WHITHER INDEFINITE IMMIGRATION DETENTION IN AUSTRALIA? RETHINKING LEGAL CONSTRAINTS ON THE DETENTION OF NON-CITIZENS

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I INTRODUCTION

The legal and practical difficulties raised by 'administrative' immigration detention of actual or suspected unlawful non-citizens have been agitated before the High Court of Australia ('HCA') and Federal Court of Australia ('FCA') recently. Chiefly, these matters have concerned cases involving persons owed 'protection obligations' under the *Migration Act 1958* (Cth)[1] (ie, refugee protection under the 1951 *Convention Relating to the Status of Refugees*[2] and 1967 *Protocol Relating to the Status of Refugees* (together referred to as '*Refugees Convention*'),[3] or 'complementary protection' under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[4] ('*CAT*') and/or the *International Covenant on Civil and Political Rights*[5] ('*ICCPR*')). One of the fundamental difficulties is that non-citizens often face prolonged and indeterminate detention both *pending* administrative decisions about entry to or removal from Australia, and while removal decisions

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1 The *Migration Act 1958* (Cth) does not directly incorporate, or reflect, international law. The Act articulates Australia's interpretation of its protection obligations under the 1951 *Refugees Convention*. The government's re-definition of a refugee was achieved, most recently, by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) ('*MMPLA Act 2014*'). Equally, the complementary protection regime is a statutory code that does not reflect relevant legal tests and definitions in international human rights treaties: see *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211, 215 [18] (The Court).

2 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

3 Opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

4 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

5 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

are *effected*.[6] Typically, these uncertainties have arisen where protection visa applicants are considered to present security risks by the Australian authorities and are denied entry, but also where non-citizens' visas are cancelled or refused on character grounds and removal is pending ('section 501 detainees').[7]

The increased number of asylum seekers travelling, unauthorised, to Australia by boat between January 2009 and January 2013,[8] the attendant increase in numbers of immigration detainees, and frequent policy changes, have together generated the recent litigation.[9] As the number of maritime arrivals has risen there has been a significant increase in the number of long-term (more than two years) immigration detainees pending entry or removal decisions.[10] This article identifies the subjects of prolonged immigration detention and the main problems with immigration detention, with a particular focus on the nature and extent of purposive and temporal constraints on immigration detention for unlawful non-citizens. A focus on recent case law reveals lingering uncertainties about these constraints, reflective of differing approaches among sitting (and recently retired) members of the HCA in respect of questions of statutory construction and constitutional interpretation. Here it is argued that while detention may lawfully continue for prolonged periods pending entry and removal decisions, the proposition that immigration detention might possibly, and lawfully, endure for the term of a non-citizen's natural life is now dubious.[11] Additionally, this article examines recent jurisprudence dealing with section 501 detainees. These cases have determined that the prospect of prolonged and indefinite immigration detention is a relevant consideration when visa cancellation decisions are made.

This article commences, in Part II, with a descriptive overview of the law and policy governing immigration detention for unlawful non-citizens, and also identifies those non-citizens who are vulnerable to prolonged and indeterminate

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6 See Commonwealth, *Immigration Detention in Australia: A New Beginning (Criteria for Release from Immigration Detention): Joint Standing Committee on Migration*, Parl Paper No 571 (2008) 91 [4.116] ('*Criteria for Release from Immigration Detention Report*'), detailing a stateless man (Peter Qasim) detained for over seven years. See also Andra Jackson, 'Forgotten: A Lonely Life Lived without Hope', *The Sydney Morning Herald* (Sydney), 7 September 2013, 9.

7 *Migration Act 1958* (Cth) s 501 (refusal or cancellation of visa on character grounds).

8 See Department of Immigration and Border Protection, 'Immigration Detention and Community Statistics Summary' (Report, Commonwealth Government, 31 January 2015) 5 ('*Immigration Detention and Community Statistics Jan 2015*'); Commonwealth, *Annual Report 2012–13: Department of Immigration and Citizenship*, Parl Paper No 432 (2013) 181, identifying a 97 per cent annual increase in the number of people held in detention (the vast majority were unauthorised maritime arrivals).

9 Eg, the Coalition Government's policy preference for temporary visas for unauthorised maritime arrivals who are declared refugees: see *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 ('*S4*'), discussed below.

10 In 2013 a total of 709 assessments under the *Migration Act 1958* (Cth) s 486O were tabled by the Ombudsman in Parliament in relation to long-term immigration detainees. This was the largest number of annual assessments undertaken since this oversight role commenced in June 2005: see Colin Neave, Immigration and Commonwealth Ombudsman, *Statement of Intent by the Commonwealth Ombudsman to the Minister for Immigration and Border Protection Concerning Assessments under Section 486O of the Migration Act 1958* (22 September 2014).

11 See generally *Al-Kateb v Godwin* (2004) 219 CLR 562, 575 (Gleeson CJ), 651 (Hayne J) ('*Al-Kateb*').

detention. The basic features of alternative types of immigration detention are mapped and the main socio-legal problems posed by immigration detention are identified. In Part III, I critically examine the alternatives to secure detention and the oversight and review mechanisms introduced in 2005, following *Al-Kateb*,[12] amid growing popular and political discomfort about the austerity of detention and lack of effective accountability.

The HCA has carefully identified the specific statutory purposes, as currently configured, that validate detention. These purposive constraints tie detention to administrative decision-making processes about entry, removal and deportation. Part IV identifies and examines primary and secondary statutory purposes, additional (implied) purposes advanced by the judiciary, and policy reasons for immigration detention. This Part illustrates how administrative law principles have prevented unlawful immigration detention, thereby ensuring that the executive do not abandon or frustrate the limited statutory purposes underpinning detention. As will become clear, judicial reviews have formally vindicated the rule of law but have not offered substantive relief from prolonged and indeterminate detention.[13]

Part IV examines the proper construction and application of the *temporal* constraints on immigration detention. *Al-Kateb* has not been overruled, but the correctness of the majority's approach to questions of statutory construction and constitutional validity is unsettled. Question marks remain over *where* the statutory line demarcating lawful from unlawful detention is drawn and the circumstances in which it is crossed. Is the outer (temporal) limit on detention only reached once removal from Australia is patently 'reasonably practicable', as the majority held in *Al-Kateb*? Or, alternatively, through application of the 'principle of legality' *or* by constitutional implication, is there a relatively more stringent (albeit indeterminate) periodic constraint to be implied correlating to the statutory purpose of removal underlying detention?

Constitutional issues about indefinite immigration detention are canvassed in Part V. If immigration detention laws are unconstrained they cannot be viewed as incidental to the executive's aliens power to admit or deport non-citizens. Accordingly, they may be characterised as punitive and not administrative in

12 Ibid.

13 The HCA has identified and policed the purposive and temporal limits of detention, ensuring that detention is in accordance with the law. But this falls short of international standards imposed by *ICCPR* art 9, which also forbids arbitrary detention. Accordingly, immigration detention must be for a specific legitimate purpose, and be *necessary, reasonable* and *proportionate*, in view of each individual detainee's circumstances to be in accordance with art 9. This requires closer scrutiny of the substantive grounds and justification for detention in individual cases: see generally Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Brill, 2010) ch 7; Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law' (2012) 19 *Indiana Journal of Global Legal Studies* 257, 273–4; United Nations High Commissioner for Refugees, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention* (2012); see Committee against Torture, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia*, 53rd sess, 1285th mgt, UN Doc CAT/C/AUS/CO/4–5 (23 December 2014) 6 [16]–[17] ('*Committee against Torture Concluding Observations on Australia*').

character, contravening the separation of powers. In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*[14] three members of the HCA resuscitated dicta drawn from the majority judgment in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[15] affirming that laws authorising detention of non-citizens are subject to purposive *and* temporal limits.[16] Accordingly, the limited legal authority to detain conferred on the executive is limited to such time as is reasonably capable of being seen as necessary for entry or removal purposes.[17] The ongoing viability of relevant purposes cannot be regarded as a matter purely for the opinion, assertion or whim of the executive.[18]

Part VI considers two recent decisions of the FCA that have required the executive to genuinely consider the consequences of their administrative actions when indeterminate and indefinite detention is the practical outcome of adverse character assessments under section 501.[19] These decisions serve to focus the executive's mind on the necessity for individual, reasoned decision-making on the merits of a non-citizen's case, as opposed to the perfunctory exercise of discretionary powers commensurate with the government's policy preferences.

II BACKGROUND

A The Regulation of Immigration Detention

In 1992 immigration detention was introduced as an exceptional, temporary and time-limited measure for a discrete cohort of unauthorised non-citizens (mainly Cambodian asylum seekers arriving by sea) via the *Migration Amendment Act 1992* (Cth).[20] At the time the Immigration Minister stated that the Government had no wish to keep people in custody indefinitely,[21] and detention was expressly limited to nine months at the outside.[22] However, that important temporal constraint was later removed and detention was extended to all

14 (2013) 251 CLR 322 ('*M76*').

15 (1992) 176 CLR 1 ('*Lim*').

16 *M76* (2013) 251 CLR 322, 369 [138]–[139] (Crennan, Bell and Gageler JJ), citing *Lim* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ, Mason CJ agreeing).

