BACK TO THE *CONSTITUTION*: THE IMPLICATIONS OF *PLAINTIFF S4/2014* FOR IMMIGRATION DETENTION

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I INTRODUCTION

> The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.[1]

As this quote succinctly captures, indefinite immigration detention challenges three core legal norms: the value of individual liberty, the separation of powers, and the rule of law. In this article, I argue that after more than two decades of wrestling with these challenges, the High Court is closer than ever to meeting them. That argument rests on the landmark case of *Plaintiff S4/2014 v Minister for Immigration and Border Protection*,[2] in which the High Court for the first time clearly articulated several constitutional limits to immigration detention.

The main purpose of this article is to explore the significance of *Plaintiff S4*, drawing on the two decades of litigation that preceded it. Two main consequences are examined: first, the possible unconstitutionality of current cases of immigration detention; and secondly, the possible convergence of Australian case law with international and comparative law on detention. This convergence, it is suggested, might provide future guidance for courts following *Plaintiff S4*.

This article begins by setting out briefly the factual and legislative background to immigration detention in Australia. Part III then analyses the key cases leading up to *Plaintiff S4*, examining in particular the different judicial approaches taken to the constitutionality of detention. Part IV analyses *Plaintiff S4*, and Part V explores its implications.

The article concludes by reflecting upon the delicate politics of immigration detention in the courts, which has been characterised by understandable

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1 *Al-Kateb v Godwin* (2004) 219 CLR 562, 612 [137] (Gummow J) ('*Al-Kateb*'), quoting *Hamdi v Rumsfeld*, 542 US 507, 554–5 (Scalia J) (2004).

2 (2014) 88 ALJR 847 ('*Plaintiff S4*').

sensitivity to claims of democratic illegitimacy. Such claims could be addressed, in part, by a constitutional theory that provides a clearer framework for understanding the distinctive role of the courts in protecting the rights of minorities. Such a theory has special relevance for asylum seekers and refugees, whose human rights are readily overridden by a political process that gives them no vote, and no voice.

II IMMIGRATION DETENTION IN AUSTRALIA: BACKGROUND

Immigration detention in Australia has a long and controversial history, which has been well canvassed in the literature.[3] This Part therefore only briefly describes the main milestones in its development, and sets out the key characteristics of immigration detention today.

A The First Mandatory Detention Regime

The modern history of immigration detention in Australia begins on 27 November 1989, with the 'second wave' of boat arrivals coming mostly from Cambodia.[4] This prompted the hasty passage of the *Migration Amendment Act*

3 See, eg, Savitri Taylor, 'Weaving the Chains of Tyranny: The Misrule of Law in the Administrative Detention of Unlawful Non-citizens' (1998) 16(2) *Law in Context* 1; Ryszard Piotrowicz, 'International Focus: The Detention of Boat People and Australia's Human Rights Obligations' (1998) 72 *Australian Law Journal* 417; Melissa Phillips, 'Impact of Being Detained On-Shore: Plight of Asylum Seekers in Australia' (2000) 23(3) *University of New South Wales Law Journal* 288; Mary Crock, 'You Have To Be Stronger than Razor Wire: Legal Issues Relating to the Detention of Refugees and Asylum Seekers' (2002) 10 *Australian Journal of Administrative Law* 33; Andreas Schloenhardt, 'Deterrence, Detention and Denial: Asylum Seekers in Australia' (2002) 22 *University of Queensland Law Journal* 54; Andreas Schloenhardt, 'To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia' (2002) 14 *International Journal of Refugee Law* 302; Greta Bird, 'An Unlawful Non-citizen Is Being Detained or (White) Citizens Are Saving the Nation from (Non-white) Non-citizens' (2005) 9 *University of Western Sydney Law Review* 87; Michael Head, 'Detention without Trial: A Threat to Democratic Rights' (2005) 9 *University of Western Sydney Law Review* 33; Daniel Wilsher, 'The Administrative Detention of Non-nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives' (2004) 53 *International and Comparative Law Quarterly* 897; Jessie Hohmann, 'The Thin End of the Wedge: Executive Detention of Non-citizens and the *Australian Constitution*' (2006) 9 *Yearbook of New Zealand Jurisprudence* 91; Matthew T Stubbs, 'Arbitrary Detention in Australia: Detention of Unlawful Non-citizens under the *Migration Act 1958* (Cth)' (2006) 25 *Australian Year Book of International Law* 273.

4 For an excellent summary of the history of boat arrivals in Australia, see Janet Phillips and Harriet Spinks, 'Boat Arrivals in Australia since 1976' (Research Paper, Parliamentary Library, Parliament of Australia, 2013). For a useful history of detention prior to 1992, see Janet Phillips and Harriet Spinks, 'Immigration Detention in Australia' (Background Note, Parliamentary Library, Parliament of Australia, 2013).

1992 (Cth), inserting a new division 4B in the *Migration Act 1958* (Cth) ('*Migration Act*').[5]

Division 4B introduced a system of detention in Australia that remains the basis of Australia's immigration detention. The legislation required that an officer must keep a 'designated person' in custody, and a person so detained was only to be released upon removal from, or admission into, Australia.[6] This is the 'mandatory' aspect of Australia's immigration detention, because it removes the discretion of an officer to detain, and also has the effect of limiting a court to reviewing only the formal immigration status of a detainee.

The legislation also provided that a detainee could request removal, in which case the officer must remove the person 'as soon as practicable'.[7] According to those who introduced it, however, the 'most important'[8] provision of division 4B was section 54R, which purported to prevent a court from releasing a person from custody.[9]

Division 4B included two significant limits that no longer exist in today's legislation. First, mandatory detention applied only to 'designated persons', defined as non-citizens in Australia who had arrived on a boat without a visa or an entry permit between 19 November 1989 and 1 December 1992[10] and whom the Department of Immigration had 'designated' by giving an individual identifier.[11] Secondly, section 54Q provided a maximum time limit of 273 days for detainees who applied for admission, although this limit excluded periods of

5 The Act was introduced in committee in the House of Representatives and passed the same day in the Senate. For a general overview of the policy during this period, see especially Mary Crock, 'A Legal Perspective on the Evolution of Mandatory Detention' in Mary Crock (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (Federation Press, 1993) 25. See also Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) [16.19]–[16.29].

6 *Migration Act* s 54L, as inserted by *Migration Amendment Act 1992* (Cth) s 3. The provision is now contained is s 189 of the current Act.

7 *Migration Act* s 54P(1), as inserted by *Migration Amendment Act 1992* (Cth) s 3. The provision is now contained in s 198 of the current Act. Section 54P also required removal 'as soon as practicable' in two other circumstances: where the person had not made an entry application within two months, and where all appeals and reviews had been finalised in respect of the refusal of the person's entry application. A similar, albeit more complicated, mechanism continues to exist under s 198 of the current Act.

8 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1992, 2370 (Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs).

9 *Migration Act* s 54R, as inserted by *Migration Amendment Act 1992* (Cth) s 3. The provision is now contained in s 196(3) of the current Act.

10 This was subsequently extended to 1 November 1993: *Migration Amendment Act (No 4) 1992* (Cth) s 3.

11 *Migration Act* s 54K, as inserted by *Migration Amendment Act 1992* (Cth) s 3. It is convenient to refer in this article simply to the 'Department of Immigration' and the 'Minister for Immigration', given the multiple name changes during the period canvassed.

time outside the Department of Immigration's control.[12] When the Act was introduced, the then Minister for Immigration observed that '[t]he Government has no wish to keep people in custody indefinitely and I could not expect the Parliament to support such a suggestion'.[13]

This legislation was challenged in the famous decision of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[14] where the High Court upheld the constitutionality of division 4B with the exception of section 54R. This case is discussed further in Part III of this article.

B The Extension and Exportation of Mandatory Detention

Division 4B was swiftly followed by the introduction of division 4C through the *Migration Reform Act 1992* (Cth).[15] This regime continued and extended the mandatory nature of detention, by requiring officers to detain all 'unlawful non-citizens',[16] being essentially a person in the migration zone who did not hold a valid visa,[17] or a person outside the migration zone trying to enter. Similarly to division 4B, division 4C required a person to be detained until the person is removed (including upon request) or deported from Australia, or granted a visa.[18] A court could not release an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the detainee had made a valid application for a visa and satisfied all the criteria for the visa.[19] As noted earlier, this legislation did not include a maximum time limit. A detainee could, however, be released on

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12 *Migration Act* s 54Q, as inserted by *Migration Amendment Act 1992* (Cth) s 3. This limit excluded periods such as when the Department was waiting for information relating to the application to be given by a person 'not under the control of the Department'; during the periods when the application's progress was under the control of the designated person or his or her adviser or representative; during court or tribunal proceedings; and otherwise if continued dealing with the application was 'beyond the control of the Department': at ss 54Q(3)(c)–(f).

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1992, 2370 (Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs).

14 (1992) 176 CLR 1 ('*Chu Kheng Lim*').

15 Division 4C was introduced by the *Migration Reform Act 1992* (Cth) s 13 and was intended to commence on 1 November 1993, but implementation was later deferred to 1 September 1994 by the *Migration Laws Amendment Act 1993* (Cth) s 5.

16 *Migration Act* s 54W(1), as inserted by *Migration Reform Act 1992* (Cth) s 13: if an officer 'knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person'. This was complemented by *Migration Act* s 54W(2), as inserted by *Migration Reform Act 1992* (Cth) s 12:

> If an officer reasonably suspects that a person in Australia but outside the migration zone:
>
> (a) is seeking to enter the migration zone; and
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> (b) would, if in the migration zone, be an unlawful non-citizen;
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> the officer must detain the non-citizen.

17 *Migration Act* ss 14–16, as inserted by *Migration Reform Act 1992* (Cth) s 7.

18 *Migration Act* s 54ZD, as inserted by *Migration Reform Act 1992* (Cth) s 13.

19 *Migration Act* s 54ZD(3), as inserted by *Migration Reform Act 1992* (Cth) s 13. Even if a court were to find that the detention was unlawful, subsequent amendments limited compensation to $1 per day: see *Migration Amendment Act (No 4) 1992* (Cth) s 6.

a 'bridging visa' during processing, provided the detainee satisfied the relevant criteria.[20] The Act also introduced provisions making detainees liable for their costs of detention.[21] This regime, with some modifications, currenly remains in place.

Mandatory detention clearly did not have a significant deterrent effect, for while only around 200–300 people were detained annually in the early 1990s, between 1998 and 2007 Australia detained over 6000 people annually.[22] These high numbers continued despite the introduction of a suite of highly restrictive measures in 2001, following the infamous *Tampa* affair.[23] This included: processing refugee claims offshore in Nauru and on Manus Island in Papua New Guinea,[24] barring those who arrived in 'excised offshore places' from applying

20 *Migration Act* s 26C, sub-div AF, as inserted by *Migration Reform Act 1992* (Cth) s 10.

21 *Migration Act* div 5A, as inserted by *Migration Reform Act 1992* (Cth) s 16. This was abolished in 2008: see *Migration Amendment (Abolishing Detention Debt) Act 2009* (Cth).

22 For exact figures, see Phillips and Spinks, above n 4, 'Immigration Detention in Australia', app B.

23 See generally David Marr and Marian Wilkinson, *Dark Victory* (Allen and Unwin, 2003); Ryszard Piotrowicz, 'International Focus – The Case of *MV Tampa*: State and Refugee Rights Collide at Sea' (2001) 76 *Australian Law Journal* 12; Chantal Marie-Jeanne Bostock, 'The International Legal Obligations Owed to the Asylum Seekers on the *MV Tampa'* (2002) 14 *International Journal of Refugee Law* 279; Simon Evans, 'The Rule of Law, Constitutionalism and the *MV Tampa*' (2002) 13 *Public Law Review* 94; Francine Feld, 'The *Tampa* Case: Seeking Refuge in Domestic Law' (2002) 8 *Australian Journal of Human Rights* 157; Michael Head, 'The High Court and the *Tampa* Refugees' (2002) 11 *Griffith Law Review* 23; Geoffrey Lindell, 'Reflections on the *Tampa* Affair' (2002) 4(2) *Constitutional Law and Policy Review* 21; Penelope Mathew, 'Australian Refugee Protection in the Wake of the *Tampa*' (2002) 96 *American Journal of International Law* 661; Helen Pringle and Elaine Thompson, 'The *Tampa* Affair and the Role of the Australian Parliament' (2002) 13 *Public Law Review* 128; Vaishakhi Rajanayagam, 'The *Tampa* Decision: Refugee Rights versus the Executive's Power to Detain and Expel Unlawful Non-citizens' (2002) 22 *University of Queensland Law Journal* 142; Donald Rothwell, 'The Law of the Sea and the *MV Tampa* Incident: Reconciling Maritime Principles with Coastal State Sovereignty' (2002) 13 *Public Law Review* 118; Alice Edwards, 'Tampering with Refugee Protection: The Case of Australia' (2003) 15 *International Journal of Refugee Law* 192; Mary Crock, 'In the Wake of the "*Tampa*": Conflicting Visions of International Refugee Law in the Management of Refugee Flows' (2003) 12 *Pacific Rim Law and Policy Journal* 49; Bradley Selway, 'All at Sea – Constitutional Assumptions and "the Executive Power of the Commonwealth"' (2003) 31 *Federal Law Review* 495.

