my student editorship of the University of Western Australia Law Review in 2014, would never have come into existence but for the encouragement and advice of the late Dr Peter Johnston. Peter was instrumental in my decision to apply to be a student editor of the Law Review, and provided incisive feedback on early drafts of each note. He was an exceptional teacher and lawyer, with a gentle, probing intellect and an infectious passion for the law. His dedicated, generous mentorship during my final years at UWA was truly transformative. It is a great privilege to have called him my teacher and my friend.

LILY HANDS*

PROLONGED DETENTION OF UNLAWFUL NON-CITIZENS: PLAINTIFF S4/2014 V MINISTER FOR IMMIGRATION AND BORDER PROTECTION

The recent unanimous decision of the High Court in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*¹ ('*Plaintiff S4*') offers a sharp reminder that the *Migration Act 1958* (Cth) will not accommodate arbitrary changes in government policy which undermine the strict constitutional and statutory limitations on immigration detention. In *Plaintiff S4*, an extremely restricted operation was attributed to relevant provisions of the *Migration Act* to avoid frustrating the administrative processes for which the prolongation of detention had been justified. This proved incompatible with the scope of decisive autonomy that the Minister for Immigration and Border Protection had been assumed to possess. This case note considers the likely practical effects of the decision, as well as the extent to which the Court's reasoning may signal scope for future restrictions on the majority position in *Al-Kateb v Godwin* ('*Al-Kateb*').²

I FACTS

The plaintiff was a stateless asylum seeker who arrived in Australia by boat in December 2011 and was detained pursuant to the *Migration Act 1958* (Cth) ('*the Act*'). Although s 46A(1) of the Act barred the plaintiff from making a

* Student Editor 2014. With thanks To Associate Professor Aviva Freilich, Winthrop Professor Michael Blakeney, Vicky Priskich and my family.

¹ [2014] HCA 34 (11 September 2014) ('*Plaintiff S4*').

² (2004) 219 CLR 562.

valid application for a protection visa, s 46A(2) permitted the Minister to lift this bar. While there is no ministerial duty to consider lifting the bar on applications,³ the Minister under the previous Commonwealth Government had stated that he would consider whether to exercise the power in respect of a group of unlawful non-citizens of which the plaintiff was a member.⁴

The plaintiff spent over two years in detention while the Department of Immigration and Border Protection determined whether he was a refugee and satisfied the relevant health and security requirements for the grant of a protection visa.⁵ These inquiries were undertaken to inform the possible exercise of the Minister's power under s 46A(2).⁶ However, when the Department determined that the plaintiff satisfied the relevant requirements, the Minister did not decide how to exercise the s 46A(2) power. Rather, acting pursuant to his powers under s 195A(2) of the Act, the Minister granted the plaintiff a temporary safe haven ('TSH') visa⁷ and a temporary humanitarian concern ('THC') visa.⁸ The grant of the TSH visa was intended to, and had the effect of, preventing the plaintiff from making a valid application for a protection visa while he remained on Australian soil.⁹

II DECISION

The High Court unanimously held that the grant of the TSH and THC visas was invalid.¹⁰ Their Honours relied on the principle as articulated in *Chu Kheng Lim v Minister for Immigration* ('*Lim*')¹¹ that authority to detain a non-citizen is not at large, but exists purely as an incident of Executive constitutional powers to either remove or permit entry to non-citizens.¹² Accordingly, the detention of a non-citizen is only lawful if, and for as long as, that detention is reasonably

³ *Migration Act 1958* (Cth) s 46A(7).

⁴ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [2], [17].

⁵ *Ibid* [2].

⁶ *Ibid* [17].

⁷ See *Migration Act 1958* (Cth) s 37A.

⁸ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [4].

⁹ See *Migration Act 1958* (Cth) s 91K. Under s91L of the Act, the Minister could decide to lift the bar, but was under no obligation to consider whether to do so. See *Plaintiff S4* [2014] HCA 34 (11 September 2014) [5]; *Migration Regulations 1994* (Cth) sch 2, sub-reg 866.227 (2).