17 *Lim* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10), 71 (McHugh J). See also *Al-Kateb* (2004) 219 CLR 562, 609 (Gummow J).

18 *Al-Kateb* (2004) 219 CLR 562, 613 (Gummow J).

19 The *Migration Act 1958* (Cth) ss 196(4)–(7) provide for continued detention for non-citizens who are detained as a result of a visa cancellation, pursuant to s 501, or pending deportation under s 200 *whether or not* removal or deportation is likely in the reasonably foreseeable future.

20 Commonwealth, *Parliamentary Debates*, Legislative Assembly, 5 May 1992, 2370 (Gerard Hand, Minister for Immigration, Local Government and Ethnic Affairs); *Criteria for Release from Immigration Detention Report*, above n 6, 3 [1.8]. The *Migration Legislation Amendment Act 1989* (Cth) s 19 permitted the arrest and administrative detention of anyone suspected of being an 'illegal entrant' pending resolution of their status.

21 Commonwealth, *Parliamentary Debates*, Legislative Assembly, 5 May 1992, 2370 ff (Gerard Hand, Minister for Immigration, Local Government and Ethnic Affairs).

22 *Migration Amendment Act 1992* (Cth) s 54Q.

unlawful non-citizens,[23] thereby providing a uniform mandatory detention regime of uncertain duration.

Accordingly, the *Migration Act 1958* (Cth) authorises the detention of unlawful non-citizens (adults and children alike)[24] by the executive, without judicial order or warrant.[25] Relevantly for present purposes, where 'officers' know or suspect a person to be an unlawful non-citizen *in* the 'migration zone' or *in* an 'excised offshore place', then immigration detention is *mandatory*.[26] For persons seeking to *enter* the 'migration zone' who would (upon effecting entry) be unlawful non-citizens, detention is permitted.[27] Limited legislative exceptions to the mandatory detention regime were infrequently used prior to 2008, due to a risk-averse and security-focused culture within the Immigration Department. Rarely utilised, for example, was the Immigration Minister's non-compellable, 'public interest' power to end a person's mandatory detention by granting a temporary bridging visa to an 'eligible non-citizen' held in immigration detention for over six months who, inter alia, made a valid application for a protection visa.[28] 'Eligible' persons fall within a prescribed class of vulnerable detainees, including children and the elderly, where satisfactory care arrangements are in place.[29]

In 2005, the legislative scheme was modified with the introduction of, inter alia, residence determinations, in order to mitigate the harsh effects of prolonged incarceration on families and vulnerable adults in secure detention facilities, and to address the tragic consequences[30] of indeterminate detention for the health and wellbeing of some non-citizens denied entry to Australia who could not be

23 See *Migration Reform Act 1992* (Cth).

24 A minor qualification aside, any person who is not a 'lawful non-citizen' (ie, a person who holds a visa that is in effect) is an 'unlawful non-citizen': *Migration Act 1958* (Cth) ss 13(1), 14(1). Unlawful non-citizens include those arriving by boat or air without a valid visa, visa over-stayers, and those whose visas have been cancelled.

25 *Migration Act 1958* (Cth) ss 189, 192, 252(3), 253(1), (10). For present purposes the key provision requiring (or permitting) detention is s 189, read in conjunction with ss 196, 198; s 189 authorises the initial detention, s 196 provides for the duration of detention until the occurrence of removal under s 198, deportation under s 200 or visa grant. Immigration detention is primarily governed by the *Migration Act 1958* (Cth), although other relevant legislation is identified in the policy guidelines: see Department of Immigration and Border Protection, *Procedures Advice Manual 3 (PAM3): Migration Act – Detention Services Manual* (at 1 July 2015) ch 1 [3.2] ('*PAM3*').

26 *Migration Act 1958* (Cth) s 189(1), (3).

27 Ibid s 189(2).

28 Ibid ss 72, 75. See also *Criteria for Release from Immigration Detention Report*, above n 6, 65–6.

29 *Migration Regulations 1994* (Cth) reg 2.20. See also *Bagheri v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 432.

30 *Al-Kateb* (2004) 219 CLR 562, 581 (McHugh J); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664, 668 [4] (McHugh J) ('*Al Khafaji*').

removed in practice.[31] Then, in 2008, the Labor Government championed a new beginning to immigration detention, signalling a move away from a presumption of secure detention to a presumption that unlawful non-citizens in Australia will remain in the community pending resolution of their status.[32] This 'risk-based' policy framework was infused by values that were more consistent with international human rights standards safeguarding the right to liberty.[33] Under the policy, detention is to be used in limited circumstances and for the shortest period possible. Officially, unlawful non-citizens are initially detained for administrative reasons: health, identity, and security checks. The Commonwealth's guidance to officials provides that *ongoing* detention is only justifiable on preventative grounds: first, on protective, public safety grounds, for non-citizens posing an unacceptable risk to the community (on character, security or health grounds); and secondly, on compliance grounds, to prevent future immigration offences, in respect to non-citizens who repeatedly breach visa conditions.[34] The policy subsists in principle,[35] but was not enshrined in legislation as Labor intended,[36] nor effectively carried out in practice. Indeed, detention practices under Labor were far removed from their espoused policy values.[37]

B The Subjects of Mandatory Detention

Immigration detention may apply to 'unlawful' non-citizens seeking entry to Australia by sea (typically, refugee protection seekers and stowaways) or air, those non-citizens whose permission to enter and remain in Australia has expired

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31 *Migration Amendment (Detention Arrangements) Act 2005* (Cth). Additionally, community care pilots were trialled from 2006 as an alternative to detention for vulnerable, elderly and infirm detainees: see Commonwealth, *Immigration Detention in Australia (Community-Based Alternatives to Detention): Joint Standing Committee on Migration*, Parl Paper No 101 (2009) 36–8 [2.71]–[2.76].
The *Migration Act 1958* (Cth) s 5(1) (definition of 'immigration detention' para (b)(v)) enables unlawful non-citizens, subject to ministerial approval, to be placed in alternative detention in the community, including residential housing projects, foster care homes (unaccompanied minors), and supervised community-based arrangements.

32 See Commonwealth, *Annual Report 2008–09: Department of Immigration and Citizenship*, Parl Paper No 351 (2009) 114 ff.

33 Chris Evans, Minister for Immigration and Citizenship, 'New Directions in Detention – Restoring Integrity to Australia's Immigration System' (Speech delivered at Australian National University, 29 July 2008) <http://apo.org.au/node/3582>; see also *Criteria for Release from Immigration Detention Report*, above n 6.

34 See *PAM3*, above n 25, which references the seven key immigration detention values driving detention policy, announced in July 2008.

35 'The key determinant of the need to detain a person … will be risk to the community': ibid ch 2 [P A085.5].

36 The *Migration Amendment (Immigration Detention Reform) Bill 2009* (Cth) lapsed at the end of Parliament in September 2010: see Tania Penovic, 'Labor's "New Directions in Detention" Three Years On: Plus ça Change' (2011) 36 *Alternative Law Journal* 240.

37 Eg, the moratorium on the processing of Sri Lankan and Afghan asylum seekers during 2010, which led to the asylum seekers being warehoused in the discredited Curtin Detention Centre whilst their protection claims were in abeyance: see Peter Billings, 'Juridical Exceptionalism in Australia: Law, Nostalgia and the Exclusion of Others' (2011) 20 *Griffith Law Review* 271, 296–7.

(visa over-stayers) or been cancelled, and illegal foreign fishers.[38] The numbers and composition of immigration detainees has varied significantly at various times over the past 25 years.[39] This reflects the influence of:

1. the maintenance of a policy of mandatory detention for unlawful non-citizens;
2. changes in external factors prompting people's flight and, relatedly, fluctuating numbers of asylum seekers arriving unauthorised by boat; and
3. different policy settings relating to border security and immigration control.[40]

Since 2009 the majority of immigration detainees have been unlawful maritime arrivals seeking refugee protection.[41] The number of detained unlawful non-citizens rose sharply after January 2009, peaking at the end of 2012.[42] Equally troubling, the average time spent in immigration detention centres has increased dramatically since July 2013, contrary to the Commonwealth's detention policy values.[43] Especially disconcerting is the great number of children who have been incarcerated in secure detention facilities for long periods, given the known consequences of detention for children's health, wellbeing and development.[44]

At the time of writing there are 2298 people in immigration detention facilities in Australia with 1825 asylum seekers also 'detained' in regional or offshore (refugee) processing centres on Nauru and in Papua New Guinea

38 *Migration Act 1958* (Cth) s 189. Foreign fishers do not, generally, suffer prolonged detention, whereas asylum seekers, refugees and other non-citizens whose visas are cancelled or refused on adverse security or character grounds are vulnerable to lengthy detention.

39 Department of Immigration and Citizenship, 'Immigration Detention and Community Statistics Summary' (Report, Commonwealth Government, 30 November 2014) 5 ('*Immigration Detention and Community Statistics Nov 2014*'); *Criteria for Release from Immigration Detention Report*, above n 6, 4–5.