24 During this period, 1637 people were detained on Nauru and Manus Island: Chris Evans, 'Last Refugees Leave Nauru' (Press Release, 8 February 2008) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYUNP6%22>. For more on the 'Pacific Solution', see generally Susan Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?' (2006) 18 *International Journal of Refugee Law* 696; Tara Magner, 'A Less than "Pacific" Solution for Asylum Seekers in Australia' (2004) 16 *International Journal of Refugee Law* 53; Mathew, above n 23; Savitri Taylor, 'The Pacific Solution or a Pacific Nightmare: The Difference between Burden Shifting and Responsibility Sharing' (2005) 6 *Asian-Pacific Law and Policy Journal* 1; Elibritt Karlsen, 'Offshore Processing: Lessons from the "Pacific Solution"' on Parliamentary Library, *FlagPost* (15 April 2014) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/April/Offshore_processing>.

for protection without the approval of the Minister for Immigration (known as 'lifting the bar'),[25] and attempting to restrict judicial review by the courts.[26]

C Liberalising Detention

Continuing political controversy, especially over the practice of detaining children,[27] and scandals involving the unlawful detention of Australians,[28] led to some liberalisation of detention in 2005.[29] These reforms included: new ministerial powers to release people from detention (through 'residence determinations'[30] and a broad power to grant a detainee a visa without

25 *Migration Act 1958* (Cth) s 46A, as inserted by *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth). The Minister's power to allow a person to apply for a visa is a personal, non-compellable power.

26 *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth). For commentary on this Act and subsequent litigation, see Simon Evans, 'Protection Visas and Privative Clause Decisions: *Hickman* and the *Migration Act 1958* (Cth)' (2002) 9 *Australian Journal of Administrative Law* 45; Sarah Ford, 'Judicial Review of Migration Decisions: Ousting the *Hickman* Privative Clause?' (2002) 26 *Melbourne University Law Review* 537; Duncan Kerr, 'Deflating the *Hickman* Myth: Judicial Review after *Plaintiff S157/2002 v The Commonwealth*' (2003) 37 *AIAL Forum* 1; Enid Campbell and Matthew Groves, 'Privative Clauses and the *Australian Constitution'* (2004) 4 *Oxford University Commonwealth Law Journal* 51.

27 See, eg, Commonwealth, *A Last Resort? National Inquiry into Children in Immigration Detention*, Parl Paper No 134 (2004); Crock, 'You Have To Be Stronger than Razor Wire', above n 3; Tania Penovic, 'Immigration Detention of Children: Arbitrary Deprivation of Liberty' (2003) 7 *Newcastle Law Review* 56; Tania Penovic and Adiva Sifris, 'Children's Rights through the Lens of Immigration Detention' (2006) 20 *Australian Journal of Family Law* 12; Tania Penovic, 'The Separation of Powers: *Lim* and the "Voluntary" Immigration Detention of Children' (2004) 29 *Alternative Law Journal* 222.

28 John McMillan, 'Inquiry into the Circumstances of the Vivien Alvarez Matter' (Report No 3, Commonwealth Ombudsman, September 2005) <http://www.immi.gov.au/media/publications/pdf/alvarez_report03.pdf>; Mick Palmer, 'Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau' (Report, July 2005) <http://www.immi.gov.au/media/publications/pdf/palmer-report.pdf>. See also Angus Francis, 'Accountability for Detaining and Removing Unlawful Non-citizens: The Cases of Vivian Solon and Cornelia Rau' (2005) 30 *Alternative Law Journal* 263; Michael Grewcock, 'Contemporary Comments: Slipping through the Net? Some Thoughts on the Cornelia Rau and Vivian Alvarez Inquiry' (2005) 17 *Current Issues in Criminal Justice* 284; Denis Lenihan, 'Ms Rau and Mr Palmer' (2006) 7 *Public Administration Today* 48.

29 Savitri Taylor, 'Immigration Detention Reforms: A Small Gain in Human Rights' (2006) 13 *Agenda* 49; Kevin Boreham, '"Wide and Unmanageable Discretions": *The Migration Amendment (Detention Arrangements) Act 2005* (Cth)' (2006) 17 *Public Law Review* 16.

30 *Migration Act* pt 2 div 7 sub-div B, as inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) sch 1 item 11. See also Catherine Marshall, Suma Pillai and Louise Stack, 'Community Detention in Australia' (2013) 44 *Forced Migration Review* 55.

application),[31] new reporting requirements,[32] and the insertion of a new 'principle' in the *Migration Act* that children should be detained as a last resort.[33]

The election of the Rudd Government in 2007 resulted in further reforms,[34] most notably the introduction of a policy based on seven 'key immigration detention values' in July 2008.[35] This reform was intended (among other things) to: require justification for detention based on risk, to end the detention of children, and to ensure administrative review of the length and conditions of detention. Although a Bill was introduced to reflect this new policy,[36] the Bill lapsed and, consequently, much of the legal framework relating to detention remained intact.

D Tightening Detention

A rapid increase in boat arrivals in 2009–10 stymied further liberalisation and resulted in even more restrictive measures, including the expansion of detention facilities, the suspension of processing of claims from Sri Lanka and Afghanistan, and the reintroduction of offshore processing.[37]

Many of those arriving were Sri Lankan Tamils, but some of these who were recognised to be refugees were assessed by the Australian Security and Intelligence Organisation ('ASIO') as a security risk – without a hearing or access to the evidence, and without the prospect of review.[38] As no other country has been willing to accept them, these refugees have been subject to indefinite

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31 *Migration Act* s 195A, as inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) sch 1 item 10.

32 This included requiring the Commonwealth Ombudsman to report on those detained for longer than two years: *Migration Act* pt 8C, as inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) sch 1 item 19.

33 *Migration Act* s 4AA, as inserted by *Migration Amendment (Detention Arrangements) Act 2005* (Cth) sch 1 item 1.

34 See Taylor, 'Immigration Detention Reforms', above n 29. See generally Mary Crock, 'First Term Blues: Labor, Refugees and Immigration Reform' (Research Paper No 10/43, Sydney Law School, 5 May 2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601086>; Tania Penovic, 'Labor's "New Directions in Detention" Three Years On: *Plus ça change*' (2011) 36 *Alternative Law Journal* 240.

35 Chris Evans, 'New Directions in Detention: Restoring Integrity to Australia's Immigration System' (Speech delivered at the Australian National University, Canberra, 29 July 2008) <http://www.jrs.org.au/files/documents/test/Resources/New_Directions_in_Detention.pdf>.

36 Migration Amendment (Immigration Detention Reform) Bill 2009 (Cth).

37 Phillips and Spinks, 'Boat Arrivals in Australia since 1976', above n 4; Phillips and Spinks, 'Immigration Detention in Australia', above n 4.

38 At the time, adverse security assessments had the effect that a public interest criterion for the protection visa (PIC 4002) had not been satisfied, resulting in denial of the protection visa. On the assessment of security risks by ASIO, see generally Ben Saul, 'Dark Justice: Australia's Indefinite Detention of Refugees on Security Grounds under International Human Rights Law' (2012) 13 *Melbourne Journal of International Law* 685; Ben Saul, 'Indefinite Security Detention and Refugee Children and Families in Australia: International Human Rights Law Dimensions' (2013) 20 *Australian International Law Journal* 55; Andrew & Renata Kaldor Centre for International Refugee Law, *Refugees with an Adverse Security Assessment by ASIO* (Fact Sheet, 20 February 2014).

detention for several years.[39] Despite successful legal challenges in the High Court[40] and complaints to the United Nations Human Rights Committee,[41] many of these refugees remain in detention following legislative reversal of these High Court decisions.[42]

The wave of boat arrivals was, predictably, met with ever more draconian legislation. New laws prevented those convicted of offences during immigration detention from receiving protection,[43] creating a new class of people subject to indefinite detention. Laws reversing the effect of the High Court's invalidation of an agreement to swap refugees with Malaysia also greatly limited the ability of Parliament and the courts to scrutinise the designation of offshore processing countries.[44] The definition of 'unauthorised maritime arrival' was extended, with the effect that those who arrived irregularly on the mainland were also barred from applying for protection visas without ministerial approval.[45] One of the final acts of the Labor Government was to announce, on 19 July 2013, that irregular boat arrivals would now be processed offshore and those so processed would 'never' be resettled in Australia.[46]

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39 However, in late 2014 and early 2015, at least 12 refugees were released after ASIO reversed its assessments: Daniel Flitton, 'Australia Urged to Allow Refugees to Appeal ASIO Ruling', *The Age* (online), 16 March 2015 <http://www.theage.com.au/federal-politics/political-news/australia-urged-to-allow-refugees-to-appeal-asio-ruling-20150316-1m06k6.html>.

40 *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322. Successful legal challenges in the High Court are discussed in Part III(A)(3).

41 Human Rights Committee, *Views: Communication No 2094/2011,* 108th sess, UN Doc CCPR/C/108/D/2094/2011 (28 October 2013); Human Rights Committee, *Views: Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2012 (28 October 2013).

42 *Migration Amendment Act 2014* (Cth) sch 3.

43 *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth).

44 *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth). This followed the High Court's decision that the Australian Government's proposed 'Malaysia solution' was not lawful: see *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144. For commentary, see Naomi Hart, '*Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011)' (2011) 18 *Australian International Law Journal* 207; Elizabeth Rowe and Erin O'Brien, '"Genuine" Refugees or Illegitimate "Boat People": Political Constructions of Asylum Seekers and Refugees in the Malaysia Deal Debate' (2014) 2 *Australian Journal of Social Issues* 171; Tamara Wood and Jane McAdam, 'Australian Asylum Policy All at Sea: An Analysis of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* and the Australia–Malaysia Arrangement' (2012) 61 *International and Comparative Law Quarterly* 274; Senate Legal and Constitutional Affairs Reference Committee, Parliament of Australia, *Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011).

45 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) sch 1. This followed the report by an Expert Panel commissioned to examine the refugee policy: Expert Panel on Asylum Seekers, Australian Government, *Report of the Expert Panel on Asylum Seekers* (Report, August 2012).

46 'Asylum Seekers Arriving in Australia by Boat To Be Resettled in Papua New Guinea', *ABC News* (online), 20 July 2013 <http://www.abc.net.au/news/2013-07-19/manus-island-detention-centre-to-be-expanded-under-rudd27s-asy/4830778>; Bianca Hall and Jonathan Swan, 'Rudd Slams Door on Refugees', *The Age* (Melbourne), 20 July 2013, 1.

These policies were continued by the succeeding Coalition Government in September 2013, which swiftly reintroduced a policy of intercepting and turning boats back to Indonesia.[47] This policy led, in July 2014, to the detention of 157 Sri Lankan Tamils on the high seas for nearly a month, as the Government unsuccessfully sought to return them to India. This detention was narrowly found to be lawful by the High Court in January 2015.[48]

The combination of these tougher policies has resulted in extensive and prolonged immigration detention. By the end of November 2014, there were 3176 people in some form of immigration detention facility within Australia.[49] Another 3111 people were formally detained, although they resided in the community under a 'residence determination'.[50] Meanwhile, the average length of detention had soared to 438 days.[51] At the same time, there were 2040 people detained offshore on Nauru or Manus Island.[52] It remains unclear where those detained offshore might be resettled, as Papua New Guinea has so far agreed only to resettle refugees for a year,[53] while tiny Nauru is incapable of absorbing its detention population.[54] A proposed deal to transfer recognised refugees to Cambodia is also unlikely to absorb these numbers.[55]

The Coalition Government also came to office promising to reintroduce temporary protection visas, which had been abolished by the preceding Labor Government.[56] However, continued opposition to this policy by Labor and the Greens effectively blocked the Coalition Government from introducing this

47 Asylum Seeker Resource Centre, *Coalition's Operation Sovereign Borders Policy* (Fact Sheet, September 2013) <http://www.asrc.org.au/wp-content/uploads/2013/07/Operation-Sovereign-Borders_FINAL-Sept-2013.pdf>; John Keane, 'Operation Sovereign Borders', *The Conversation* (online), 5 July 2014 <http://theconversation.com/operation-sovereign-borders-28831>.

48 *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207.

49 Department of Immigration and Border Protection (Cth), *Immigration Detention and Community Statistics Summary* (Report, 30 November 2014) 3 <http://www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-nov2014.pdf>.

50 Ibid.

51 Ibid 10.

52 Ibid 3.

53 Helen Davidson, 'PNG Says Refugee Resettlement Deal To Be Revised Due to Lack of Public Support' *The Guardian* (online), 20 October 2014 <http://www.theguardian.com/australia-news/2014/oct/20/png-says-refugee-resettlement-deal-to-be-revised-due-to-lack-of-public-support?CMP=twt_gu>.