¹⁰ Only the TSH visa prevented the plaintiff from applying for a protection visa by engaging s91K of the Act; however, the Court held that the decision to grant the TSH and THC visas could not be severed because to do so would radically recast its nature and effect: *Plaintiff S4* [2014] HCA 34 (11 September 2014) [55].

¹¹ (1992) 176 CLR 1, 10 (Mason CJ), 32 (Brennan, Deane and Dawson JJ), 53 (Gaudron J).

¹² *Plaintiff S4* [2014] HCA 34 (11 September 2014) [25].

capable of being seen as necessary¹³ to carry one of three purposes into effect: removing the non-citizen from Australia; receiving, investigating and determining an application for a visa permitting entry into Australia; or determining whether to permit a valid application for a visa.¹⁴

In this case, the Minister had prolonged the plaintiff's detention for the valid purpose of considering whether to exercise his power under s46A. Their Honours held that, as an Act should be interpreted on the basis that its provisions are intended to give effect to harmonious goals,¹⁵ the 'apparent generality' of the power conferred by s 195A had to be read as subordinate to any current process under s 46A in order to avoid retrospectively robbing the prolongation of detention of a valid statutory purpose.¹⁶ As a result, the Minister could not grant a visa which precluded the plaintiff from making a valid application until he had decided, under s 46A, whether to permit the making of such an application.¹⁷

III COMMENTARY

A *Return to Stricter Limits on the Executive Power to Detain Non-Citizens?*

Immediately following the High Court's delivery of judgment in *Plaintiff S4*, a number of commentators suggested that the Court's reasoning alleviated the harshness of the approach which led a narrow majority in *Al-Kateb v Godwin*¹⁸ to hold that the *Migration Act* validly authorises the indefinite executive detention of non-citizens for the purpose of removal, even if there is no reasonable prospect of removal in the foreseeable future.¹⁹ The conclusion that the decision represents a departure from *Al-Kateb* is perhaps encouraged by the

¹³ *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ), 53 (Gaudron J), 65-66 (McHugh J).

¹⁴ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [26]-[29].

¹⁵ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-82 [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ).

¹⁶ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [48].

¹⁷ *Ibid* [7].

¹⁸ (2004) 219 CLR 562.

¹⁹ See, eg, Joyce Chia, 'High Court Verdict Spells the End for Australian Immigration Detention as We Know It', *The Guardian* (online), 11 September 2014 <<http://www.theguardian.com/commentisfree/2014/sep/11/high-court-verdict-spells-the-end-for-australian-immigration-detention-as-we-know-it/print>>; Paul Farrell and Oliver Laughland, 'Asylum Seeker Can Apply for A Permanent Protection Visa, High Court Rules', *The Guardian* (online), 11 September 2014 <<http://www.theguardian.com/world/2014/sep/11/asylum-seeker-can-apply-for-permanent-protection-visa-high-court-rules>> ; Australian Broadcasting Commission, 'High Court Ruling a Game Changer for Mandatory Detention?' *Sunday Extra*, 14 September 2014 (Jonathan Green).

Court's strong reiteration of the constitutional limits on the power to detain non-citizens as expressed in the earlier decision of *Lim*, as well as the decisive result of the case itself. For example, in *Plaintiff S4*, the Court emphasised that the duration of any form of detention, and thus its lawfulness, must be capable of being determined and judicially enforced 'at any time and from time to time'.²⁰ Moreover, the duration of the plaintiff's detention as an unlawful non-citizen was ultimately bounded by the Act's requirement to effect his removal as soon as reasonably practicable, in the sense that removal from Australia was the only event terminating immigration detention which 'must occur' if antecedent processes including deportation, removal for offshore processing, or the grant of a visa did not eventuate.²¹ However, determinability simply requires that the duration of detention is limited (and its lawfulness capable of determination by reference to) what is both necessary and incidental to the fulfilment of one of the three valid statutory purposes of detention under the Act.²² By contrast, the relevant dilemma that fundamentally split the High Court in *Al-Kateb* was whether detention remains reasonably necessary and incidental to fulfilling the purpose of removal where there is no longer an objective future likelihood of the possibility of removal.²³ In other words, detention may be indefinite (due to factors outside Executive control in attempting to remove a non-citizen) and yet still *determinable* in the sense proposed by the Court in *Plaintiff S4*, as long as the purpose of removal is considered to remain on foot. That the purpose does remain on foot was the central conclusion of the majority in *Al-Kateb*.²⁴