40 Eg, the intermittent use of interdiction and turn-backs at sea and transfers to regional processing centres on Nauru and Manus Island has reduced the number of asylum seekers arriving and, thus, immigration detainees, in Australia. These policies have led to 'maritime' detention on the high seas and indefinite detention in third countries for large numbers of asylum seekers: see *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 ('*CPCF*'); *AG v Secretary for Justice* [2013] NRSC 10.

41 *Immigration Detention and Community Statistics Nov 2014*, above n 39, 6.

42 Ibid 5.

43 As at 31 January 2015 the average processing time was 442 days: *Immigration Detention and Community Statistics Jan 2015*, above n 8, 10. This compares unfavourably with processing times during 2013. For instance, in July 2013 the average processing time was 72 days, down from 277 days in November 2011: Department of Immigration and Citizenship, 'Immigration Detention and Community Statistics Summary' (Report, Commonwealth Government, 31 July 2013) 9. Why the processing times for adults and children have slowed in the past eighteen months warrants an official explanation; deterrence of asylum seekers is not a lawful statutory purpose and in practice mandatory detention does not deter asylum seekers.

44 See Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) 13 ('*Forgotten Children Inquiry*'), which summarises the findings of the Australian Human Rights Commission's inquiry, evidencing the detrimental impact of prolonged detention on the physical, mental and emotional health of children.

(Manus Province) pursuant to bilateral agreements with Australia.[45] Offshore there is no, official, presumption that detainees will be released from custody into the community pending resolution of their status.[46] Rather, the detainees are segregated from the wider local communities. The unambiguous rationale for regional processing is to deter (or 'disincentivise') asylum seekers from taking hazardous, unauthorised, maritime voyages to Australia.[47]

C Immigration Detention Facilities

Immigration detention facilities include: immigration detention centres ('IDCs'), immigration residential housing, alternative places of detention ('APoDs') such as hotel rooms or rented housing, transit accommodation, and other approved places.[48] IDCs have many, if not all, of the physical features and administrative arrangements commonly found in prisons. Residential housing offers an improved physical environment for families and vulnerable adults but the facilities are secure and schooling and community excursions are supervised. Additionally, there is so-called 'community detention' where unlawful non-citizens, the subject of 'residence determinations', may live at particular places *as if* under immigration detention while residing and moving freely in the community.[49] These community arrangements 'offer a far more humane and effective approach to the treatment of asylum seekers, refugees and stateless persons than closed detention'.[50]

D Problems with Immigration Detention

Immigration detention can, and frequently does, produce 'dire consequences' for detainees.[51] There are various, critical, issues with immigration detention,

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45 *Immigration Detention and Community Statistics Jan 2015*, above n 8, 3. In *AG v Secretary for Justice* [2013] NRSC 10, [54]–[55], von Doussa J concluded that while the asylum seekers held in the processing centre on Nauru were not subject to restrictions associated with close confinement in a prison, they were detained at the time of the proceedings.

46 Evidently the principle is not reflected in current immigration detention practices within Australia when one considers the increased average periods of detention since July 2014: *Immigration Detention and Community Statistics Nov 2014*, above n 39, 10.

47 Angus Houston, Paris Aristotle and Michael L'Estrange, *Report of the Expert Panel on Asylum Seekers* (August 2012), 7–8, 12.

48 *Migration Act 1958* (Cth) s 5 (definition of 'immigration detention' para (b)).

49 Residence determination provisions were added by the *Migration Amendment (Detention Arrangements) Act 2005* (Cth). Where the Immigration Minister makes a determination (pursuant to the *Migration Act 1958* (Cth) s 197AB), specified persons may reside at a particular place in the community. This is functionally equivalent to being on bail but is treated administratively as detention.

50 Australian Human Rights Commission, 'Community Arrangements for Asylum Seekers, Refugees and Stateless Persons: Observations from Visits Conducted by the Australian Human Rights Commission from December 2011 to May 2012' (Report, July 2012) 2.

51 *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, 38 [170] (Buchanan J) ('*NBMZ*'), referring to indeterminate detention.

including concerns about the duration[52] and conditions[53] of detention in Australia (and offshore).[54] Additionally, the debilitating consequences of prolonged detention and attendant uncertainty (pending entry or removal decisions) on the physical and mental health of detainees, and development of children, are very well documented.[55] These problems stem from the absence of timely and effective oversight and accountability mechanisms regarding the substantive merits (qua necessity and proportionality) of detention in individual cases (especially refugees or others with adverse security or character assessments).[56] Plainly the human rights of detainees are breached in various ways, as several national and international human rights monitors attest.[57] The domestic legal constraints on mandatory immigration detention – invoked in the cases canvassed below in Parts IV and V – are not informed by, nor do they meet, international

52 There is no statutory maximum length of detention for unlawful non-citizens. There are time limits for certain 'designated' non-citizens who arrived in Australian territorial waters after 19 November 1989 and before 1 September 1994: *Migration Act 1958* (Cth) div 6.

53 The *Migration Act 1958* (Cth) is generally silent about the conditions of detention: see *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 ('*Behrooz*'), where the HCA held (Kirby J dissenting) that detention conditions were not relevant to the legality (constitutional validity) of detention. An unlawful non-citizen might have civil remedies (eg, for breach of duty of care), or criminal sanctions might be imposed if the custodians of a detainee violated the criminal law. On the Commonwealth's duty of care and alternative forms of detention, see *SBEG v Commonwealth* (2012) 208 FCR 235.

54 See, eg, United Nations High Commissioner for Refugees, *UNHCR Monitoring Visit to the Republic of Nauru: 7 to 9 October 2013* (26 November 2013). The United Nations High Commissioner for Refugees ('UNHCR') observed that the mandatory detention of asylum seekers on Nauru amounted to arbitrary detention: at 13 [63]. Further, the UNHCR identified serious issues with the conditions at Nauru's regional processing centre and compliance with international human rights law: at 16 [90].

55 See, Stephanie J Silverman and Evelyne Massa, 'Why Immigration Detention Is Unique' (2012) 18 *Population, Space and Place* 677, 678 n 1, citing the comparative literature. See also Colin Neave, Commonwealth and Immigration Ombudsman, 'Suicide and Self-harm in the Immigration Detention Network' (Report No 02, Commonwealth Government, May 2013); Commonwealth, *Final Report: Joint Select Committee on Australia's Immigration Detention Network*, Parl Paper No 122 (2012) 103–33 ('*Final Report on Australia's Immigration Detention Network 2012*'); Melissa Bull et al, 'Sickness in the System of Long-term Immigration Detention' (2013) 26 *Journal of Refugee Studies* 47; Louise Newman, Nicholas Proctor and Michael Dudley, 'Seeking Asylum in Australia: Immigration Detention, Human Rights and Mental Health Care' (2013) 21 *Australasian Psychiatry* 315.

56 See, eg, *Jaffarie v Director-General of Security* (2014) 226 FCR 505, 538 [128] (White J) ('*Jaffarie*'). Jaffarie was not a refugee. He arrived lawfully but had his temporary (partner) visa cancelled following ASIO's adverse security assessment. Jaffarie faces indefinite detention pending deportation from Australia; he asserted that his life would be endangered in Afghanistan but had not, at the time of the case, sought refugee protection.

57 See, eg, *Forgotten Children Inquiry*, above n 44, 74–7; Australian Human Rights Commission, *Asylum Seekers, Refugees and Human Rights: Snapshot Report* (2013) ch 2; *Committee against Torture Concluding Observations on Australia*, UN Doc CAT/C/AUS/CO/4–5, 6–7 [16]–[18]; Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee – Australia*, 95th sess, 2624th mtg, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) 5–6 [23]–[24]; Human Rights Committee, *Communication No 2094/2011*, 108th sess, UN Doc CCPR/C/108/D/2094/2011 (20 August 2013); Human Rights Committee, *Communication No 2136/2012*, 108th sess, UN Doc CCPR/C/108/D/2136/2012 (20 August 2013).

standards relating to effective (substantive) review of the grounds and circumstances of a person's detention.[58]

The problem of uncertainty and indeterminacy surrounding immigration detention manifests, in a legal and practical sense, in various ways. The problem can stem from the tension between Australia's adherence to its international law obligations and the laws authorising mandatory and indefinite detention for visa-less non-citizens. Accordingly, there are non-citizens who are owed protection by Australia – either as refugees under the *Refugees Convention* or under the *CAT* or *ICCPR* – who have visas denied or cancelled on either security-related or adverse character grounds and are deprived of their liberty pending removal.[59] When coupled with an inability, on the part of Australia, to identify a third country to safely admit them, there is prolonged and indeterminate deprivation of liberty because the statutory duty to remove unlawful non-citizens as soon as reasonably practicable cannot be performed. Additionally, there are refugees who are *not* owed protection obligations by Australia, and are denied protection visas by operation of 'safe third country' principles.[60] Detention, pending removal, can be of an indeterminate and indefinite duration when relevant third countries are uncooperative and refuse admission.[61] Furthermore, unlawful non-citizens are held in detention for indeterminate periods where removal elsewhere may be impractical. This situation can arise due to a person's personal circumstances (they may be stateless)[62] or because their country of origin is unwilling to re-admit them.[63] Finally, there are unlawful non-citizens, frequently asylum seekers, subjected to prolonged immigration detention pending a decision on formal entry

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58 Parliamentary committees have, recently, proposed that an independent tribunal (such as the Administrative Appeals Tribunal ('AAT')) should provide the necessary independent and periodic review on the merits of detention in individual cases: see *Criteria for Release from Immigration Detention Report*, above n 6, 97–8 [4.142]–[4.144]. See also *Final Report on Australia's Immigration Detention Network 2012*, above n 55, xxii, where recommendation 28 calls for the Security Appeals Division of the AAT to be given jurisdiction over ASIO's security assessments. This proposal was rejected: see Australian Government, *Government Response to Recommendations by the Joint Select Committee on Australia's Immigration Detention Network* (2012) 22 ('*Government Response to Immigration Detention Network Recommendations*').