54 See, eg, Ben Doherty, 'Resettled Refugees Say They Are Desperate and Living "Like Animals in the Jungle" on Nauru', *The Age*, (online) 25 August 2014 <http://www.theage.com.au/federal-politics/political-news/resettled-refugees-say-they-are-desperate-and-living-like-animals-in-the-jungle-on-nauru-20140824-107sov.html>.

55 So far, the agreement only guarantees the settlement of up to five refugees in 2014: see Peter Zsombor, 'Documents Shed Light on Refugee Deal', *The Cambodia Daily* (online), 29 September 2014 <http://www.cambodiadaily.com/news/documents-shed-light-on-refugee-deal-68547/>; Andrew & Renata Kaldor Centre for International Refugee Law, *The Cambodia Agreement* (Fact Sheet, 14 October 2014).

56 *Migration Amendment Regulations (No 5) 2008* (Cth).

policy until the end of 2014, with the Senate twice disallowing regulations introducing the policy.[57]

The practical effect of that battle is that there has been only a single grant of a permanent protection visa since the Coalition came into power,[58] resulting in prolonged detention for many boat arrivals as the Minister for Immigration found ways to forestall the granting of permanent protection visas. One of these strategies was the grant of temporary humanitarian concern visas, which was the subject of the challenge in *Plaintiff S4*.

In September 2014, the Minister for Immigration introduced legislation to insert temporary protection visas into the *Migration Act*.[59] This was eventually passed just before Parliament closed in December 2014.[60] It is likely that this legislation, as well as other legislation introduced in the same parliamentary session,[61] will increase the number of people in detention.

III IMMIGRATION DETENTION AND THE LAW

A The Key Cases

This Part reviews the key jurisprudence leading up to *Plaintiff S4*, focusing in particular on the treatment of the seminal case of *Chu Kheng Lim*.[62] As most of these cases have been discussed extensively by commentators, this Part is brief and designed to allow the reader to follow the analysis in the rest of the article.

1 Chu Kheng Lim

As noted in Part II(A) above, in *Chu Kheng Lim* a majority upheld the constitutionality of the detention regime set out in division 4B of the *Migration*

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57 The regulations allowing for temporary protection visas were disallowed twice by the Senate, on 2 December 2013 and on 27 March 2014: see *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth); *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth).

58 Karen Barlow, 'Asylum Seeker Lawyer David Manne Hopes Permanent Protection Visa Granted for Teenage Stowaway Has Set Precedent' *ABC News* (online), 22 July 2014 <http://www.abc.net.au/news/2014-07-22/visa-for-teen-stowaway-may-have-set-precedent-says-lawyer/5614746>.

59 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

60 Louise Yaxley, Jane Norman and Jonathon Gul, 'Temporary Protection Visas: Senate Votes to Bring Back Temporary Visas after Deal to Get Children off Christmas Island', *ABC News* (online), 5 December 2014 <http://www.abc.net.au/news/2014-12-05/senate-agrees-to-reintroduce-temporary-protection-visas/5945576>.

61 *Migration Amendment (Character Test and Visa Cancellation) Act 2014* (Cth); *Migration Amendment (Protection and Other Measures) Act 2014* (Cth). The first Act strengthens ministerial powers to cancel visas on 'character' grounds, which has the effect of increasing the potential for indefinite detention in those cases. The second Act increases the difficulty of obtaining protection, with the result that more people will be liable to detention after being refused protection.

62 For a detailed case note, see Mary Crock, 'Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia' (1993) 15 *Sydney Law Review* 338.

Act, with the exception of section 54R. In the case of section 54R, the whole Court agreed that, read literally, it appeared to prevent a court from ordering a detainee to be released even where custody was unlawful (eg, because it exceeded the maximum time limit).[63] So interpreted, this would impermissibly interfere with the High Court's constitutional powers of judicial review,[64] and also impermissibly direct 'the courts as to the manner in which they are to exercise their jurisdiction'.[65] The Court split, however, on whether section 54R could be read down as referring only to circumstances in which the person was lawfully in custody,[66] with the majority holding that to reinterpret the section in this way would amount to a 'complete and impermissible reformulation' of the section.[67]

The more significant aspect of *Chu Kheng Lim*, however, rests in its reasoning upholding the constitutionality of the rest of division 4B. The principal question was whether the power of the executive to detain a person without charge or trial was an exercise of judicial power that offended the long established doctrine that only courts could exercise 'judicial power' under Chapter III of the *Constitution*.[68]

The joint judgment of Brennan, Deane and Dawson JJ (with Mason CJ agreeing on this point)[69] began by declaring that, as a general proposition,[70] executive detention would infringe the exclusive nature of the judicial power under Chapter III. This was because 'the involuntary detention of a citizen in custody by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[71] Otherwise, 'the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth'.[72]

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63 *Chu Kheng Lim* (1992) 176 CLR 1, 11 (Mason CJ), 36 (Brennan, Deane and Dawson JJ), 50 (Toohey J), 58 (Gaudron J), 68 (McHugh J).

64 Ibid 36 (Brennan, Deane and Dawson JJ).

65 Ibid.

66 This was the view of the minority: ibid 51 (Toohey J).

67 Ibid 37 (Brennan, Deane and Dawson JJ).

68 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). For an extended discussion, see, eg, Stephen McDonald, 'Involuntary Detention and the Separation of Judicial Power' (2007) 35 *Federal Law Review* 25.

69 *Chu Kheng Lim* (1992) 176 CLR 1, 10 (Mason CJ).

70 Four exceptions to this general proposition were identified: pre-trial detention, executive detention for the purposes of mental illness or infectious disease, the power of contempt held by Parliament, and the power of military tribunals with respect to military discipline: ibid 28 (Brennan, Deane and Dawson JJ).

71 Ibid 27 (Brennan, Deane and Dawson JJ).

72 Ibid 28–9 (Brennan, Deane and Dawson JJ). See also Jeffrey Steven Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Non-criminal Detention' (2012) 36 *Melbourne University Law Review* 41.

The key point was that this constitutional immunity was restricted to 'citizens', as the 'vulnerability of the alien to exclusion or deportation' put the non-citizen in a different position.[73] The majority held, importantly, that the *Constitution* authorised detention as an incident of the executive power to expel or deport a non-citizen, and also as an incident of the powers to 'receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport'.[74] Such detention is 'neither punitive in nature nor part of the judicial power of the Commonwealth'.[75]

According to the majority, as detention was authorised only as an 'incident' of an executive power, the laws authorising detention would only be valid to the extent they were 'limited to what is reasonably capable of being seen as necessary' to effect the constitutionally permitted purposes.[76] This introduces a test that requires the court to examine whether the mechanism of detention can be seen to be effecting the constitutionally permitted purposes. This is a test of degree that can be seen as a weak standard of 'proportionality'.

On the facts before them, the majority held that division 4B was so limited. The key factors in coming to this conclusion were: the maximum time limit, the requirement that a person should be removed 'as soon as practicable' after failure to make an application for admission or after final determination of a refusal, and (most importantly) the ability of a detainee to request removal 'as soon as practicable' and therefore to bring their custody to an end at 'any time'.[77]

Justice Gaudron reached the same conclusion by another route. Her Honour considered that, rather than being a question of judicial power,[78] the key question was whether the laws were sufficiently connected to the constitutional power to regulate aliens. This power, in her Honour's view, included two limits. First, the power only authorised the imposition of obligations or disabilities that were connected with the entitlement of aliens to remain in Australia. Secondly, the laws must be 'appropriate and adapted to regulating entry or facilitating departure as and when required'.[79] Her Honour agreed, however, that for the reasons canvassed by the majority, the laws were 'appropriate and adapted' to regulating entry and departure, provided the laws were read down to exclude the possibility of applying to those who entered lawfully.[80]

All of the judges except McHugh J, therefore, recognised two types of constitutional limits to immigration detention: first, the laws must relate to the permissible purposes of detention, being regulating entry and departure; and

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73 *Chu Kheng Lim* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ).
74 Ibid 32 (Brennan, Deane and Dawson JJ).
75 Ibid.
76 Ibid 33 (Brennan, Deane and Dawson JJ).
77 Ibid.
78 Ibid 55.
79 Ibid 57 (Gaudron J).
80 Ibid 58.

secondly, there must be a degree of proportionality (either 'reasonably capable of being seen as necessary' or 'appropriate and adapted') between the laws and those purposes.

Justice McHugh's dissent largely rested on his view that there was a third permissible purpose, namely, ensuring 'exclu[sion] from the community' pending removal or admission.[81] However, McHugh J agreed that the laws must be 'reasonably necessary' to achieve these permissible purposes,[82] and that, in assessing this proportionality, the power of the alien to request removal was critical.[83]

2 Al Masri to Al-Kateb and Beyond

Later cases, unfortunately, demonstrated that although a person could request removal, this did not necessarily have the practical effect of removal, raising the potential that detention could be indefinite.[84] Justice Merkel heard such a case in *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs,* in which a Palestinian could not be removed to the Gaza Strip because neighbouring countries refused to admit him.[85]

His Honour interpreted the relevant provisions of the *Migration Act*[86] as subject to two implied limitations. First, the 'Minister [must be] taking all reasonable steps to secure the removal from Australia of a removee as soon as is reasonably practicable'.[87] Secondly, 'the removal of the removee from Australia [must be] "reasonably practicable", in the sense that there must be a real likelihood or prospect of removal in the reasonably foreseeable future'.[88] His Honour held that removal in this case was not reasonably foreseeable,[89] and therefore ordered that Al Masri be released.[90] His Honour reached that conclusion by a straightforward route, beginning with the ruling in *Chu Kheng Lim*, and

81 Ibid 71.
82 Ibid.
83 Ibid 72.
84 For discussion of the Federal Court cases, see Lara Wood Gladwin, 'How Long Is Too Long? The Implied Limit on the Executive's Power to Hold Non-citizens in Detention under Australian Law' (2003) 39 *AIAL Forum* 58.
85 (2002) 192 ALR 609, 610 [5]–[6] ('*Al Masri*').
86 *Migration Act* ss 196, 198. Section 196 then provided, in similar terms to earlier regimes, that the duration of detention continued until a person was removed, deported or granted a visa. Section 198 then provided that an officer must remove an unlawful non-citizen who requests removal 'as soon as reasonably practicable'.
87 *Al Masri* (2002) 192 ALR 609, 619 [38] (Merkel J).
88 Ibid.
89 Ibid 621 [51]–[52]. His Honour drew an adverse inference because of the absence of evidence as to the present prospects for removal.
90 Ibid 621–2 [54]–[56].

drawing support from overseas cases that had similarly implied limitations on the power to detain pending deportation.[91]

Justice Merkel's decision was followed by a raft of single-judge decisions in the Federal Court, with some following that judgment, but others disagreeing in part or wholly with those conclusions.[92] Notably, French J declined to follow *Al Masri*, on the basis that the language of the legislation was 'intractable' – the reasoning later adopted by the High Court.[93]

On appeal, however, the Full Federal Court essentially upheld Justice Merkel's decision.[94] In the Full Federal Court's view, if no limitation were implied into the provision authorising detention, the provisions would be constitutionally invalid, following *Chu Kheng Lim*. This view was based both on the absence of a maximum time limit, and the implied assumption that a detainee could practically effect his or her removal by request.[95] Further, the connection between the purpose of removal and detention would be too 'tenuous' because of the absence of any real prospect of removal.[96]

However, like Merkel J, the Full Federal Court considered that the relevant provisions could be read down. While the Court rejected Justice Merkel's first suggested implied limitation,[97] the Court endorsed his Honour's second limitation, namely that the detention was lawful only 'where there is a real likelihood or prospect of the removal of the person from Australia in the reasonably foreseeable future'.[98]

The *Al Masri* litigation formed part of a broader range of legal challenges to detention that came to the High Court in 2004. These included cases concerning the Family Court's jurisdiction to release, and make orders concerning the welfare of, children in detention,[99] and the relevance of the conditions of

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91 *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97; *Zadvydas v Davis*, 533 US 678 (2001). The first of these cases is discussed further in Part V(B)(II) below.

92 See *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 95–6 [167]–[169] (The Court).

93 *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625.

94 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54.

95 Ibid 71 [61] (The Court).

96 Ibid 73–4 [74] (The Court).

97 The Full Federal Court found that an order of mandamus should be sought: ibid 88 [134].

98 Ibid 88 [136].

99 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365. See also Richard Chisholm, 'Immigration and the Family Court: The High Court Speaks' (2004) 18 *Australian Journal of Family Law* 193; Adiva Sifris and Tania Penovic, 'Children in Immigration Detention: The Bakhtiyari Family in the High Court and beyond' (2004) 29 *Alternative Law Journal* 217; Adiva Sifris, 'Children in Immigration Detention: The Bakhtiyari Family in the Family Court' (2004) 29 *Alternative Law Journal* 212; Lara Ruddle and Sally Nicholes, 'B and B and Minister for Immigration and Multicultural and Indigenous Affairs: Can International Treaties Release Children from Immigration Detention Centres?' (2004) 5 *Melbourne Journal of International Law* 256.

detention to its legality.[100] The question in *Al Masri* arose before the High Court that year in the companion cases of *Al-Kateb v Godwin* and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*.[101] In all of these cases, a majority of the High Court rejected the challenges to the mandatory detention regime.