By contrast, in his minority judgment in *Al-Kateb* Gummow J held that if a detainee cannot be removed, and as a matter of reasonable practicability is unlikely to be removed, detention no longer retains a *present purpose* of facilitating the detainee's reasonably prospective removal. The valid purpose will thereby be spent and further detention purely to segregate the non-citizen from the community will be punitive and unlawful unless and until there is a reasonable prospect of removal.²⁵ Ultimately, the reasoning in *Plaintiff S4* does not engage the central question of the circumstances under which a purpose of detention will remain on foot. Nonetheless, it is significant that the Court

²⁰ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [29].

²¹ *Ibid* [33].

²² *Ibid* [29].

²³ Matthew Zagor, 'Uncertainty and Exclusion: Detention of Aliens and the High Court' (2006) 34 *Federal Law Review* 127, 159.

²⁴ *Al-Kateb v Godwin* (2004) 219 CLR 562 (McHugh, Hayne, Callinan and Heydon JJ).

²⁵ *Ibid* 608 [122] (Gummow J).

perhaps went further than *Lim* in holding that ‘detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected’ and thereafter exhaustively delineating those purposes.²⁶ This may be contrasted with the majority position in *Al-Kateb*, which postulates a (potentially much broader) category of ‘exclusion from the Australian community’ as a valid non-punitive purpose which will sustain administrative detention of non-citizens if the purpose of release is exhausted.²⁷ The conclusion that purely exclusionary detention is non-punitive (and therefore consistent with Chapter III of the *Commonwealth Constitution*) was arguably influenced by an underlying preoccupation with the ‘fault’ of the unlawful non-citizen in entering or remaining in Australia ‘illegally’.²⁸ Again, the Court took a radically different attitude in *Plaintiff S4*, unflinchingly stating that ‘[a]n alien within Australia, whether lawfully or not, is not an outlaw.’²⁹ Accordingly, although the respective *ratios* of *Plaintiff S4* and *Al-Kateb* are directed to different questions, the remarks of the French High Court implicitly call into question some of the underlying assumptions upon which the majority appears to have built their ultimate conclusion.

B *Consequences of the Court’s Restrictive Construction of s 195A*

Despite refusing to make a direct determination as to whether the Minister could be compelled to decide whether or not to exercise his s46A power,³⁰ the Court repeatedly indicated that, in the circumstances of the case, the Minister had to decide how to exercise the power under s 46A in respect of the plaintiff as soon as reasonably practicable, regardless of whether the plaintiff was detained again.³¹ *Prima facie*, the Court’s position thus seems to be that once the Minister has decided to consider the exercise of power under s 46A, and

²⁶ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [26].

²⁷ Zagor, above n 23, 152.

²⁸ *Ibid* 156; *Al-Kateb v Godwin* (2004) 219 CLR 562, 651 [268] (Hayne J), 661-2 [298], [301] (Callinan J), 584-5 [45]-[47] (McHugh J).

²⁹ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [24].

³⁰ *Ibid* [40]. Note that a Minister cannot be compelled to *consider* whether to exercise a power which he is under no duty to consider exercising: *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (203) 211 CLR 441, 461 (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ), 474 (Gaudron and Kirby JJ).

³¹ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [9], [10]; see also *Plaintiff M76*, [24] (French CJ), [92] (Hayne J).

provided that the relevant criteria for the exercise of the power are met,³² the Minister must conclude the statutorily prescribed course of conduct by deciding how to exercise power *under that specific provision*.³³ This suggests a broader and more stringent rule than is indicated solely by the Court's narrow invalidation of the grant of a TSH visa in *Plaintiff S4*.³⁴ However, arguably the purpose of detention is not stultified where another decision, made under a different power, achieves the same effect. Such reasoning can be seen in *Plaintiff M79*.³⁵ In that case, French CJ, Crennan and Bell JJ (Gageler J concurring) indicated that the Minister's grant of a TSH visa was not invalid because its purpose was to prevent onshore applications where those applications had been, or were being, assessed through other processes.³⁶ This is consistent with the Court's finding in *Plaintiff S4* that the grant of a visa under another general provision of the Act will only be invalid to the extent that it is *repugnant to the purpose for which prolongation of that detention was justified*.³⁷ Thus there is no reason in principle why the administrative processes of assessment and review begun under and for the purposes of s 46A should not be continued under and for the purposes of 'lifting the bar' under another provision³⁸ on applications made by persons granted a TSH visa.³⁹