59 The way Australia 'gives effect' to its international law obligations has recently been transformed. The *MMPLA Act* pt 2 sch 5 removed references to the *Refugees Convention* from the *Migration Act 1958* (Cth) and inserted a new statutory definition of a refugee. These amendments are designed to diminish the influence of foreign courts and international bodies on the interpretation of refugee law in Australia, and to remove the ability of non-citizens to challenge removal decisions in court: see Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10 545 (Scott Morrison, Minister for Immigration and Border Protection).

60 *Migration Act 1958* (Cth) s 36(3). Note also, Division 3 Subdivision AI – Safe third countries which operates to *bar* certain non-citizens from applying for protection.

61 See *Al Khafaji* (2004) 219 CLR 664, where the asylum seeker was refused a protection visa because he had not taken all possible steps to avail himself of a right to reside in Syria, as required under the *Migration Act 1958* s 36(3). As Syria would not admit him he was left in limbo.

62 See *Al-Kateb* (2004) 219 CLR 562.

63 Eg, Iran refuses to admit its nationals forcibly returned from Australia: see Sarah Whyte, 'Darwin-Based Asylum Seeker on Hunger Strike, Near-Critical after 44 Days', *The Sydney Morning Herald* (online), 15 December 2014 <http://www.smh.com.au/federal-politics/political-news/darwinbased-asylumseeker-on-hunger-strike-nearcritical-after-44-days-20141213-126r5s.html>.

to Australia. Specifically, this occurs in regard to whether to permit a protection visa application to be lodged by unauthorised maritime arrivals ('UMAs') and, subsequently, the investigation and determination (including reviews) of refugee protection claims in circumstances where applications are permitted.[64] Typically these administrative processes (including reviews and appeals) are completed within two years.[65]

III IMMIGRATION DETENTION AFTER *AL-KATEB*: ALTERNATIVES AND OVERSIGHT

Immigration detention for unlawful non-citizens (in the migration zone or excised offshore place) is mandatory because it is divorced from the detainee's personal circumstances. There is no *legislative* requirement permitting officials to exercise discretion and make a judgment about the suitability of detention, given a person's individual characteristics and circumstances, before detention occurs. Accordingly, those persons detained under the *Migration Act 1958* (Cth) include refugees and refugee applicants. They might be young, unlikely to abscond, unhealthy and/or badly affected by incarceration.[66]

In 2005 the Australian Parliament may be said to have squarely addressed several issues arising from the prolonged detention of unlawful non-citizens in Australia with legislative amendments.[67] Parliament did not countermand the decision in *Al-Kateb*. Rather, in an attempt to soften the impact of detention on vulnerable families and individuals, and deal with 'difficult cases' (like *Al-Kateb*) the *Migration Act 1958* (Cth) was amended. The object was to introduce flexibility, greater timeliness and transparency, and to ameliorate the physical and psychological burden of prolonged and uncertain detention.[68] The 2005 legislative amendments supplied the executive with, inter alia, non-compellable, non-reviewable powers to remove non-citizens from secure detention facilities and place them into community detention or grant bridging visas:

1. *Community detention*: The Immigration Minister has a personal, non-compellable, non-reviewable, discretionary power to make 'residence

64 See also the discussion of *M76* below.

65 See Immigration Ombudsman, 'An Analysis of Reports Under Section 486O of the Migration Act 1958 Sent to the Minister by the Ombudsman in 2013' (Report, Commonwealth Government, September 2014) 11–13, which reveals that the average processing time for protection claims is 5–6 months, with a further 8–9 months for a review (reconsideration), an additional 8–9 months for a second (typically, merits) review, and 6–7 months for any third review, including judicial review.

66 *Al-Kateb* (2004) 219 CLR 562, 574 [12] (Gleeson CJ).

67 See *Migration Amendment (Detention Arrangements) Act 2005* (Cth). See also *M76* (2013) 251 CLR 322, 366 [125] (Hayne J), 382 [194] (Kiefel and Keane JJ), referring to Parliament's frequent legislative amendments to the *Migration Act 1958* (Cth) since 2004 but absence of change to the text of provisions governing immigration detention.

68 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 2005, 55 ff (Peter McGauran, Minister for Citizenship and Multicultural Affairs).

determinations'.[69] Priority is given to unaccompanied minors, families with young children, other vulnerable families and adults, and those whose cases will take a long time to resolve.[70] Persons considered to present a health or security risk are ineligible. Plainly, this is a less onerous form of 'detention' than incarceration in a secure IDC, but as a conditional release from custody it involves an interference with liberty. This regime creates a cohort of unlawful non-citizens who are physically present in the community but who do not hold valid visas (administratively they remain in detention). This is inconsistent with the general binary nature of migration controls under the Act.[71]

2. *Bridging visas*: The Minister has been granted a personal, non-compellable and non-reviewable discretionary power to grant immigration detainees a visa as an alternative to either ongoing incarceration or community detention (including a 'removal pending bridging visa' in circumstances where removal is impracticable).[72]
3. *Independent Scrutiny*: The executive is required to report to the Commonwealth Ombudsman on long-term detainees (those persons detained for two years or more), and the Ombudsman must provide assessments and advice about the appropriateness of the detention arrangements relating to those persons to the Minister.[73]

These amendments were intended to relieve 'the harshness of indefinite detention',[74] and promote transparency over government decision-making. The reforms responded to Liberal backbench pressure about the impact of mandatory detention, especially on children. The humanitarian impulse justifying the usage

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69 *Migration Act 1958* (Cth) ss 197AE–197AF. Note that the concept of alternative, community, detention pre-dates the introduction of residence determinations in June 2005. Policy guidance was issued in 2002: Department of Immigration and Ethnic Affairs, 'Alternative Places of Detention' (Migration Series Instruction No 371, 2 December 2002) (now *PAM3*, above n 25, ch 2 [P A073.6]). See Commonwealth, *Immigration Detention in Australia (Community-Based Alternatives to Detention): Joint Standing Committee on Migration*, Parl Paper No 101 (2009) ch 2; Savitri Taylor, 'Immigration Detention Reforms: A Small Gain in Human Rights' (2006) 13 *Agenda* 49, 51–3. See also Commonwealth, *A Last Resort? National Inquiry into Children in Immigration Detention: Australian Human Rights Commission*, Parl Paper 134 (2004) 56, 853, which discusses, inter alia, residential housing projects.

70 Department of Immigration and Border Protection, *Fact Sheet – Immigration Detention* <https://www.border.gov.au/about/corporate/information/fact-sheets/82detention>; Commonwealth, *Annual Report 2013–14,* Parl Paper 305 (2014) 150 ('*Annual Report 2013–14*').

71 On 18 October 2010 the program was expanded to relieve pressure on the detention network following a ministerial announcement that women and children would be moved out of secure detention. As at June 2014, 9044 people (5949 adults and 3095 children) have been approved for community detention: see *Annual Report 2013–14*, above n 70, 195.

72 *Migration Act 1958* (Cth) s 195A. See also Department of Immigration and Border Protection, *Fact Sheet – Removal Pending Bridging Visa (RPBV)* <https://www.border.gov.au/about/corporate/information/fact-sheets/85removalpending> (non-citizens with adverse character or security assessments are ineligible).

73 *Migration Act 1958* (Cth) ss 486L–486Q. Running in parallel with the statutory review process is a more frequent, non-statutory, review process whereby the Immigration Department reports to the Ombudsman every six months while a person is detained. The Ombudsman then reports back to the Department about the appropriateness of the person's detention arrangements.

74 *NBMZ* (2014) 220 FCR 1, 3 (Allsop CJ and Katzmann J).

of these powers is clear from the ministerial statements tabled in Parliament periodically.[75] Parliament committed decisions about community detention and bridging visas to the discretion of the executive.[76] The conferral of personal, non-compellable, 'public interest' powers on the Immigration Minister – to make residence determinations or grant bridging visas to detainees – is, effectively, beyond judicial review: practically unexaminable by the courts in most instances.[77] This is because the 'public interest' powers are self-defining powers and, as recent history attests, they can be self-serving. It is political expediency – rather than a principled concern for the health and welfare of immigration detainees – that prompted use of the ministerial power to grant bridging visas in the recent past. The following example offers a stark illustration of how the employment of these powers can serve party political ends.