Shortly before *Al-Kateb* and *Al Khafaji* were heard, Parliament passed the *Migration Amendment (Duration of Detention) Act 2003* (Cth). The Act was drafted initially to reverse, in effect, the Full Federal Court's decision in *Al Masri*, by expressly providing that detention was to continue regardless of whether there was a real likelihood of the person being removed or deported in the reasonably foreseeable future.[102] However, the Bill failed to obtain the support of the Labor Party, which negotiated a compromise.[103] Instead, the relevant provision was limited to apply only to detention pending deportation for convicted criminals and those detained on 'character' grounds.[104] This amendment was also expressed as not affecting by implication the continuation of detention in other circumstances under the *Migration Act*.[105] Senator Sherry, announcing this compromise, stated:

> In a civilised Western democracy, we would all agree that detaining someone and depriving them of their liberty is probably the biggest, most significant policy decision that the state – the government – can take against any individual in our society. It would be highly inappropriate to sanction a course of conduct whereby we would wholly rob the court of the jurisdiction to make the determination that someone's detention had become unlawful and put us in a position where people could literally be detained for a lifetime – certainly for some of these children it is their lifetime – and have absolutely no means of having that addressed anywhere.[106]

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100 *Behrooz v Secretary of Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

101 *Al-Kateb* (2004) 219 CLR 562; *Al Khafaji* (2004) 219 CLR 664 ('*Al Khafaji*'). There is extensive literature on these cases: see, eg, James Allan, '"Do the Right Thing" Judging? The High Court of Australia in *Al-Kateb*' (2005) 24 *University of Queensland Law Journal* 1; Cameron Boyle, 'Executive Detention: A Law unto Itself? A Case Study of *Al-Kateb v Godwin*' (2005) 7 *University of Notre Dame Australia Law Review* 119; Juliet Curtin, 'Never Say Never: *Al-Kateb v Godwin*' (2005) 27 *Sydney Law Review* 355; Head, 'Detention without Trial', above n 3; Dennis Rose, 'The High Court Decisions in *Al-Kateb* and *Al Khafaji* – A Different Perspective' (2005) 8 *Constitutional Law and Policy Review* 58; Oscar Roos, 'Commonwealth Legislative Power and "Non Punitive" Detention: A Constitutional Roadmap' (2005) 1 *High Court Quarterly Review* 142; Eloise Dias, 'Punishment by Another Name? Detention of Non-citizens and the Separation of Powers' (2004) 15 *Public Law Review* 17; Matthew Zagor, 'Uncertainty and Exclusion: Detention of Aliens and the High Court' (2006) 34 *Federal Law Review* 127.

102 Department of the Parliamentary Library (Cth), *Bills Digest*, No 182 of 2002–03, 23 June 2003; Explanatory Memorandum, Migration Amendment (Duration of Detention) Bill 2003 (Cth).

103 Commonwealth, *Parliamentary Debates*, Senate, 8 September 2003, 14 446 (Nicholas Sherry).

104 See *Migration Act* ss 200–3.

105 Ibid s 196(5A).

106 Commonwealth, *Parliamentary Debates*, Senate, 8 September 2003, 14 446 (Nick Sherry).

The Australian Government, having partly failed in Parliament, then succeeded in the High Court. As is well known, in the infamous case of *Al-Kateb* a majority of four judges held that there was no such implied limitation, and that the *Migration Act* therefore required a person to be detained even if there was no reasonable likelihood of removal. The majority came to this conclusion with 'ruthless literalism',[107] echoing the reasoning of French J below, to find that the relevant provision was simply 'unambiguous' and 'intractable', and not amenable to the reading in of any implications.[108]

Al-Kateb, while not overruling *Chu Kheng Lim*, clearly cast doubt on its authority. Justice Hayne, in the majority, began by expressing the view that the limits established in *Chu Kheng Lim* only arose once the purpose of removal had been spent, which was not until it had become 'reasonably practicable to remove the non-citizen concerned'.[109]

On the limit of permitted purposes, Hayne J agreed with McHugh J that 'segregation from the community in the meantime' was a legitimate non-punitive purpose.[110] Justice Callinan took an even broader view, and appeared open to extending the permissible purposes to include preventing non-citizens 'working, or otherwise enjoying the benefits that Australian citizens enjoy' as well as 'to deter entry by persons without any valid claims to entry either as a punishment or a deterrent'.[111] Further, in his Honour's view, the power to detain remained as long as the Minister 'continues to have the intention of removing the appellant from the country',[112] whether or not there was any prospect of removal.

Justice Hayne also questioned the proportionality limit expressed in *Chu Kheng Lim*, considering such questions were more properly addressed to characterising constitutional powers.[113] Meanwhile, McHugh J rather opaquely rejected his own statement in *Chu Kheng Lim* that the law could not go 'beyond what was reasonably necessary' to effect deportation, suggesting this was not directed to a situation such as the present.[114] Further, McHugh J considered that the power to detain aliens was not incidental to the aliens power, but was rather a law with respect to the subject matter of that power, making any proportionality standard irrelevant.[115] The basic objection of both Hayne and McHugh JJ to the argument that *Chu Kheng Lim* applied, however, was that such laws were non-punitive in nature.[116]

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107 Curtin, above n 101, 369.
108 *Al-Kateb* (2004) 219 CLR 562, 581 [33] (McHugh J), 643 [241] (Hayne J), 662–3 [303] (Heydon J agreeing).
109 Ibid 647 [251] (Hayne J).
110 Ibid 648 [255]–[256]. Justice McHugh also restated this view: at 584 [45].
111 Ibid 658 [291].
112 Ibid 662 [299].
113 Ibid 647 [253].
114 Ibid 586 [49].
115 Ibid 583–4 [42]–[43].
116 Ibid 584 [45] (McHugh J), 649–50 [261]–[263] (Hayne J).

At the heart of the majority's view was concern over the illegitimacy of judicial intervention against the wisdom or justice of the Parliament:

> As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by the Parliament is not examinable in this or any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. … The doctrine of separation of powers does more than prohibit the Parliament and the Executive from exercising the judicial power of the Commonwealth. It prohibits the Ch III courts from amending the Constitution under the guise of interpretation.[117]

The dissenting judges, Gleeson CJ, Kirby and Gummow JJ, also wrote separate judgments. Chief Justice Gleeson's judgment essentially endorsed the conclusion of the Full Federal Court, relying largely on the principle of legality.[118] Justices Kirby and Gummow both defended the constitutional principle expressed in *Chu Kheng Lim*.[119]

Justice Gummow's main argument, however, was that once the assumption that removal was possible had been falsified, there was no longer a sufficient connection to the purpose of deportation.[120] Justice Gummow also sought to discard the distinction between punitive and non-punitive purposes of detention as the touchstone for constitutional validity, arguing that '[i]t is primarily with the deprivation of liberty that the law is concerned'.[121]

The relationship between *Al-Kateb* and *Chu Kheng Lim* arose again soon after in October 2004 in *Re Woolley; Ex parte Applicants M276/2003*.[122] The case challenged, unsuccessfully, the application of mandatory detention to children. Most interestingly for present purposes, McHugh J argued that *Al-Kateb* had effectively overturned *Chu Kheng Lim*[123] – a contention, however, that did not receive the support of the other judges in the majority in *Al-Kateb*.

Justice McHugh expressly argued that the view from *Chu Kheng Lim* that citizens enjoyed a 'constitutional immunity' from detention had also effectively been overruled.[124] Instead, whether detention was 'penal or punitive must depend on all the circumstances of the case', and the only constitutional limit to executive detention rested on the limits to Commonwealth legislative power rather than the exclusivity of judicial power.[125]

His Honour also argued that detention laws could validly have a deterrent aspect, provided that deterrence was not 'one of the principal objects of the law'

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117 Ibid 595 [74] (McHugh J); see also: at 651 [259] (Hayne J).
118 Ibid 577 [20].
119 Ibid 613 [139] (Gummow J), 618 [153] (Kirby J).
120 Ibid 608 [122].
121 Ibid 612 [137].
122 (2004) 225 CLR 1.
123 Ibid 25 [59].
124 Ibid 26 [62].
125 Ibid 24–5 [57]–[58], 27 [63] (McHugh J).

and the detention could not 'be regarded as punishment to deter others'.[126] The 'deterrent aspect itself' must be intended to be punitive before an 'otherwise protective' law would be seen as punitive in nature.[127]

However, McHugh J was prepared to identify some limits to the power of detention. In his Honour's view, disguised punishment could offend Chapter III of the *Constitution*,[128] and the length of detention itself could indicate that the connection with a legitimate purpose had become too 'tenuous' and therefore punitive, even if the law itself had a non-punitive purpose.[129] Further, his Honour was prepared to read into the statute the requirement that the steps of processing a visa must be performed within a 'reasonable time'.[130]

Justice Callinan partly extended his position in *Al-Kateb* by suggesting that another permissible purpose might be the purpose of 'not fragment[ing] an alien family', in the case of the detention of children.[131] His Honour also suggested that the government would continue to have a permitted purpose of removal until the government 'formally and unequivocally' abandoned that purpose.[132]

Justice Gummow continued to adhere to his minority opinion in *Al-Kateb* that detention was authorised only while removal was 'reasonably practicable',[133] and defended the 'basic constitutional precepts' expressed in *Chu Kheng Lim*.[134] His Honour also attacked the suggested permissible purpose of 'exclusion from the Australian community' as 'Orwellian' and founded on a 'political idea whose time has gone'.[135]

3 Plaintiffs M61, M47 and M76

The tide, however, began to turn under the leadership of French CJ. In *Plaintiff M61/2010E v Commonwealth of Australia*,[136] the High Court held unanimously that a non-statutory refugee status assessment process then in place for irregular arrivals remained subject both to existing jurisprudence on the refugee definition, and to obligations of procedural fairness.

For present purposes, the High Court held that it was a legitimate purpose to detain a person to enable the Minister to consider 'lifting the bar' or to exercise his personal power to grant a visa '[a]ssuming the relevant steps were taken promptly'.[137] This was a logical application of the existing legitimate purpose of

126 Ibid 26 [61] (McHugh J).
127 Ibid.
128 Ibid 35 [82].
129 Ibid 36–37 [88].
130 Ibid 38 [94].
131 Ibid 85 [264].
132 Ibid 85 [262]–[264].
133 Ibid 52 [134].
134 Ibid 55 [150].
135 Ibid 52 [137], 54 [146].
136 (2010) 243 CLR 319 ('*Offshore Processing Case*').
137 Ibid 342 [35] (The Court).

considering admission into Australia. Relevantly, the Court also found that the decision to implement the refugee status assessment process was itself a decision to consider 'lifting the bar', the first part of a two-stage process. The High Court also recognised, uncontroversially, that detention affected a 'right, interest or privilege' for the purposes of determining whether procedural fairness was required.[138]

Of greater relevance were two cases involving adverse security assessments by ASIO, *Plaintiff M47/2012 v Director-General of Security*[139] and *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*[140] (discussed in Part II(D)). In both cases, the plaintiffs directly challenged the authority of *Al-Kateb*.