In the future, the Court's restrictive construction of the relevant provisions in *Plaintiff S4* is likely to encourage either simultaneous consideration of the exercise of power under both ss46A and 195A,⁴⁰ or lead to the complete eschewal of s46A⁴¹ in order to avoid potentially attracting a statutory obligation

³² Where the criteria identified as relevant to the Minister's consideration of whether to exercise the power are not met, the Minister does not have to decide how to exercise the power: see *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 [77].

³³ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [43].

³⁴ Undoubtedly the Court had in mind recent asylum seeker policy under which the grant of a temporary visa that would allow the plaintiff to make a valid application for permanent protection would be unlikely: see, eg, Emma Griffiths, 'Government to Introduce New Asylum Seeker Measures After Temporary Protection Visas Blocked in Senate', *Australian Broadcasting Commission* (online), 3 December 2013, <<http://www.abc.net.au/news/2013-12-03/government-introduce-new-asylum-seeker-policy-after-tpvs-blocked/5131080>>.

³⁵ *Plaintiff M79/2012 v Minister for Immigration and Citizenship* [2013] HCA 24 (29 May 2013).

³⁶ *Ibid* [14] (French CJ, Crennan and Bell JJ), [99], [133] (Gageler J).

³⁷ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [47].

³⁸ *Migration Act 1958* (Cth) s 91L.

³⁹ *Plaintiff M79/2012 v Minister for Immigration and Citizenship* [2013] HCA 24 (29 May 2013) [14] (French CJ, Crennan and Bell JJ), [135] (Gageler J).

⁴⁰ For an example of the High Court implicitly approving of such an approach, see *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 341–342 [35], 353–354 [78].

⁴¹ See *Plaintiff S10/2012 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, in which the High Court held that inquiries designed to inform the Minister as to whether he should *consider*

to decide whether to permit the making of a valid application.⁴² It is also important to note that *Plaintiff S4* does not undermine the legality of temporary visas *per se*. In view of the current uncertainty surrounding the reintroduction of Temporary Protection Visas,⁴³ the previously obscure THC visa may therefore achieve further prominence as a ‘backdoor’ means of effecting temporary protection.⁴⁴ These strategies arguably undermine the premium that the Court placed on a construction of the Act as a coherent statutory scheme limited by the rule of law and closely defined purposes of detention.⁴⁵ Unfortunately, such is the pattern of action and reaction between the Executive and the courts that has come to be characteristic of Australian migration law.⁴⁶

IV CONCLUSION

While *Plaintiff S4* leaves the TSH visa scheme intact, it demonstrates that the current High Court is willing to read down otherwise general executive powers under the *Migration Act* in order to preclude frustrating the purpose for which the detention of a non-citizen is prolonged. On the other hand, the discretion afforded to the Minister to select the purpose or purposes for which to prolong detention within the constraints of the *Migration Act*, as well as to decide upon the criteria for permitting entry or an application for entry under the broad rubric of the ‘public interest’, suggests that the Executive will not soon suffer a

exercising analogous non-compellable powers under the *Migration Act 1958* (Cth) were not indicative of a decision to consider whether to exercise the relevant powers, and were therefore not reviewable.

⁴² Assuming the Unauthorised Maritime Arrival meets the criteria for eligibility: for an example of a failure to meet the criteria, see *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

⁴³ See, eg, Michael Gordon, ‘Scott Morrison Under Pressure to Compromise on Temporary Protection Visas’, *The Age* (online), 27 November 2014 <<http://www.theage.com.au/federal-politics/political-news/scott-morrison-under-pressure-to-compromise-on-temporary-protection-visas-20141128-11vesl.html>>.