The risk that such broad and unreviewable powers could be used for ulterior purposes (at best, mixed motives) and not for their primary, humanitarian, purpose was evidenced in December 2014. The Government made political capital out of detained children when the Immigration Minister brandished his discretionary power to release children held on Christmas Island – before wavering Senators – in order to induce political support for controversial migration and maritime law amendments.[78] It is striking that the executive elected to release children from detention after leveraging the Senate's acceptance of its amendments given the executive always retained the power to achieve that outcome, and in view of the statutory exhortation that minors are to be detained as a measure of last resort.[79]

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75 The Immigration Minister is required to table statements detailing the reasons why, respectively, the grant of a visa or the making of a residence determination, is in the public interest: *Migration Act 1958* (Cth) ss 195A(6)–(8), 197AG.

76 The Joint Select Committee on Australia's Immigration Detention Network recommended, under recommendation 29, that the Government publish the criteria for determining whether to place non-citizens in community detention or on bridging visas: *Final Report on Australia's Immigration Detention Network 2012*, above n 55, xxii. This call for greater transparency was rejected by the Government: *Government Response to Immigration Detention Network Recommendations*, above n 58, 20.

77 Public interest powers are not unconfined, unfettered and unreviewable. When exercised, non-compellable public interest powers may be subject to declaratory and injunctive relief to promote legality and guard against arbitrariness. See, eg, *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505; *S4* (2014) 253 CLR 219, discussed below.

78 The *MMPLA 2014* increases the discretionary powers of the Minister (without independent checks and balances) in a manner that is fundamentally at odds with Australia's international refugee law, and human rights treaty, obligations: see, *Fourteenth Report of the 44th Parliament – Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Parliamentary Joint Committee on Human Rights,* Parl Paper 327 (2014) 70–93 ('*Fourteenth Report of the 44th Parliament*'); *Committee against Torture Concluding Observations on Australia*, UN Doc CAT/C/AUS/CO/4–5, 5–6.

79 *Migration Act 1958* (Cth) s 4AA. Ninety-four children were released from offshore detention on Christmas Island during mid-December 2014, but were then placed in an alternative place of detention in Darwin where they remained during the early part of 2015: see Sarah Whyte, 'Christmas Island Asylum Seeker Children Still Waiting for Release into Community', *The Sydney Morning Herald* (online) 22 January 2015 http://www.smh.com.au/federal-politics/political-news/christmas-island-asylum-seeker-children-still-waiting-for-release-into-community-20150122-12vn1t.html.

In short, statutory powers regulating the liberty of non-citizens (among other powers) enable Immigration Ministers to 'play God'.[80] In that role office-holders must ensure their powers are exercised responsibly – for the (humanitarian) purposes for which they were, evidently, conferred. With judicial review effectively neutered, due to the breadth of the statutory discretion vested in the executive, political accountability mechanisms assume greater importance. Objections to the Immigration Minister's (mis)use of his discretionary powers were raised forcefully in the Senate in December 2014; for example, Labor Senators ventured that the Immigration Minister had used children as 'bargaining chips', effectively holding Parliament to ransom in order to get the migration amendments through Parliament.[81] The promise of releasing children from detention was, understandably, sufficient inducement for key independent Senators to agree to the migration and maritime powers amendments. But those amendments constitute several backward steps in terms of overall refugee protection standards in and around Australia.[82]

In summary to this point, the 2005 legislative amendments were relatively minor reforms, directed in part to alleviate growing political and popular concerns about the harshness of detention. The reforms have not delivered on that promise and significant numbers of non-citizens have been detained long-term (beyond two years). This is attributable to administrative inertia and government policy; health, character and security checks and concerns serve as a barrier to the use of alternatives to prolonged, secure detention. This means that in difficult cases, often involving non-citizens with adverse security or character assessments, protracted periods of detention persist, with limited powers of oversight vested in the Ombudsman.[83] While there has been increased use of community detention for women and children since 2010, following the spike in maritime arrivals and overcrowding in detention facilities, the 2005 amendments have not ameliorated the harshness of immigration detention in practice for many unlawful non-citizens.

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80 Mark Metherell, 'I Should Not Play God: Evans', *The Sydney Morning Herald* (Sydney), 20 February 2008, 6. Then Immigration Minister Chris Evans expressed concerns to a parliamentary committee about the scope of his immigration powers and lack of transparency and accountability.

81 Commonwealth, *Parliamentary Debates*, Senate, 4 December 2014, 10 259, 10 261 (Kim Carr).

82 See United Nations High Commissioner for Refugees, Submission No 138 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [Provisions]*, 31 October 2014; *Fourteenth Report of the 44th Parliament*, above n 78, 70–93.

83 Limited insofar as the Ombudsman's periodic reviews and ensuing reports are advisory; that is not to say they are ineffective and unpersuasive. The author's survey of the reports tabled in Parliament since June 2005, and the annual Ombudsman's reports to Parliament reveals that Immigration Ministers are often responsive to the Ombudsman's recommendations. However, it is not government policy to release detainees, even if removal is not foreseeable, if there are security concerns.

IV THE PURPOSIVE NATURE OF IMMIGRATION DETENTION AND TEMPORAL LIMITS

A Introduction: Executive Power to Detain Is Not Unconstrained

Non-citizens within Australia, whether lawfully or not, are not outlaws.[84] Immigration detention is subject to common law, statutory and constitutional constraints. In *Re Bolton; Ex parte Beane* Deane J observed that:

> The common law of Australia knows no lettre de cachet or executive warrant pursuant to which *either citizen or alien* can be deprived of his freedom by mere administrative decision or action. … [the] person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate.[85]

Likewise, in *M76* the joint judgment stated: 'The common law does not recognise any executive warrant authorising arbitrary detention'.[86] Immigration detention is constrained because it is directed to particular statutory purposes that are coupled with temporal limits.[87] When describing and justifying detention as being under and for the purposes of the *Migration Act 1958* (Cth), it is first necessary to identify the relevant purpose(s) for detention: section 189 requires an officer to detain unlawful non-citizens, but does not speak directly to the purpose of detention; section 196 identifies the duration of detention, with reference to relevant terminating events;[88] and section 198 provides for the outer limit to detention, with removal to be effected as soon as reasonably practicable (not within a fixed period of time).

In *M76*, Hayne J observed that mandatory detention provisions served the broad purpose of immigration control:

> s 196 (when read with ss 189 and 198) takes its place as a provision which is central to effecting *the overall purpose of the whole of Pt 2* (ss 213–274) of the Act. That *purpose is to control the arrival and presence of non-citizens in Australia*. … Detention under and for the purposes of the Act in accordance with those provisions serves the purpose of controlling the arrival and presence of non-citizens in Australia.[89]

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84 *S4* (2014) 253 CLR 219, 230 [24] (The Court), citing *Lim* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ). See also *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 150–1 [391] (Crennan J) ('*M47*').

85 (1987) 162 CLR 514, 528–9 (Deane J) (emphasis added). This statement was cited with approval in *Lim* which, in turn, was recently cited with approval in the HCA: *CPCF* (2015) 89 ALJR 207, 239 [148] (Hayne and Bell JJ).

86 (2013) 251 CLR 322, 369 [139] (Crennan, Bell and Gageler JJ).

87 Ibid 369 (Crennan, Bell and Gageler JJ). The temporal limits are not expressly and precisely fixed at the time detention commences; but statutory purposes must be fulfilled as soon as reasonably practicable (ie, capable of achievement).

88 Section 196 provides that an unlawful non-citizen must be kept in immigration detention until the happening of one of four events: removal from Australia under s 198 or s 199; an officer beginning the process under s 198AD(3) for removal to a regional processing country; deportation under s 200; or visa grant.

89 (2013) 251 CLR 322, 366 [127] (emphasis added).

Whereas in *Plaintiff S4/2014 v Minister for Immigration* ('*S4*') the HCA, having identified the broad regulatory objectives of the *Migration Act 1958* (Cth), stated that mandatory immigration detention served:

> the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.[90]

This excerpt may be read as exhaustively identifying the specific statutory purposes underlying mandatory detention. However, the HCA did not expressly reject, or endorse, plausible alternatives postulated in earlier cases such as exclusion or segregation from the community, protecting public safety, or deterrence.[91] The Court iterated that the primary purpose (removal) and subordinate purposes (entry-related claims) must be pursued and carried into effect 'as soon as reasonably practicable'.[92]

The HCA's conclusions were reinforced by the text and structure of the *Migration Act 1958* (Cth) understood in the context of fundamental principles. The relevant principles are supplied by the constitutional reasoning in *Lim* and by *Crowley's case*.[93] In *Lim* the HCA stated that the legislative provisions (then) authorising mandatory detention of certain aliens were constitutionally valid laws if the detention which those laws required was 'reasonably capable of being seen as necessary for the purposes of deportation or to enable an application for entry to be made and considered'.[94] *Crowley's case* is authority for the proposition that '[t]he duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time'.[95] In *S4,* the HCA re-affirmed that detention must serve the purposes of the Act *and* that duration of detention is fixed by reference to what is both necessary and incidental to the execution of those powers and fulfilment of those purposes.[96] Further, these criteria – against which the lawfulness of detention must be capable of being determined and enforced by the courts at any time (per *Crowley's case*) – do not vary, although the facts to which these criteria are applied may vary.[97] Accordingly, the intersection of mandatory detention provisions with Chapter III of the *Australian Constitution* ('*Constitution*') is critical (see Part V, below).