In both cases, however, the majority avoided addressing this issue by finding for the plaintiffs on other grounds.[141] First, in *Plaintiff M47*, the High Court held that the public interest criterion relating to ASIO assessments was invalid because it was inconsistent with the *Migration Act* scheme of merits review for such cases. This meant that in *Plaintiff M76* the decision not to refer the plaintiff's case to the Minister to consider 'lifting the bar', on the basis of the same public interest criterion, was also invalid.[142]

Nevertheless, in *Plaintiff M47* a minority chose to address the *Al-Kateb* argument directly. Justices Gummow and Bell both challenged the authority of *Al-Kateb*, while Heydon J rose to its defence. Intriguingly, Gummow J chose to shift from his earlier reasoning in *Al-Kateb* to Chief Justice Gleeson's reasoning,[143] arguing that the majority in *Al-Kateb* had erred by failing properly to apply the principle of legality.[144] His Honour also raised, but considered it unnecessary to decide, the question of whether *Al-Kateb* was compatible with *Chu Kheng Lim*.[145] Similarly, Bell J would have overruled *Al-Kateb* on the ground of the failure to discuss the principle of legality.[146]

Justice Heydon not only defended *Al-Kateb*, but also suggested a new legitimate purpose, namely, to detain 'unlawful non-citizens who threaten the safety or welfare of the community because of the risks they pose to Australia's security'.[147] His Honour also joined McHugh J in arguing that the

138 Ibid, 350 [70], 352 [75] (The Court).
139 (2012) 251 CLR 1 ('*Plaintiff M47*').
140 (2013) 251 CLR 322 ('*Plaintiff M76*').
141 See *Plaintiff M47* (2012) 251 CLR 1, 48 [72] (French CJ), 155 [405] (Crennan J), 170 [460] (Kiefel J); *Plaintiff M76* (2013) 251 CLR 322, 344 [341] (French CJ), 369–73 [136]–[149] (Crennan, Bell and Gageler JJ).
142 *Plaintiff M76* (2013) 251 CLR 322, 341 [24]–[25] (French CJ), 368 [134] (Crennan, Bell and Gageler JJ), 398 [222]–[223] (Kiefel and Keane JJ), 356 [86] (Hayne J).
143 Ibid 68 [148].
144 Ibid 59–61 [116]–[120].
145 Ibid 57 [106].
146 Ibid 189–93 [525]–[533].
147 Ibid 136 [346].

proportionality test in *Chu Kheng Lim* was inappropriate, although even if there was such a test, his Honour thought it was met.[148] However, his Honour expressly refused to decide whether the majority decision in *Chu Kheng Lim* was still good law.[149]

In *Plaintiff M76*, a new shift occurred. Justice Hayne, while affirming his decision in *Al-Kateb*,[150] sounded a loud warning:

> The power to detain unlawful non-citizens given by the Act should not be construed as unbounded. Nor are the applicable provisions of the Act to be construed as authorising detention for whatever period of time the Minister may choose.[151]

His Honour continued:

> The Act does not authorise detention of an offshore entry person for whatever number of successive periods of detention would be necessary for the Minister to obtain information and advice about a series of disconnected inquiries said to relate to questions of public interest governing the exercise of the power under section 46A(2). To read the Act as permitting that to occur would be to read the Act as permitting detention at the will of the Executive. That construction should be rejected.[152]

Justice Hayne also introduced a new constitutional limit in his reasons. At the time detention begins, the lawfulness of the detention must be determined by a criterion or criteria that fix the boundaries of the lawfulness of that detention, both in relation to its purpose and its length. This is essential because it is the only way a court can judge and enforce the lawfulness of detention.[153] In the present case, the Government's policy at the time of detention made it clear that the only relevant consideration to the decision on whether to 'lift the bar' was whether the person met the definition of a refugee.[154] Consequently, according to Hayne J, detention could not be justified after the plaintiff had been assessed to be a refugee, including for considering any 'public interest criteria'.[155] As will be seen in the next Part, this new limit has now been endorsed by a majority of the High Court in *Plaintiff S4*.

148 Ibid 131 [335], 136–137 [348]–[349 (Heydon J).
149 Ibid 135–6 [345].
150 *Plaintiff M76* (2013) 251 CLR 322, 345 [36].
151 Ibid 359 [98].
152 Ibid 360 [103].
153 Ibid 359 [99] (Hayne J).
154 Ibid 360 [102]–[105] (Hayne J).
155 Ibid 360 [102].

IV *PLAINTIFF S4*

A Background

In December 2011, the plaintiff arrived by boat and, like the plaintiffs in *Plaintiff M61, Plaintiff M47* and *Plaintiff M76*, was detained during a non-statutory refugee status assessment process.[156] The plaintiff was found to meet the definition of a refugee on 13 April 2012,[157] as well as the applicable health and character requirements.[158] However, the incoming Minister for Immigration did not grant the plaintiff a protection visa, but rather a temporary safe haven visa and a temporary humanitarian concern ('THC') visa, as part of the strategy, discussed in Part II(D) above, to deny permanent protection. The Minister purported to grant these visas pursuant to his personal, non-compellable ministerial power to grant a detainee a visa under section 195A of the *Migration Act*.

The temporary safe haven visa and THC visa had been created as part of the humanitarian response to the Kosovar and East Timorese crises,[159] and as they were already part of the migration legislation, they were not subject to disallowance by the Senate. These visas did not need to be applied for but could be 'offered' by the government. Once accepted, a statutory bar prevented the visa holder from making further applications for other kinds of visas, subject only to another personal, non-compellable ministerial power to 'lift the bar'.[160]

B Analysis of the Judgment

1 The Main Ruling

In *Plaintiff S4*, five judges of the High Court (including Hayne J) unanimously ruled that these visas were not validly granted.[161] The High Court held that, reading the Act coherently,[162] the Minister could not exercise his power under section 195A of the *Migration Act* in a way that would prevent him from

156 This was known as the protection obligations determination process. It was relevantly similar to the refugee status assessment process considered by the High Court in *Offshore Processing Case* (2010) 243 CLR 319.

157 Plaintiff S4/2014, 'Plaintiff's Chronology', Submission in *Plaintiff S4/2014 v Minister for Immigration and Border Protection,* S4/2014, 3 June 2014.

158 *Plaintiff S4* (2014) 88 ALJR 847, 850 [3], 852 [19] (The Court).

159 See generally Savitri Taylor, 'Protection or Prevention? A Close Look at the New Temporary Safe Haven Visa Class' (2000) 23(3) *University of New South Wales Law Journal* 75.

160 *Migration Act* ss 91K–91L.

161 (2014) 88 ALJR 847 (French CJ, Hayne, Crennan, Kiefel and Keane JJ). This was because the parties did not argue that the case raised constitutional issues: see Transcript of Proceedings, *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCATrans 2 (23 January 2014).

162 (2014) 88 ALJR 847, 855–6 [42]–[46] (The Court). In particular, this required the application of the proposition 'that an enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course': at 855 [42].

completing the consideration of whether to 'lift the bar' under section 46A, because of the consequence of a new 'visa bar' attached to those visas.[163] This was especially true where the plaintiff's detention had been prolonged to allow the Minister to consider whether to 'lift the bar', as that would deprive the plaintiff's prolonged detention of its purpose.[164] That is, while section 195A, read on its face, appears to confer on the Minister unfettered power to grant visas releasing a person from detention, that power could not properly be read to allow the grant of visas that would deprive the detention of its purpose.

This reasoning has several advantages. First, it has the merit of logic, by reconciling the potential conflict of two ministerial powers. Secondly, it has the advantage of remaining in the terrain of textual analysis, where the courts are most comfortable and their authority is least controversial. Thirdly, the reasoning promotes the rule of law by: requiring a process begun by one Minister to be continued by another; and promoting the values of predictability, consistency, and the application of law. The reasoning also promotes the rule of law by refusing to allow the Minister to use a back door to achieve what could not be done through the front door – namely, by enacting regulations subject to parliamentary scrutiny.

The Minister, however, refused to give up. The High Court's decision was premised on the fact that the Minister had not yet completed the two-stage process of considering whether to 'lift the bar'. In a case brought together with *Plaintiff S4*, *Plaintiff S297/2013 v Minister for Immigration and Border Protection*,[165] the Minister completed the process by refusing to grant a protection visa on the basis that it was not in the 'national interest', a little-used criterion in the *Migration Regulations 1994* (Cth).[166] The Minister then promptly granted the plaintiff a THC visa, a move that was swiftly challenged and unanimously invalidated by the High Court.[167] However, the passage of legislation introducing temporary protection visas has now limited the practical significance of the result.

2 The Return to Chu Kheng Lim

The true legacy of *Plaintiff S4* rests, however, in the joint judgment's clear articulation of the constitutional limits on detention. Although *Plaintiff S4* was not heard as a constitutional case and its comments on detention are obiter,[168] the unanimous nature of the judgment and its clear statement of constitutional

163 Ibid 856 [45]–[46] (The Court).
164 Ibid 856 [47], 857 [58] (The Court).
165 (2015) 89 ALJR 292 ('*Plaintiff S297*').
166 *Migration Regulations 1994* (Cth) sch 2 cl 866.266.
167 *Plaintiff S297/2013* (2015) 89 ALJR 292.
168 The issue of detention was addressed, it appears, because the consequence of finding that the visa was invalid meant the plaintiff was liable to detention. The Court's observations, therefore, appear to warn the Minister's delegates that re-detention of the plaintiff may not be constitutional.

principles marks *Plaintiff S4* as a real turning point. Its significance may well be underestimated, however, because *Plaintiff S4* carefully omits any discussion of the controversies raised in the preceding jurisprudence.

The most significant aspect of the High Court's discussion is its surprising and ringing endorsement of the principles in *Chu Kheng Lim*, reviving the authority of a much-doubted case. The judgment first endorsed *Chu Kheng Lim*'s statements that 'an alien within Australia, whether lawfully or not, is not an outlaw' and that detention is not an end in itself, but must be in aid of the objects expressed in the *Migration Act*.[169]

More significantly, in the following two paragraphs, the High Court endorsed, without further comment, the majority reasoning in *Chu Kheng Lim*.[170] In particular, the High Court endorsed the three following constitutional principles set out in *Chu Kheng Lim*: that immigration detention was an incident of the executive power to admit into, or deport or otherwise remove from Australia; that detention must be for constitutionally permissible purposes; and that the validity of the laws depended upon whether detention could be 'reasonably capable of being seen' to be limited to effect those purposes. *Plaintiff S4* signally omits discussion of subsequent case law questioning the authority of *Chu Kheng Lim,* including *Al-Kateb.* This silence speaks.

Without any overt discussion, *Plaintiff S4* therefore appears to clearly settle the question of whether *Chu Kheng Lim* remains good authority, including rejecting the suggestions of Hayne and McHugh JJ that detention was at the 'heart' of the aliens power rather than an incident of that power. This resurrection of *Chu Kheng Lim* is surprising, given the repeated failures of the High Court in earlier cases to reaffirm its authority, and particularly in light of *Plaintiff M47*, where it appeared that the principle of legality was the most fertile path for challenging *Al-Kateb*.[171] The High Court, it seems, is going back to the beginning, and re-stumping the constitutional foundations for challenges to detention.

This return to the *Constitution* has one immediately obvious effect – the High Court's interpretation of the *Constitution* cannot be overturned by legislation. This is of immense practical significance, given the history of legislative reversals of court decisions in this area, and recent entrenchments of categories of indefinite detention in legislation, as discussed in Part II.

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169 *Plaintiff S4* (2014) 88 ALJR 847, 852 [24] (The Court), citing *Chu Kheng Lim* (1992) 176 CLR 1, 19 (Brennan Deane and Dawson JJ).

170 Ibid 852–3 [25]–[26] (The Court).

171 This principle has been elevated and elaborated in recent years in Australia: see, eg, Dan Meagher, 'The Principle of Legality and the Judicial Protection of Rights – *Evans v NSW*' (2009) 37 *Federal Law Review* 295; Phillip Sales, 'A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*' (2009) 598 *Law Quarterly Review* 605; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449; Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372.

An immediate question raised by *Plaintiff S4* is the continued authority of *Al-Kateb*, which is not referred to in the case. Just as *Al-Kateb* stood uneasily next to *Chu Kheng Lim,* so too do *Al-Kateb* and *Plaintiff S4* appear difficult to reconcile.

Nevertheless, the notoriety of *Al-Kateb*, and possibly Chief Justice French's earlier endorsement of its principal reasoning, may well have the effect of encouraging the High Court to approach *Al-Kateb* cautiously by reinterpreting the decision or, at least, its binding elements. A possible way of reconciling *Plaintiff S4* with *Al-Kateb* is to restrict *Al-Kateb* to the principle that section 196 of the *Migration Act* did not contain any qualifying limitations. Rather, the proper approach was to consider whether the purposes were constitutionally permissible, and if so whether the detention was limited to what could reasonably be seen to be capable of effecting those purposes. In an individual case, such a determination is a question of degree to be examined in all the circumstances, which could also possibly justify the ultimate conclusions in *Al-Kateb*. Another possibility is for the High Court to do what *Al-Kateb* itself did to *Chu Kheng Lim*: refuse to overrule it expressly, but by a process of attrition cast doubt on its authority.

3 Innovations

The next step of *Plaintiff S4* was to settle the jurisprudential debate over the constitutionally permissible purposes of immigration detention. The High Court declared (omitting all reference to the earlier debate) that there were only three lawful purposes: removal; receiving, investigating and determining an application for a visa permitting an alien to enter and remain in Australia; or determining whether to permit a valid application for a visa (that is, whether to 'lift the bar').[172] This statement is exhaustive, so implicitly rules out the other permissible purposes suggested in earlier cases, including 'exclusion from the community'. In essence, therefore, we return to *Chu Kheng Lim*: the only permissible purposes are admission to, and removal from, Australia. This shift returns the High Court to focusing on the key difference between aliens and citizens, namely, their immigration status and, as discussed in Part V(A), casts doubt on the legality of some of Australia's more extreme practices of indefinite detention.