⁴⁴ See, eg, Paul Farrell, ‘Coalition Finds Fresh Way to Bring Back Temporary Visas for Asylum Seekers’, *The Guardian* (online), 7 February 2014

<<http://www.theguardian.com/world/2014/feb/07/coalition-finds-backdoor-way-to-reintroduce-temporary-visas-to-refugees>>; Sarah Whyte, ‘Scott Morrison Reintroduces Temporary Visas for Asylum Seekers’, *The Sydney Morning Herald* (online), 7 February 2014

<<http://www.smh.com.au/federal-politics/political-news/scott-morrison-reintroduces-temporary-visas-for-asylum-seekers-20140207-326v3.html>>; ‘New Visas Bypass Senate Decision: Labor’, *The Australian* (online), 10 February 2014 <<http://www.theaustralian.com.au/news/latest-news/new-visas-bypass-senate-decision-labor/story-fn3dxiwe-1226823384417>>.

⁴⁵ See *Plaintiff S4* [2014] HCA 34 (11 September 2014) [45].

⁴⁶ See generally John McMillan, ‘Judicial Restraint and Activism in Administrative Law’ (2002) 30 *Federal Law Review* 335.

similar situation to arise. Moreover, the Court's reasoning does not operate as a qualification on the majority position in *Al-Kateb*. However, the decision does suggest that, if the appropriate opportunity arises, the current High Court may be amenable to reconsidering the legitimacy of the purported constitutional basis for the indefinite detention of unlawful non-citizens.⁴⁷ By way of a final point, their Honours left in abeyance the question of whether constitutional writs are available where the right to liberty is affected.⁴⁸ However, the strong insistence that the purpose for which detention is justified must be carried into effect as soon as reasonably practicable⁴⁹ suggests that the Executive may soon find itself subject to more intense judicial scrutiny over whether a certain duration of detention is justified in particular cases.

⁴⁷ *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53 (11 December 2013) [31] (French CJ), although Hayne J observed at [125] that the only relevant change since *Al-Kateb* was decided is the composition of the Bench, which would not of itself be sufficient to revisit the decision.

⁴⁸ *Plaintiff S4* [2014] HCA 34 (11 September 2014) [39].

⁴⁹ *Ibid* [28]–[35].

CONSTITUTIONAL LIMITATIONS ON DETENTION ‘AT
HER MAJESTY’S PLEASURE’:
POLLENTINE V ATTORNEY-GENERAL (QLD) [2014] HCA

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LILY HANDS*

In *Pollentine v Attorney-General (Qld)* (*‘Pollentine’*),¹ the High Court held that a law which permits a State court to direct the indefinite detention of a sex offender as a precursor to an executive power to continue or terminate detention does not infringe the principle identified in *Kable v Director of Public Prosecutions (NSW)* (*‘Kable’*).² In upholding the validity of the relevant provisions, their Honours emphasised the fact that the executive power to detain was subject to a criterion which admitted of judicial review. This case note contends that the Court’s reasoning coincides with the principle in *Kirk v Industrial Court of NSW* (*‘Kirk’*)³ that the power to grant relief for jurisdictional error is a defining characteristic of a State Supreme Court. However, *Pollentine* illustrates that the statutory criteria against which the lawfulness of indefinite preventive detention is tested may nonetheless admit of a significant risk of executive abuse. Finally, the case note considers some of the ramifications of the Court’s strict conceptual separation between the respective judicial and executive functions provided for under the relevant legislation.

I THE PRINCIPLE IN *KABLE*

The principle first identified in *Kable* is that, since the Constitution established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, States may not enact a law which is repugnant to or incompatible with the institutional integrity of a State court.⁴ Relevant applications⁵ of this prohibition include:

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¹ [2014] HCA 30 (14 August 2014).

² (1996) 189 CLR 51.

³ (2010) 239 CLR 531, [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁴ *Kable v DPP (NSW)* (1996) 189 CLR 51; *Fardon v A-G (Qld)* (2004) 223 CLR 575, 591 (Gleeson CJ); most recently, see *Kuczborski v Queensland* [2014] HCA 46 (14 November 2014) [38] (French CJ).

⁵ *Baker v The Queen* (2004) 223 CLR 513, 541 (Kirby J); *Kuczborski v Queensland* [2014] HCA 46 (14 November 2014) [38] (French CJ).