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90 (2014) 253 CLR 219, 231 [26]. Removal of an *unlawful* non-citizen from Australia can occur under *Migration Act 1958* (Cth) ss 198, 199, or via s 198AD(2) (removal to a regional processing country); certain *lawful* non-citizens may be *deported* under s 200, following conviction for certain crimes and upon security grounds.

91 Alternative (legislatively unstated) purposes, and relevant authorities, are discussed below.

92 *S4* (2014) 253 CLR 219, 232 [28], 233–4 [35].

93 (1818) 36 ER 514.

94 Ibid 231 [26], citing *Lim* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ), 53 (Gaudron J), 65–6 (McHugh J).

95 *S4* (2014) 253 CLR 219, 232 [29], citing *Crowley's case* (1818) 36 ER 514, 531 (Lord Eldon LC).

96 (2014) 253 CLR 219, 232 [29].

97 See, eg, *Al-Kateb* (2004) 219 CLR 562, 577 [21] (Gleeson CJ); *M47* (2012) 251 CLR 1, 154 [401] (Crennan J).

B The Primary Purpose of Immigration Detention: Effecting Removal of Unlawful Non-citizens as Soon as Reasonably Practicable

The question of whether immigration detention continues to be authorised under the *Migration Act 1958* (Cth) in circumstances where removal supplies the purpose for detention, but there is no reasonably foreseeable likelihood of the non-citizen's removal in the future, has been raised in recent HCA proceedings. The subjects of these proceedings are refugees (within the meaning of the *Refugees Convention* article 1A) who have had protection visas refused on security-related or character grounds. Another common denominator is that all these cases have turned on questions of administrative law; the application of, broadly, legality, reasonableness and procedural fairness criteria have conditioned decision-making and functioned to prevent unlawful detention.

M47 concerned a Sri Lankan asylum seeker who was issued with a temporary visa, brought to Australia from Indonesia,[98] and then detained on arrival on 30 December 2009, upon expiration of the visa. The plaintiff applied for protection and the authorities determined that he had a well-founded fear of persecution in Sri Lanka. Officially recognised as a person whom Australia owed 'protection obligations' the plaintiff failed to satisfy an essential pre-requisite, a public interest criterion ('PIC') prescribed by regulation (PIC 4002),[99] for the grant of a protection visa.[100] The non-satisfaction of PIC 4002 stemmed from an adverse security assessment by the Australian Security and Intelligence Organisation ('ASIO'). As a refugee without a valid visa to enter and remain in Australia, the plaintiff's unlawful status prompted continued detention; pending removal to a country that would admit him (other than Sri Lanka, or any other territory where he would face a real chance of persecution or risk of refoulement) or until such time as ASIO rescinded its adverse assessment.[101]

Counsel for the plaintiff, and interveners,[102] argued, inter alia, that there was no reasonable prospect or likelihood of any country agreeing to take the plaintiff and no realistic prospect of his removal; consequently, detention was for an

98 The plaintiff was one of 78 asylum seekers who were intercepted at sea, *en route* to Australia, by the Australian Customs Vessel *Oceanic Viking* in October 2009. The interdictees were disembarked in Indonesia and, subsequently, granted special purpose visas to travel to Australia.

99 *Migration Regulations 1994* (Cth) sch 2 cl 866.225, later amended by *Migration and Maritive Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) sch 2 cl 36.

100 Plaintiff M47/2012 was not disqualified from protection by virtue of the application of *Refugees Convention* art 1F (as adopted by *Migration Act 1958* (Cth) s 36(2)). Nor were the disentitling criteria in *Refugees Convention* arts 32(2), 33(2) invoked.

101 ASIO rescinded a negative security assessment in June 2013 in relation to a family of refugees on the eve of a HCA challenge: Transcript of Proceedings, *Plaintiff S138/2012 v Director-General of Security* [2013] HCATrans 148 (13 June 2013). This was directed at, inter alia, the legality of immigration detention under *Migration Act 1958* (Cth) ss 189, 196 and, by implication, the decision in *Al-Kateb*. ASIO's decision followed a recommendation made by the Independent Reviewer of Adverse Security Assessments (a retired judge): see Daniel Flitton, 'Refugee Family Free as ASIO Assessment Overturned', *The Sydney Morning Herald* (online), 12 June 2013 <http://www.smh.com.au/federal-politics/political-news/refugee-family-free-as-asio-assessment-overturned-20130612-2o4vq.html>; Commonwealth, *ASIO Report to Parliament 2012–2013*, Parl Paper No 389 (2013) 38–9.

102 Respectively, Plaintiff M47/2012 and the Australian Human Rights Commission.

unlimited time. The HCA was invited to overrule the keenly-debated decision in *Al-Kateb*,[103] where a majority of the HCA determined that the relevant terms of the *Migration Act 1958* (Cth) supplied a clear statutory mandate requiring unlawful non-citizens to be kept in detention until removed, deported or granted a visa. Counsel invited the court to interpret the power to detain as spent in circumstances where removal was unpractical, because the continuing *purpose* of detention – removal – could not be sustained.[104]

A majority of the HCA did not consider it necessary or appropriate to address the arguments directed at *Al-Kateb* in order to dispose of the matter. Instead, they concluded that the regulation prescribing PIC 4002 (as a criterion for the grant of a visa) was invalid because it was inconsistent with, and negated, important elements of statutory scheme relating to Australia's refugee protection obligations.[105] The refusal of the protection visa was a decision tainted by jurisdictional error; therefore there had been no valid determination of the visa application. Consequently, detention continued to be lawful pending proper determination of the visa application.[106]

Tellingly, Crennan J raised the 'possibility that the lawfulness of detention will be affected by the length of the removal process'.[107] In relation to removal under section 198, her Honour observed that: 'what is reasonably practicable in respect of an unlawful non-citizen who is a refugee with an adverse security assessment may differ from what is reasonably practicable in respect of an unlawful non-citizen without such an assessment'.[108] Here Justice Crennan evidences, at the very least, a willingness to scrutinise detention closely the longer it endures. This is broadly consistent with the subsequent joint judgment in *S4*.

Justices Gummow and Bell (dissenting on the question of the validity of PIC 4002) expressed the view that *Al-Kateb* should not be followed.[109] Their Honours favoured the construction of section 198 advanced by Gleeson CJ (in the minority in *Al-Kateb*) which 'better accommodates the basic right of personal

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103 (2004) 219 CLR 562, 581 [33]–[35] (McHugh J), 643 [241] (Hayne J), 661–2 [298] (Callinan J), 662–3 [303] (Heydon J). See James Allan, '"Do the Right Thing" Judging? The High Court of Australia in *Al-Kateb*' (2005) 24 *University of Queensland Law Journal* 1; Michael Head, 'Detention without Trial – A Threat to Democratic Rights' (2005) 9 *University of Western Sydney Law Review* 33; Matthew 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; Matthew Zagor, 'Uncertainty and Exclusion: Detention of Aliens and the High Court' (2006) 34 *Federal Law Review* 127.

104 *M47* (2012) 251 CLR 1, 5–11.

105 Ibid 48 [71] (French CJ), 92 [225] (Hayne J), 152–4 [396]–[401] (Crennan J), 169–70 [457]–[458] (Kiefel J). Parliament responded swiftly to this set back by legislative amendment: *Migration Amendment Act 2013* (Cth) sch 3. This introduced a specific criterion for a protection visa to reflect the terms of PIC 4002: at s 36, so that an applicant is refused a protection visa if they are assessed by ASIO to be directly or indirectly a risk to security within the meaning of *Australian Security Intelligence Organisation Act 1979* (Cth) s 4.

106 *M47* (2012) 251 CLR 1, 48 [72] (French CJ), 72 [160], 92 [225] (Hayne J), 155 [404] (Crennan J), 170 [460] (Kiefel J).

107 Ibid 154 [401].

108 Ibid.

109 Ibid 61 [120], 68 [145] (Gummow J), 193 [533] (Bell J).

liberty'[110] over the majority's statutory construction. Importantly, in *Al-Kateb*, Gleeson CJ considered that if removal of a detainee ceased to be a practical possibility, then detention must cease, at least for as long as that situation continues. It followed that the duty of removal imposed on an immigration officer by section 198 subsists, but is in abeyance, where removal is impractical.[111] In such circumstances a detainee is able to obtain an order in the nature of habeas corpus to secure release,[112] subject to conditions, pending the circumstances arising that would enable removal as envisaged under the Act.