Another innovation in *Plaintiff S4* was the unequivocal statement that these 'purposes must be pursued and carried into effect as soon as reasonably practicable',[173] endorsing the previous statement by McHugh J. The High Court made it as plain as possible that the power to remove a person, and '[t]he powers to consider whether to permit the application for, and the grant of, a visa had themselves to be pursued as soon as reasonably practicable'.[174]

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172 *Plaintiff S4* (2014) 88 ALJR 847, 853 [26] (The Court).
173 Ibid 853 [28], 854 [34] (The Court).
174 Ibid 854 [34]–[35] (The Court).

This was justified, first, on the grounds of statutory interpretation. Section 196 of the *Migration Act* provides that detention will terminate on one of four events of which only the first – removal from Australia – had to happen and which, therefore, indicated the outer limit of detention.[175] Since removal had to occur 'as soon as reasonably practicable' under that provision, this also qualified the legality of detention under the Act.[176]

This was also justified on constitutional grounds, picking up the point made by Hayne J in *Plaintiff M76*[177] that, in order for executive detention to be lawful, the length and purposes of the detention must be fixed at the outset by what is 'necessary and incidental' to fulfil the legitimate purposes.[178] Further, the length of detention must be capable of being ascertained at any time, as otherwise the courts could not determine the lawfulness of the detention.[179] While the facts to which these criteria are to be applied may vary according to the inquiries and decisions made along the way, the criteria to be applied in determining lawfulness 'do not, and may not, vary'.[180] This part of *Plaintiff S4* therefore artfully blends the ruling in *Chu Kheng Lim* with Justice Hayne's reasoning in *Plaintiff M76*.

The requirement that the relevant criteria must be set at the start of detention has two significant practical consequences: the grounds of detention cannot be changed during the process, and (as discussed further below), it asserts the ongoing power of the courts to examine the legality of detention for reasons other than the formal immigration status of the detainee. Yet, the most striking implication of *Plaintiff S4* is that various categories of immigration detention may well be unconstitutional, as discussed below.

V IMPLICATIONS OF *PLAINTIFF S4*

A Constitutionally Suspect Cases of Detention

Plaintiff S4 casts doubt on the constitutionality of the following categories of detention:

- detention on grounds of security and character;
- detention in cases where processing is not being undertaken;
- cases of unduly lengthy detention; and

175 The other three events are that an officer begins to deal with the non-citizen for the purposes of taking the person to a regional processing country, or the person is deported, or the person is granted a visa.
176 *Plaintiff S4* (2014) 88 ALJR 847, 854 [30]–[33] (The Court).
177 *Plaintiff M76* (2013) 251 CLR 322, 359 [98]–[99].
178 *Plaintiff S4* (2014) 88 ALJR 847, 853 [29] (The Court).
179 Ibid.
180 Ibid.

- other cases, including detention of recognised refugees for health and security checks, and those refused protection visas but not currently in the process of being removed.

1 Indefinite Detention on Security and Criminal or Character Grounds

The first category that stands out as arguably unconstitutional is the indefinite detention of those with adverse security assessments from ASIO, because *Plaintiff S4* appears to rule out the purpose of 'protecting the Australian community from security risks' as it neither relates to the entry nor removal of aliens. It may be that other sources of Commonwealth power could be used, such as the defence power under section 51(vi)[181] or the little-used influx of criminals power under section 51(xxviii) of the *Constitution*. The latter may be difficult to sustain given the detention power is not confined to those who have been proven to have committed crimes.

Even if another constitutional source of power could justify such detention, the current form of the detention remains suspect. Other constitutional cases suggest that if detention is grounded on the protection of the public, such measures must allow courts to do more than 'rubber stamp' preceding administrative decisions.[182] It is also arguable that the defence power is purposive in nature and includes a requirement of proportionality,[183] which the current detention regime is unlikely to satisfy, especially given the comparative examples of control order regimes.

Another category of indefinite detention which may be unconstitutional for similar reasons is the detention of those denied protection on the basis of previous crimes, including relatively minor offences committed in detention.[184] Indefinite detention on these 'character' grounds are subject to the provisions of the *Migration Amendment (Duration of Detention) Act 2003* (Cth), which are said to authorise detention 'whether or not there is a real likelihood of the person detained being removed … or deported … in the reasonably foreseeable future'.[185] There have already been several such cases before the courts, including two Full Federal Court decisions in 2014 that found the Minister was required to

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181 The defence power has been held to extend to internal threats, including the protection of the public at large: *Thomas v Mowbray* (2007) 233 CLR 307. For analysis of this case, see Andrew Lynch, '*Thomas v Mowbray*: Australia's War on Terror Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182.

182 *South Australia v Totani* (2010) 242 CLR 1.

183 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

184 *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth). While the detention of some of these individuals might be justified if they were in the process of removal, such removal must actually be being undertaken and must be effected as 'soon as reasonably practicable'.

185 *Migration Act* ss 196(4)–(5), as inserted by *Migration Amendment (Duration of Detention) Act 2003* (Cth).

consider the consequence of indefinite detention.[186] This class of detainees will probably expand as the result of recent legislation expanding ministerial powers to cancel visas on 'character' grounds, including powers to overturn decisions made by the Department or the Administrative Appeals Tribunal.[187]

This category of cases appears to clearly breach the principle of the exclusivity of judicial power, especially given the close similarity between criminal punishment and indefinite detention for crimes or other 'character' breaches. Further, the government has expressly relied on the concept of general deterrence to justify these detentions,[188] a purpose which now appears not to be constitutionally legitimate. The extent of ministerial powers to cancel visas and overturn decisions only makes this regime more obviously disproportionate.

2 Cases Where Processing Is Not Being Undertaken

Another probable case of unlawful detention occurs when processing, either for entry or removal, is not being undertaken 'as soon as reasonably practicable' because of an administrative suspension of processing, officially or unofficially, whether as a class or on an individual basis.

As noted earlier, the Gillard Labor Government in 2010 suspended processing for boat arrivals from Sri Lanka and Afghanistan,[189] yet continued to detain these asylum seekers. It is strongly arguable that a deliberate suspension in processing means either that the government is not detaining for the purpose of determining admissibility or effecting removal, or that such processes are not being undertaken 'as soon as reasonably practicable'.

An even more vivid case is the effective suspension of processing after the 2013 election, which provided the context of *Plaintiff S4* itself. As noted above, in 2013–14, processing of refugees was at a standstill due to the Australian Government's refusal on political grounds to issue permanent protection visas.[190] As noted in Part II(D) above, only a single permanent protection visa was granted following the Coalition's election in September 2013.

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186 *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44; *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1. While the Full Federal Court upheld the constitutional validity of the legislative grounds for such cancellations, there was no challenge to the constitutionality of the indefinite detention of those so detained.

187 *Migration Amendment (Character Test and Visa Cancellation) Act 2014* (Cth).

188 See, eg, *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44, 79 [136] (Buchanan J) where it was found that the only reason given for the detention was general deterrence.

189 Leigh Sales, Interview with Chris Bowen and Christopher Pyne (Television Interview, 9 April 2010) <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=transcripts/2010/029.htm&pageID=004&min=ceba&Year=&DocType=>.

190 In 2013–14, only 545 protection visas were granted to irregular maritime arrivals, compared to 4994 the previous year: Department of Immigration and Border Protection, *Annual Report 2013–14* (Annual Report, 15 September 2014) 111 <https://www.immi.gov.au/about/reports/annual/2013-14/pdf/index.htm>.

There are two plausible arguments for the unlawfulness of the detention during this period: first, detention was being carried out for the illegitimate purpose of fulfilling a political promise; and secondly, the processing of visa applications was not carried out 'as soon as reasonably practicable' during this period. Unusually, there is fairly clear objective evidence of the illegitimate purpose, including public statements that 'lifting the bar' would not happen until the Parliament allowed the introduction of temporary protection visas,[191] evidence of the Minister of Immigration being briefed on his legal options to avoid granting permanent protection,[192] and the Minister's promise to Members of Parliament to release children from immigration detention on the passage of the legislation introducing temporary protection visas.[193] The second option, however, is both easier to mount and more politically attractive, because of its reliance on objective evidence, such as the increasing duration of detention and the very small numbers of protection visas issued.

Another way of suspending processing is the mechanism of setting a 'cap' on the number of protection visas able to be issued in a financial year, a strategy used by the Minister for Immigration in 2014.[194] While the High Court ruled that such caps could not be imposed upon protection visas as a matter of statutory construction,[195] this decision has now been effectively reversed by legislation.[196]

Such caps have the effect of deferring the granting of visas until the next financial year once the maximum number of visas has been reached. There is a strong argument that, once this cap has been reached, it would not be constitutional to continue detaining those falling outside the cap. Arguably, such a cap would mean that detention no longer served the purpose of considering admission. Alternatively, if it still served such a purpose,[197] it is difficult to see how detention in this circumstance would be limited to what is 'reasonably capable of being seen as necessary' to effect that purpose, or that visa applications were being considered 'as soon as reasonably practicable'. Further, it is arguable that the imposition of a cap impermissibly changes the criteria for

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191 See, eg, ABC Radio National, 'Morrison Freezes Onshore Protection Visas', *PM*, 4 December 2013 (Scott Morrison) <http://www.abc.net.au/pm/content/2013/s3905082.htm?source=rss>.

192 Ben Doherty, 'Scott Morrison Ignored Departmental Advice on Visas for Boat Arrivals', *The Guardian* (online), 27 October 2014 <http://www.theguardian.com/australia-news/2014/oct/27/scott-morrison-ignored-department-advice-on-visas-for-boat-arrivals>.

193 Michael Gordon, 'Ricky Muir's Anguish on Asylum Vote', *The Age* (online), 5 December 2014 <http://www.theage.com.au/national/ricky-muirs-anguish-on-asylum-vote-20141205-1219av.html>.

194 Minister for Immigration and Citizenship (Cth), *Migration Act 1958 – Granting of Protection Class XA Visas in 2013/2014 Financial Year*, IMMI 14/026, 4 March 2014, 1.

195 *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 735; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 722.

196 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 7.

197 It is arguable that the purpose is still being served as the processing itself continues up until the point of the grant of a visa.

determining the lawfulness of the detention after detention has begun, by effectively introducing a new criterion for the grant of a protection visa.

Finally, there are currently an estimated 20 000–30 000[198] irregular arrivals subject to processing under the newly legislated 'fast tracking' scheme.[199] For these people, the bar has not yet been 'lifted' by the Minister and it has been publicly estimated that it will take around three years to complete processing.[200] It is arguable that continued detention of this category would be unconstitutional if no active steps are being taken to consider their cases.

3 Unduly Lengthy Detention

Another implication of *Plaintiff S4* is that unduly lengthy detention could be challenged on the ground that processes are not being undertaken 'as soon as reasonably practicable'. This implication has significant potential to enable Australian courts to review immigration detention in a substantive way.

This is because, if a detainee challenges detention on this ground, the Commonwealth would need to justify the length of detention, including providing evidence of the reasonableness of the steps and time taken to effect admission or removal. Piercing the secrecy of these administrative processes is likely to have the salutary effect of fostering a culture of justification for detention, and discouraging the government from defending administrative negligence, incompetence or tardiness.

Requiring justification for inordinately lengthy detention may also enable courts to consider individual factors that ought to be relevant to the duration of detention, such as the complexity of any case, the cooperation of the individual, the mental harm caused to the individual, and the risk of the individual absconding. Perhaps more optimistically, routine challenges of this nature might encourage an administration to decide on a more systematic and cost-efficient way of reviewing detention, such as a process of bail.

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198 The official statistics show there are 25 080 people on a bridging visa E, as at 30 November 2014: Department of Immigration and Border Protection (Cth), *Immigration Detention and Community Statistics Summary*, above n 49, 3. There is, however, no exact figure for this 'backlog'. Public statements vary from 25 000–30 000: see, eg, Liberal Party of Australia and National Party of Australia, *The Coalition's Policy to Clear Labor's 30 000 Border Failure Backlog* (Policy Statement, August 2013) <http://www.nationals.org.au/Portals/0/2013/policy/ClearLabor30000BorderFailureBacklog.pdf>; Stefanie Balogh, 'Push to End Asylum Claim Uncertainty', *The Australian* (Sydney), 26 November 2014, 3.

199 This scheme restricts access to merits review for irregular boat arrivals, replacing merits review by the Refugee Review Tribunal with a paper review by a newly constituted Immigration Assessment Authority. For a smaller category, 'excluded fast track review applicant[s]', there will be no review of the Department's decision at all. See *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 4.

200 Balogh, above n 198.

4 Other Possible Cases

The endorsement in *Plaintiff S4* of Justice Hayne's argument in *Plaintiff M76* also suggests that, as his Honour argued in that case, where an asylum seeker being considered under the refugee status assessment and protection obligations determination process has been determined to be a refugee, any further detention for the purposes of conducting security or health checks is unconstitutional.

Finally, another constitutionally suspect form of detention would be where an asylum seeker has been finally refused protection, but there has not yet been any administrative action to begin removal, or such removal is unlikely to be effected in the reasonably foreseeable future. This would also include cases similar to that in *Al-Kateb*, where removal is not reasonably foreseeable because of the refusal of other countries to admit a person. In both cases, as Gummow J has argued, the link with the purpose of removal has become too tenuous.

B Convergence with International and United Kingdom Law

A less obvious implication of *Plaintiff S4* is that it opens up the possibility of convergence with international human rights law and comparative state practice. This remainer of this Part highlights key points of convergence with international human rights law and comparable law in the United Kingdom ('UK'), although clearly discussion of the detail is beyond the scope of this article.[201] Notwithstanding these points of convergence, it remains clear that constitutional reasoning is still some distance away from complying with international law or aligning with comparative state practice. However, it is suggested that this convergence can fruitfully inform the High Court's future judicial reasoning.

1 International Human Rights Law

Freedom from executive detention 'is arguably the most fundamental and probably the oldest, the most hardly won and the most universally recognised of human rights'.[202] The right to liberty and security, and the prohibition of arbitrary and unlawful detention, are enshrined in multiple international human rights

201 See James Renwick, 'Constitutional Aspects of Detention without Trial in Australia, the United States and the United Kingdom' (2006) 9 *Constitutional Law and Policy Review* 37; Dias, above n 101.

202 Tom Bingham, 'Personal Freedom and the Dilemma of Democracies' (2003) 52 *International and Comparative Law Quarterly* 841, 842.

instruments,[203] including the *Universal Declaration of Human Rights*[204] and the *International Covenant on Civil and Political Rights*.[205]

The application of these rights to the detention of asylum seekers and refugees has been elaborated in recent years,[206] including most relevantly by the UN High Commissioner for Refugees ('UNHCR') in its *Guidelines on Detention*[207] and in the newly revised *General Comment No 35* on article 9 of the *ICCPR*. The key principles are set out succinctly in *General Comment No 35*:

> Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case by case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic reevaluation and judicial review. Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention. Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[208]

Clearly, while the limitations set out in *Plaintiff S4* are welcome, they fall well short of ensuring a detention regime that is compatible with this guidance on

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203 See, eg, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 37; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), art 14. For a full summary, see Michael Fordham, Justine N Stefanelli, and Sophie Eser, *Immigration Detention and the Rule of Law: Safeguarding Principles* (British Institute of International and Comparative Law, 2013).

204 *Universal Declaration of Human Rights* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 3.

205 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('*ICCPR*').

206 For a general overview of applicable standards, see Fordham, Stefanelli, and Eser, above n 203.

207 UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Guidelines, 2012).

208 Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person),* 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) [18] (citations omitted).

article 9.[209] Nevertheless, there are some points of convergence with international law.

First, *Plaintiff S4* sets out the parameters of immigration detention by reference to categories of permitted purpose. While *General Comment No 35* does not expressly address this, the UNHCR's *Guidelines on Detention* expressly identify three permissible purposes: public order, public health, or national security. Permissible purposes relating to 'public order' include: 'where there are strong grounds for believing that the specific asylum-seeker is likely to abscond or otherwise to refuse to cooperate with the authorities', in connection with 'accelerated procedures for manifestly unfounded or clearly abusive cases', and to 'carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks'.[210] The UNHCR also gives two examples of purposes that are not legitimate: detention as a penalty for illegal entry and/or to 'deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them'; and detention during proceedings to determine their refugee status on the ground of expulsion, as '[d]etention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected'. [211]

The permitted purposes under *Plaintiff S4* remain far broader than that allowed under international law, particularly as detention during refugee status determination remains constitutional. However, *Plaintiff S4* does at least rule out some illegitimate purposes, including the illegitimate purpose of deterrence. As discussed above, this has real practical value. Further, as argued above, detention for the purposes of removal must require some connection with processes of removal being undertaken.

Secondly, there is some degree of convergence between the requirement in *Plaintiff S4* that detention must be 'limited to what is reasonably capable of being seen as necessary' to effect its purposes and the more stringent standard that detention must be 'reasonable, necessary and proportionate in light of the

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209 As the Human Rights Committee has repeatedly confirmed, Australia's mandatory system of detention is in breach of art 9: see, eg, Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, UN Doc CCPR/C /78/D/1014/2001 (18 September 2003) [7.2]; Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) [9.4]; Human Rights Committee, *Views: Communication No 2094/2011,* 108th sess, UN Doc CCPR/C/108/D/2094/2011 (28 October 2013). For commentary, see eg, Nick Poynder, '*"A" v Australia*' (1997) 22 *Alternative Law Journal* 149; Nick Poynder, '*A (Name Deleted) v Australia*: A Milestone for Asylum Seekers' (1997) 4 *Australian Journal of Human Rights* 155; Saul, 'Dark Justice', above n 38; Saul, 'Indefinite Security Detention', above n 38, Stubbs, above n 3.

210 UNHCR, above n 207, [22]–[24].

211 Ibid [32]–[33]. However, where there are grounds for believing that the specific asylum seeker has lodged an appeal or introduced an asylum claim merely in order to delay or frustrate an expulsion or deportation decision which would result in his or her removal, the authorities may consider detention – as determined to be necessary and proportionate in the individual case – in order to prevent their absconding, while the claim is being assessed.

circumstances'. Clearly, *Plaintiff S4* does not require either reasonableness or proportionality per se. Rather, proportionality in *Plaintiff S4* appears to be less of a freestanding test than the logical consequence of requiring detention to be in aid of its purposes. Yet by including an element of proportionality, *Plaintiff S4* allows us to begin again to ask the question that human rights law asks at the start: is detention needed to effect the purpose?

Much depends on the way this test is applied. In this context, as discussed below, judicial attitudes of deference towards the legislature or executive will prove crucial. *Chu Kheng Lim* does, however, provide a worked example. In *Chu Kheng Lim*, it is reasonably clear that the majority would have found a detention regime unconstitutional if there was no maximum time limit and a person could not end their detention upon request. While that example suggests a more deferential approach than international legal standards, it does appear to rule out the indefinite detention of those detained on security or character grounds.

Thirdly, as already discussed, *Plaintiff S4* has the potential to enable regular challenges to individual detentions on grounds beyond that of the immigration status of the detainee. Article 9(4) of the *ICCPR* expressly entitles detainees to take proceedings before a court to challenge the lawfulness of their detention and, if the detention is unlawful, to be released from detention.[212] This requires a form of judicial review that is not confined to the 'mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with [the *ICCPR*]', including in particular article 9(1).[213] Therefore, a court must have the power to examine the 'substantive necessity' of detention and to order release upon this ground.[214]

While *Plaintiff S4* does not go so far, it does enable courts to examine some of the issues relevant to the arbitrariness of detention, such as suspensions or delays in processing and ulterior purposes of detention. In particular, as noted earlier, the ability of the detainee to raise these issues ought to have the consequence of requiring greater justification by domestic authorities of the grounds for detention and the timeliness of processing. This has real potential to allow for substantive judicial review of at least some aspects of detention. There are, therefore, some points at which *Plaintiff S4* clearly moves Australia closer to compliance with international law.

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212 This clearly includes immigration detainees: Human Rights Committee, *General Comment: No 35 Article 9 (Liberty and Security of Person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) [39].

213 Human Rights Committee, *Views: Communication No 1014/2001*, 78th sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) [7.2]; Human Rights Committee, *Views: Communication Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004*, 90th sess, UN Doc CCPR/C/79/D/1255,1256,1259,1260,1266,1268,1270&1288/2004 (11 September 2007) [7.3]. Cf Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) [9.4].

214 See, eg, Human Rights Committee, *Views: Communication No 1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (6 November 2003) [9.6].

2 UK Law

In the UK, judges have developed implied limitations on the statutory power to detain pending deportation. These limitations are known as the '*Hardial Singh* principles', deriving from Justice Woolf's judgment in *R v Governor of Durham Prison; Ex parte Hardial Singh*.[215] These principles, as settled authoritatively by the UK Supreme Court, are fourfold:

(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

(ii) The deportee may only be detained for a period that is reasonable in all the circumstances;

(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;

(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.[216]

While, as originally stated, the principles were conceived as the outcome of statutory interpretation, subsequent cases have elevated and constitutionalised these principles.[217] Courts have emphasised that these principles are to be supervised by the courts 'according to high standards',[218] and that courts can determine as a matter of fact whether the detention is 'pending removal'.[219] The *Hardial Singh* principles have also been interpreted as converging with the requirements under article 5 of the *European Convention on Human Rights*,[220] which is relevantly similar to article 9 of the *ICCPR*. However, unlike article 9, this article expressly provides for limited grounds for depriving a person of liberty, including relevantly paragraph (1)(f), 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.

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215 [1984] 1 WLR 704, 706 ('*Hardial Singh*').

216 The UK Supreme Court endorsed this summary of principles in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, [22] (Lord Dyson). See also: at [174] (Lord Hope), [189] (Lord Walker), [250] (Lord Kerr). These principles were first stated in this form by Dyson LJ in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [46].

217 See also the House of Lords' endorsement of these principles in *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131, [26] (Lord Slynn). The Privy Council has emphasised that the courts should be 'slow' to exclude or modify the *Hardial Singh* principles, as statutory provisions allowing for the deprivation of liberty should be strictly construed: *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, 111 (Lord Browne-Wilkinson).

218 *Re Wasfi Suleman Mahmod v Secretary of State for the Home Department* [1995] Imm AR 311.

219 *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

220 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) ('*ECHR*').

The *Hardial Singh* principles have been supplemented by published policy guidance on detention,[221] which sets out a general presumption in favour of temporary admission or release and, wherever possible, the use of alternatives to detention.[222] Detention is said to be '*most* usually appropriate' for three purposes: to effect removal, initially to establish a person's identity or basis of claim, or where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release.[223] The policy also sets out factors that must be considered in individual decisions to detain, including: the likelihood and timeframe of removal, evidence of previous absconding or non-compliance, previous history of compliance with immigration controls, ties with the UK, individual expectations about the outcome of a case, the risk of offending or harm to the public, and whether the person is a child or has a history of torture or ill health.[224]

When set next to each other, *Plaintiff S4* and *Hardial Singh* reach strikingly similar conclusions on the limits of the executive power to detain. Like the *Hardial Singh* principles, *Plaintiff S4* is ultimately directed to the question of purpose. In the UK, this is founded on the 'the long-established principle of United Kingdom public law that statutory powers must be used for the purpose for which they were conferred and not for some other purpose'.[225] In the *ECHR* context, it has also been established that detention is 'arbitrary' unless the detention 'genuinely conform[s] with the purpose of the restrictions' permitted under article 5(1) of the *ECHR*.[226]

The permitted purposes under article 5(1)(f) of the *ECHR* also bear a striking resemblance to those in *Plaintiff S4*. In the famous case of *Saadi v United Kingdom*, the Grand Chamber of the European Court of Human Rights considered whether the UK Government could justify its practice of detention for the purposes of accelerated procedures of refugee status determination under the first limb of 'preventing [a person from] effecting an unauthorised entry'.[227] The Grand Chamber held that this paragraph permitted detention of any person who has made an 'unauthorised entry' until the state has 'authorised' entry, thereby permitting in principle the detention of asylum seekers for the purposes of

221 This is a requirement of UK law: see *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245.

222 UK Visas and Immigration, *Enforcement Instructions and Guidance* (Manual, 10 December 2013) 55.1.1 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307995/Chapter55.pdf>.

223 Ibid (emphasis altered).

224 Ibid 55.3.1.

225 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

226 *Saadi v United Kingdom* (2008) 47 EHRR 17, [69] ('*Saadi*'), citing, inter alia, *Winterwerp v Netherlands* (1979) 2 EHRR 387, 402 [39].

227 (2008) 47 EHRR 17, [65].

refugee status determination.[228] Read in this way, the permitted purposes under *Plaintiff S4* and those in article 5(1)(f) of the *ECHR* broadly align.

Similarly, there is convergence between *Plaintiff S4* and the requirements of UK law in relation to the test of proportionality. The UK test is clearly more demanding, as the test is one of 'reasonable[ness]' in all the circumstances, involving judgments of degree where no 'factor is necessarily determinative'.[229] This requires courts to consider factors such as the timeframe of deportation (including the underlying evidence); the risk of absconding; the risk of offending and potential gravity of offending; the extent to which the delay is being caused by lack of cooperation by the deportee; the effect of detention on the deportee, including mental health issues; and the conduct of the Secretary of State, including 'the diligence and speed at which efforts have been made to enforce the deportation order'.[230]

The stringency of such analysis is unlikely in the Australian context, where the test of 'reasonably capable of being seen as being necessary' connotes a more deferential approach, as is suggested by the conclusion of *Chu Kheng Lim* itself. However, the Australian approach is perhaps more consonant with the more circumspect approach taken in the European Court of Human Rights.[231] In *Saadi*, the Grand Chamber confirmed that the principle of proportionality in relation to article 5(1)(f) did not require detention to be 'reasonably considered necessary' to effect the permitted purposes, but rather that the detention be 'closely connected' to such purposes and that such detention did not 'continue for an unreasonable length of time'.[232] This appears closer to the Australian test in practice, including the limitation on the duration of detention expressed in *Plaintiff S4*.[233]

A third point of convergence is the express requirement that the government must pursue and effect its purposes 'as soon as reasonably practicable' (in *Plaintiff S4*), 'act with reasonable diligence and expedition' (in *Hardial Singh*) or prosecute proceedings 'with due diligence' (in *Saadi*). Such terminology appears virtually interchangeable, and requires the government to justify the steps so far taken in the process. The limitation may be more practically significant in Australia, however, because of Australia's practice of routinely detaining people during the refugee status determination process. For example, as discussed

228 Ibid. For commentary, see Helen O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008) 10 *European Journal of Migration and Law* 149.