Justices Gummow and Bell also expressed the view that the majority reasoning in *Al-Kateb* was weakened by the absence of a discussion of the 'principle of legality'.[113] The principle of legality mandates that the legislature must manifest an intention to abrogate fundamental principles, infringe rights or depart from the general system of law.[114] Assuming the correct starting point is the common law's recognition of freedom from restraint or deprivation of liberty (or, a right to personal liberty) for non-citizens,[115] the question is whether there is '[s]tatutory authority to engage in what otherwise would be tortious conduct [which] must be clearly expressed in unmistakable and unambiguous language'.[116] There are alternative, contemporary, justifications for the 'clear statement' requirement. In *Coco v The Queen* the rationale was enhancement of the parliamentary legislative process,[117] whereas in *R v Secretary of State for the Home Department; Ex parte Simms* the foundation for the principle was related to electoral accountability and democratic processes; as Lord Hoffman explained: 'the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words'.[118]

In *M76* Kiefel and Keane JJ refuted the view that the 'clear statement' principle was overlooked in *Al-Kateb* by two members of the majority.[119] A fair reading of the reasoning of the majority in *Al-Kateb* reveals that the principle of legality was raised and directly addressed by Hayne J, with whom McHugh and

110 Ibid 61 [120] (Gummow J).

111 *Al-Kateb* (2004) 219 CLR 562, 578 [22] (Gleeson CJ).

112 *M47* (2012) 251 CLR 1, 57–8 [108]–[109], 68 [149] (Gummow J), 193 [534] (Bell J).

113 Ibid 60 [119] (Gummow J), 193 [532] (Bell J).

114 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

115 The assumption was questioned in *M76* (2013) 251 CLR 322. Justices Kiefel and Hayne expressed doubt that non-citizens enjoyed a common law right to personal liberty (or, freedom from restraint): at 380 [184], while recognising the high value accorded to liberty in the tradition of the common law: at 381 [187].

116 *Coco v The Queen* (1994) 179 CLR 427, 436 (Mason CJ, Brennan, Gaudron and McHugh JJ). See also *CPCF* (2015) 89 ALJR 207, 229 [76] (Hayne and Bell JJ).

117 (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). See *CPCF* (2015) 89 ALJR 207, 277–8 [422] (Keane J), where his Honour determined that the legislature had directed its mind squarely to the question of whether the liberty of unlawful non-citizens, on a detained vessel, should be invaded at sea ('maritime detention').

118 [2000] 2 AC 115, 131. The reasoning was cited with approval in the HCA: *Al-Kateb* (2004) 219 CLR 562, 577 [19] (Gleeson CJ). See Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372.

119 *M76* (2013) 251 CLR 322, 378 [177]–[178].

Heydon JJ concurred.[120] Justice Hayne looked closely at the language in the *Migration Act 1958* (Cth), concluding that the three relevant provisions read together were intractable and required detention until removal or deportation. However, his Honour did not raise and, therefore, did not address the concern about legislative processes: whether (per *Coco v The Queen*) Parliament had directed its attention to the abrogation of non-citizen's rights and freedoms. As Gummow J claimed in *M47*, there is no evidence that Parliament ever squarely confronted the issue of the legislation's impact on freedom from indefinite administrative detention.[121]

For the majority in *Al-Kateb* the law unambiguously authorised prolonged detention without a finite end-point and, equally, for Kiefel and Keane JJ in *M76* there was no legislative lacuna and so no work for the principle of legality to do.[122] Their Honours highlighted the absence of precise temporal limitations on the duration of detention for removal purposes, stating:

> the absence of an express limitation upon continued detention where removal is not practicable within a reasonable time is not 'silence' on the part of the legislature. The circumstance that the language of ss 189, 196 and 198 is not qualified by any indication that the mandate requiring detention depends upon the reasonable practicability of removal within any time frame is eloquent of an intention that an unlawful non-citizen should not be at large in the Australian community.[123]

As the different judicial opinions expressed in *Al-Kateb*, *M47* and *M76* evidence, the construction of relevant sections supporting the scheme of detention continues to divide judicial opinion, and equally uncertain is the scope and relevance of the principle of legality in this context. What appears clearer (though deeply regrettable in my view) is that ten years on from *Al-Kateb*, lingering doubts about Parliament's intentions have evaporated. The implications of the meaning of the detention provisions (and their deleterious effects on detainees' health and development) have not gone unnoticed by Parliament. But

120 (2004) 219 CLR 562, 643 [241] (Hayne J), 581 [33] (McHugh J), 662 [303] (Heydon J). Justice Callinan stated that the relevant terms in the *Migration Act 1958* (Cth) were clear and unambiguous so, inferentially, he thought the principle of legality was redundant: *Al-Kateb* (2004) 219 CLR 562, 661 [298].

121 (2012) 251 CLR 1, 59 [116] (Gummow J). Cf *M76* (2013) 251 CLR 322, 379 [182] (Kiefel and Keane JJ). The *Migration Reform Act 1992* (Cth) removed the nine-month time limit on immigration detention. Detainees were to be informed of the consequences of detention, but indefinite detention was not raised as a possible consequence.

122 Justice Hayne re-affirmed the interpretative approach he adopted as part of the majority in *Al-Kateb*, adding that s 196 serves the broad over-arching purpose of immigration control: *M76* (2013) 251 CLR 322, 366 [127].

123 *M76* (2013) 251 CLR 322, 379 [182] (Kiefel and Keane JJ). Cf *Al-Kateb* (2004) 219 CLR 562 (Gleeson CJ, Gummow and Kirby JJ); *M47* (2012) 251 CLR 1 (Gummow and Bell JJ).

the legislature has resolutely left them unaltered.[124] There is force in the reasoning of Hayne J in *M76*, who pointed to the passing of nine years since *Al-Kateb*, observing that, despite numerous amendments to the *Migration Act 1958* (Cth), Parliament had not taken steps to amend the provisions and address the effect of *Al-Kateb*.[125] Put differently, the democratic process has modified immigration detention but has failed to implement effective (merits) review or maximum time limits for detention with the result that many unlawful non-citizens have experienced prolonged and indeterminate detention.

Furthermore, the proposition that there is a common law 'freedom of bodily movement without arbitrary restraint'[126] (or, 'right to personal liberty') for citizens *and non-citizens* alike has been treated with suspicion in the HCA. For example, in *M76* Kiefel and Keane JJ opined that non-citizens' liberty is governed by statute alone: that the legislation left no room for the possibility that an unlawful non-citizen may lawfully be at liberty within the Australian community without a visa issued under the Act.[127] With respect, that assessment appears too expansive given the operation of a significant feature of immigration detention under the Act. Detainees who are the subject of a 'residence determination' enjoy qualified freedom in Australia; they are given permission to live in the community and access services but they are not granted a bridging visa to enter Australia (though that remains a possibility). In short, they are non-citizens who are 'visa-less', but at large. More problematically, this view poses a challenge to fundamental and ancient principles of Australia's common law heritage. The presumption of individual liberty is repudiated for those who bear the characteristic of unlawful non-citizen.[128]

Constitutional limits on the executive's power to detain feed into the statutory construction of purposive *and* temporal limits on immigration detention for unlawful non-citizens. These constitutional constraints – revitalised of late in *M76* and *S4* – may (in an appropriate matter) prompt a re-think and renovation of the majority's interpretation of *temporal* limits in *Al-Kateb*.[129] Is the outer limit on detention only reached once removal from Australia is patently 'reasonably practicable', as the majority held in *Al-Kateb*? This would have the result that

124 It is questionable whether there is a political cost for Parliament (or, political parties) to confront because asylum seekers are a marginalised minority in Australia. Two private members' bills directed at major reforms of mandatory immigration detention (with provision for enhanced judicial review, fixed limits on the duration of detention and merits review before the AAT over exceptional cases) were introduced in the Senate on 16 June 2005: Migration Amendment (Act of Compassion) Bill 2005 (Cth); Migration Amendment (Mandatory Detention) Bill 2005 (Cth). These were later withdrawn following the Howard Government's changes announced on 17 June 2005.

125 *M76* (2013) 251 CLR 322, 345 [36]. See also at 365 [125] (Kiefel and Keane JJ).

126 *CPCF* (2015) 89 ALJR 207, 243 [173] (Crennan J), 275–6 [400] (Keane J).

127 (2013) 251 CLR 322, 379 [181], 380 [184].

128 See also *Al Khafaji* (2004) 219 CLR 664, 678 [46] (Callinan J), observing that the common law's jealous protection of liberty was inapplicable to the circumstances of the case which gave 'sufficient cause' for departure from the fundamental and ancient right of individual liberty.

129 Recall that in *Al-Kateb*, the combined operation of ss 189, 196 and 198 was construed as authorising the detention of the plaintiff, even if removal was not presently reasonably practicable from Australia, provided the non-citizen is being detained for the purpose of such removal.

detention could endure for the remainder of a person's natural life so long as the purpose of removal was not unequivocally abandoned by the executive and removal remained a theoretical possibility.[130] Or, alternatively, by *constitutional implication* is there a relatively more stringent (albeit indeterminate) periodic constraint to be implied correlating to the statutory purpose of removal underlying detention? So, for example, where it could be shown that the statutory purpose of removal was not 'reasonably foreseeable', then the purpose may be construed as spent or frustrated, rendering detention unlawful. Such a test permits greater intrusiveness (or, closer scrutiny) by a reviewing court than the test adopted by the majority in *Al-Kateb* and *Al Khafaji*. These matters are addressed in Part V.