229 *R (Mahfoud) v Secretary of State for the Home Department* [2010] EWHC 2057 (Admin) [6] (Hickinbottom J).

230 Ibid.

231 However, this more circumspect approach is partly justified by the supranational character of the Court, requiring it to give a 'margin of appreciation' to varying legal cultures and contexts.

232 *Saadi* (2008) 47 EHRR 17, [71]–[74].

233 However, another limitation inferred by the European Court of Human Rights, that 'the place and conditions of detention should be appropriate' to the nature of asylum seeking, is unlikely to apply in Australia: ibid [74]. Cf *Behrooz v Secretary of DIMIA* (2004) 219 CLR 486.

above, practices of suspending processing of asylum claims, capping protection visas, and 'fast track' processing of asylum seekers over a period of three years would arguably render detention unconstitutional.

3 Learning from International and Comparative Law

Notwithstanding Justice McHugh's views in *Al-Kateb* on the irrelevance of foreign and international law, these points of convergence suggest at least three ways that judicial reasoning post-*Plaintiff S4* could benefit from knowledge of international and comparative law.

First, the selection of permissible purposes in *Plaintiff S4* can be fortified by other supportive norms and principles, including: broad consistency with international norms, the public law principle that powers must be used only for the purposes for which they were conferred, and the 'arbitrary' nature of the use of laws for purposes other than which they were conferred. There may also be room for reconsidering Justice Gaudron's suggestion that the aliens power may be confined only to matters relating to their alien status.[234] Courts could also look abroad to the examination of disguised purposes: for example, in *A v Secretary of State for the Home Department [No 1]* the House of Lords identified the true purpose of the control order regime as relating to terrorism rather than immigration control,[235] reasoning that appears relevant to cases of immigration detention on national security or character grounds.

Secondly, courts could benefit from guidance on the proportionality element of *Chu Kheng Lim*. Several developments in comparative practice and international law since *Chu Kheng Lim*, including the development of alternatives to detention, may help inform courts when deciding whether Australia's detention measures can reasonably be seen as necessary.[236] Thirdly, and perhaps most practically, guidance could be obtained from the application of the *Hardial Singh* principles and comparable jurisprudence. The relevant factors to be weighed, their appropriate weight, and the judgments of degree that have

234 *Chu Kheng Lim* (1992) 176 CLR 1, 55. Cf: at 64 (McHugh J).

235 [2005] 2 AC 68 ('*Belmarsh Case*').

236 See generally European Migration Network, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies* (Synthesis Report, November 2014) <http://www.refworld.org/docid/546dd6f24.html>; European Migration Network, *EMN Inform: The Use of Detention and Alternatives to Detention in the Context of Immigration Policies* (Factsheet, November 2014) <http://www.refworld.org/docid/546dd69d4.html>; 'Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons – Geneva, Switzerland, 11–12 May 2011' (2011) 23 *International Journal of Refugee Law* 876; International Detention Coalition, *There Are Alternatives: Policy Guide* (Policy Guide, 1 August 2011) <http://idcoalition.org/publications/there-are-alternatives-policy-guide/>; Alice Edwards, 'Measures of First Resort: Alternatives to Immigration Detention in Comparative Perspective' (2011) 7 *Equal Rights Review* 117; Alice Edwards, 'Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (Research Series, April 2011) <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4dc935fd2>.

been made elsewhere could greatly assist Australian courts although, as noted above, these are likely to need some modification.

The problem of immigration control, and immigration detention in particular, is not a peculiarly Australian problem. It is a problem grappled with by democracies across the world, and their conclusions and guidance should be welcomed by Australian judges.

VI CONCLUSION

There remains one more important lesson from international and comparative law – a lesson on the appropriate role of the courts in supervising immigration detention. This article suggests that, taken to their logical conclusion, the constitutional limits in *Chu Kheng Lim*, as reaffirmed by *Plaintiff S4*, could have far-reaching consequences that would reshape the face of immigration detention as we know it today. The large question is whether the High Court is prepared to back up its warning shot in *Plaintiff S4*, despite the inevitable political storm that will question the legitimacy of any such intervention.

The lesson from international and comparative law, as well as of history, should be that it is the duty of courts to ensure judicial supervision of executive detention. Otherwise, executive detention will violate core legal norms – norms that are shared by democracies – including the value of individual liberty, the separation of powers, and the rule of law. However, while some judges source their legitimacy in core legal norms and view the judiciary as a guardian of the rule of law, other judges source their legitimacy in the methodology of textual exegesis and view the judiciary as interpreters of the texts provided by the legislature. It is this divide that ultimately split the judges in *Al-Kateb*, and it is this divide that repeatedly recurs in different doctrinal guises such as approaches to constitutional and statutory interpretation, the scope of judicial review, and the contest over 'substantive' grounds of judicial review.

Despite the prevalence of this divide, Australian public law is unusually bereft of both a coherent constitutional theory and analytical tools to structure and guide our understanding of the legitimate relationship between the courts and the executive. Public law in Australia appears to have been barely influenced by lively debates elsewhere over such related topics as the foundations of judicial

review,[237] the doctrine of judicial deference,[238] and the role of proportionality.[239] Australian law still has no real framework or even a decent vocabulary to explain why and when courts legitimately overrule governmental or parliamentary decisions. This leaves courts open to criticisms of undue 'judicial activism' or undue 'deference' (depending on one's standpoint), giving the law the appearance of being poorly disguised politics.

While a proper discussion of this issue is beyond the scope of this article, addressing these deficiencies might provide a useful way forward post-*Plaintiff S4*. One possible path is suggested by Stephen Gageler, who has argued for a

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237 See, eg, T R S Allan, 'Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction' [2003] *Public Law* 429; Paul Craig, 'Constitutional Foundations, the Rule of Law and Supremacy' [2003] *Public Law* 92; Christopher Forsyth and Mark Elliott, 'The Legitimacy of Judicial Review' [2003] *Public Law* 286; Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001); Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000). There has been limited Australian commentary: see Peter Bayne, 'The Common Law Basis for Judicial Review' (1993) 67 *Australian Law Journal* 781; Bradley Selway, 'The Principle behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217.

238 See, eg, Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press, 2012); Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in G Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008) 184; Jeffrey Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2003] *Public Law* 592; Michael Tolley, 'Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective' (2003) 31 *Policy Studies Journal* 421; Aileen Kavanagh, 'Judging the Judges under the *Human Rights Act*: Deference, Disillusionment and the "War on Terror"' [2009] *Public Law* 287; Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222; Mark Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' (Research Paper No 32/2013, University of Cambridge Faculty of Law, 17 September 2013). For Australian commentary, see Alan Freckelton, 'The Concept of "Deference" in Judicial Review of Administrative Decisions in Australia: Part 1' (2013) 73 *AIAL Forum* 52; Alan Freckelton, 'The Concept of "Deference" in Judicial Review of Administrative Decisions in Australia: Part 2' (2013) 74 *AIAL Forum* 48.

239 This is partly due to judicial reluctance to use proportionality in recent years: see *Leask v Commonwealth* (1996) 187 CLR 579. There was greater interest in the early 1990s: see Peter Bayne, 'Administrative Law: Reasonableness, Proportionality and Delegated Legislation' (1993) 67 *Australian Law Journal* 448; Russell Smyth, 'The Principle of Proportionality Ten Years after *GCHQ*' (1995) 2 *Australian Journal of Administrative Law* 189; Bradley Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212. There have also been some more recent articles: see Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85; Gabrielle Appleby, 'Proportionality and Federalism: Can Australia Learn from the European Community, the US and Canada?' (2007) 26 *University of Tasmania Law Review* 1. Cf the extensive literature on proportionality in the UK in recent years: see, eg, Aileen Kavanagh, 'Reasoning about Proportionality under the *Human Rights Act 1998*: Outcomes, Substance and Process' (2014) 130 *Law Quarterly Review* 235; Philip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *Law Quarterly Review* 223; Lady Justice Arden, 'Proportionality: The Way Ahead?' [2013] *Public Law* 498; Tom Hickman, 'The Substance and Structure of Proportionality' [2008] *Public Law* 694; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174; Alan D P Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press, 2012).

vision of the *Constitution* in which the ordinary political process is the primary mechanism for achieving a representative democracy characterised by responsible government and a separation of powers, and where courts act as an 'extraordinary constitutional constraint'.[240] The scope of the courts' role, in this vision, is directly linked to the existence of political accountability, with the scope of the courts' role increasing where mechanisms of political accountability are weak.

This vision derives from the highly influential theory of judicial review developed in the United States ('US') by Professor John Hart Ely.[241] Ely argued for a process-driven theory of judicial review in which courts are responsible for intervening when the political market is 'systemically malfunctioning'. This can occur either because the 'ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out' or, more relevantly, because representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognise commonalities of interest, and thereby denying that minority the protection afforded to other groups by a representative system.[242]

The roots of this theory can be traced back to the US Supreme Court's famous decision in *United States v Carolene Products Co*, in which the Court noted that more stringent judicial review may be required in cases involving particular 'religious … or national … or racial minorities … [being] discrete and insular minorities', because their minority status 'tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry'.[243]

Asylum seekers fall squarely into the category of cases that should receive heightened judicial solicitude. As the US Supreme Court has observed, aliens are a 'prime example' of a 'discrete and insular' minority.[244] Further, Ely identifies another element that should be required to attract 'special scrutiny': that the group is 'the object of widespread vilification, groups we know others (especially those who control the legislative process) might wish to injure'.[245] Asylum seekers clearly fall within that description in Australia.

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240 Stephen Gageler, 'Beyond the Text: A Vision for the Structure and Function of the *Constitution*' (2009) 32 *Australian Bar Review* 138; Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or *Constitution*?' (2000) 28 *Federal Law Review* 303.

241 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

242 Ibid 103.

243 304 US 144, 152 n 4 (Stone J) (1938), cited in Ely, above n 241, 75–7.

244 *Graham v Richardson,* 403 US 365, 372 (Blackmun J) (1971). As Ely points out, 'discrimination against aliens seems a relatively easy case' because they cannot vote, because hostility towards them is a 'time honored American tradition', and because legislatures are overwhelmingly composed of citizens: Ely, above n 241, 161.

245 Ely, above n 241, 153.

Whether or not one accepts Ely's theory, Gageler's vision does highlight the fact that asylum seekers are a 'discrete and insular minority' who have no vote in the political process, a point that is all too frequently overlooked. Also overlooked is the practical impact of the strict party discipline operating in Australia, which results in the rapid passage of legislation and, consequently, minimal parliamentary scrutiny.[246] These points are only exacerbated by the increasingly unfettered nature of ministerial power in refugee and migration law. All of these matters reveal real and considerable limits to the mechanisms of political accountability in this context.

In the past, judges have bowed too quickly to the superior democratic legitimacy of Parliament and the executive. As the High Court is poised on the brink of reversing this trend in immigration detention, it would benefit from a constitutional theory which recognises that a crucial function of the courts in Australia, as elsewhere, is to preserve the rights of minorities, as a balance to the threat of majoritarian tyranny. In the cases of 'discrete and insular minorities', the defects of a populist and majoritarian decision-making process with limited parliamentary scrutiny make it imperative that courts subject the decisions of the executive, and hastily enacted legislation, to 'most anxious scrutiny'.[247]

246 See, eg, above n 5. For a recent example, the public had four business days to make submissions to a Senate Legal and Constitutional Affairs Legislation Committee Inquiry regarding the Australian Citizenship and Other Legislation Amendment Bill 2014, despite the lack of explanation for this apparent urgency: Senate Legal and Constitutional Affairs Legislation Committee, Commonwealth, *Australian Citizenship and Other Legislation Amendment Bill 2014 [Provisions]* (2014) 2 [1.8], 40 [3.59]–[3.60].

247 The phrase 'most anxious scrutiny' was first used in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531 (Lord Bridge). The case indicates that the level of judicial scrutiny should increase 'according to the gravity of the issue which the decision determines'. This was later developed into a varying standard of judicial review: see *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696; *R v Ministry of Defence; Ex parte Smith* [1996] QB 517. Cf Lord Sumption, 'Anxious Scrutiny' (Speech delivered at the Administrative Law Bar Association Annual Lecture, Inner Temple, Main Hall, London, 4 November 2014) <https://www.supremecourt.uk/docs/speech-141104.pdf>.