C Secondary Statutory Purposes Underpinning Immigration Detention: Investigating and Determining Entry

The primary purpose of immigration detention is to effect removal as soon as reasonably practicable from Australia (where formal entry is denied or permission is withdrawn or expires). What are the subordinate statutory purposes? These are to be understood, broadly, as relating to inquiries and decisions about a person's entry to Australia and, more specifically, in terms of permitting and granting visa applications.

In *M76* an asylum seeker arriving by boat from Sri Lanka was taken into immigration detention in May 2010.[131] In March 2011, the Minister made a 'residence determination' permitting her and her sons to reside in 'community detention' and move freely in the community. As an UMA the plaintiff was, formally, barred from lodging a valid visa application by operation of section 46A(1).[132] Section 46A contained both a prohibition on making a valid visa application, and the means to lift this prohibition. The Immigration Minister may (but need not) *consider* whether to lift the statutory prohibition on visa application in relation to specific UMAs. To cater to situations where the Minister was minded to consider 'lifting the bar', a non-statutory administrative scheme was established to address a threshold question of whether Australia's international refugee law obligations were enlivened (without more) in respect of a given person. Pursuant to departmental advice, the Minister could subsequently take the second step of considering whether to lift the bar, thereby permitting a valid visa application.

In the earlier case of *Plaintiff M61/2010E v Commonwealth*, the HCA held that the continued detention of plaintiffs who were subject to the statutory bar was authorised *because* it was connected to statutory processes and underpinned by a legitimate purpose: the *reasonably prompt* consideration of whether to

130 Accordingly, where removal was reasonably practicable, *but not effected*, detention would be unlawful.

131 At the time asylum seekers arriving by boat were defined as 'offshore entry persons' *Migration Act 1958* (Cth) s 5(1), later amended by *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) ss 3, 8; following amendments, the *Migration Act 1958* (Cth) now refers to 'unauthorised maritime arrivals': s 5AA.

132 *Migration Act 1958* (Cth) s 46A(1).

permit that person to make a valid visa application under section 46A.[133] Otherwise, unconstrained executive discretion perpetuated the detention – an unattractive proposition which meant the executive could detain for a given purpose (refugee status assessment) which it might choose to abandon at any time.[134]

Plaintiff M76/2013 was a person in respect of whom Australia owed 'protection obligations' but was the subject of an adverse security assessment by ASIO. This assessment led the department to advise the plaintiff that she was ineligible for a protection visa because of the non-satisfaction of PIC 4002. Her 'residence determination' was revoked by the Minister in May 2012 and the plaintiff and her sons returned to immigration detention while efforts were made to resettle her in another country. At the time of the High Court hearing, the Commonwealth accepted that there was no real likelihood or prospect that the plaintiff would be removed from Australia in the reasonably foreseeable future. Her position was, in that respect, comparable to *Al-Kateb*, though formal recognition of her refugee status is a point of distinction.

In keeping with *M47*, the decision in *M76* did not turn on whether *Al-Kateb* was correctly decided. Rather, the decision hinged on the fact that administrative procedures had miscarried following the proleptic refugee status assessment. Specifically, due to reliance upon PIC 4002, the immigration department failed to refer the plaintiff's case to the Minister for consideration. The reliance on PIC 4002 constituted an error of law (following *M47*) because PIC 4002 was an invalid criterion for the grant of a protection visa.[135] As a result of the Immigration Department's misstep there had been no referral to the Immigration Minster for consideration about *whether* to lift the statutory bar and permit a valid protection visa application to be lodged. The statutory process was unlawfully halted. Having decided to consider exercising statutory powers the Minister was obliged to continue to decide the matter, otherwise:

> there would be detention at the unconstrained discretion of the Executive if … the Minister could decide, at any time, to refuse to conclude, or to stop, consideration of whether to lift the bar. If the Minister, having decided to consider whether to exercise the power to lift the bar, had no *duty* to conclude that consideration, the Act would authorise detention at the will of the Minister.[136]

The continued detention of Plaintiff M76/2013 was authorised under the Act pending the lawful (and timely) performance of the administrative inquiries into refugee status *and* the related (and required) ministerial determination about whether and how to exercise section 46A(2) powers – powers that correlated to the ultimate issue of admission as a refugee or detention/removal from

133 (2010) 243 CLR 319, 341–2 [35], 347–51 [61]–[71] (The Court).

134 See *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505, 554 [269]–[270] (Lander and Gordon JJ).

135 *M76* (2013) 251 CLR 322, 343 [29] French CJ, 388 [222], 392 [240] (Kiefel and Keane JJ), 368 [134] (Crennan, Bell and Gageler JJ agreeing).

136 Ibid 358 [93] (Hayne J) (emphasis in original).

Australia.[137] In short, the purpose of detention (completing statutory processes) was not spent.

In *M76* the outcome was remittal of the matter to the Minister for 'reasonably prompt' consideration. Having given the matter genuine consideration, the non-compellable nature of the Minister's public interest powers – a concept that embraces security considerations – means there is no compulsion to lift the bar prohibiting a visa application to be made. Accordingly, the decision formally vindicates the rule of law but represents a pyrrhic victory insofar as the plaintiff enjoyed no imminent, substantive relief from ongoing detention, which was the crux of the matter from the detainee's perspective. Judicial relief from detention could issue should the executive exhibit tardiness (or bad faith) and not respond promptly to the court's declaration.[138]

Subsequently, in the case of *S4* the HCA decided that two decisions of the Immigration Minister served to frustrate the statutory purpose that had justified the plaintiff's prolonged detention. The protection seeker, originally from Myanmar, was stateless. He was detained for more than two years while the executive actively considered whether to exercise power under section 46A(2) and lift the statutory bar prohibiting UMAs from lodging valid protection visa applications. Following its inquiries, immigration officials determined that the plaintiff was a refugee (within the meaning of *Refugees Convention* article 1A) and eligible for a *permanent* protection visa. The outstanding inquires related to health and character requirements. However, in furtherance of the Government's policy of denying permanent protection to (what it terms) 'illegal maritime arrivals' the Immigration Minister purported to grant two *temporary* protection visas (a Temporary Safe Haven visa and Temporary Humanitarian Concern visa) under *Migration Act 1958* (Cth) section 195A. The evident purpose of granting the Temporary Safe Haven visa (valid for seven days) was to engage a statutory prohibition on the making of any other visa application other than for another Temporary Safe Haven visa.[139] The effect was to prohibit a bid for permanent protection.

The Minister's decision to grant temporary protection visas was invalid because the decision foreclosed the exercise of power under section 46A. Critically, the plaintiff's prolonged detention had been for the purpose of considering whether to exercise power under section 46A and permit the making of a valid visa application. The Immigration Minister's purported exercise of alternate statutory powers circumvented the operation of section 46A and so deprived detention of its lawful purpose.[140] The Court concluded that detention could not be 'for any purpose other than the determination, as soon as reasonably

137 Ibid 343 [30] (French CJ), 368 [135] (Crennan, Bell and Gageler JJ), 390 [227] (Kiefel and Keane JJ).

138 '[S]ubject to reasonable promptness on the part of the Minister and his officers in responding to the declaration of this Court, the plaintiff's continuing detention is authorised': Ibid 343–4 [30] (French CJ).

139 *S4* (2014) 253 CLR 219, 227 [5] (The Court).

140 Ibid 235 [41], 237 [46] (The Court).

practicable, of whether to permit the plaintiff to make a valid application for a protection visa'.[141]

For *S4*, who had been detained long-term while administrative inquiries were undertaken, the outcome rings hollow. There was no immediate end to incarceration in sight while the matter was remitted to the Minister for a proper decision, this time under section 46A. However, the lawfulness of detention for investigative, 'entry' purposes (deciding whether to lift the statutory bar) is bound by the temporal requirement of 'reasonable practicability' which is capable of being scrutinised and enforced by the court 'at any time and from time to time'.[142] Importantly, the Court signalled that nothing in their reasons should 'be understood as assuming or deciding that the decision which the Minister should now be required to make under s 46A is unconstrained … *by the fact and circumstances of the plaintiff's prolonged detention*'.[143]

So the courts will oversee the progression of administrative enquiries that are tethered to a statutory process that supplies the basis for ongoing detention to ensure, inter alia, 'reasonable promptness'.[144] Further, the detainee's circumstances (such as whether they are found to be a genuine refugee) will affect the application of the 'reasonably practicable' criteria.[145] These are important statements of principle and the HCA is accustomed and 'well-equipped to assess whether it can be concluded that the achievement of a statutory purpose is a practical possibility or not'.[146] However, in practice this does not add up to the effective judicial supervision required under relevant international law norms. Put simply, the legal constraints on administrative detention are not exacting and seemingly do not prevent excessive (unnecessary and disproportionate) periods of detention; for instance, in *S4* there was no indication that the court considered an inordinately long (two years) processing period to be approaching the temporal bar that demarcates lawful from unlawful detention.

D Implied Statutory Purposes: Exclusion from the Australian Community

Immigration detention is not imposed as punishment for an offence relating to unauthorised arrival.[147] But it has been construed as legitimately serving an (legislatively unspecified) exclusionary purpose: by segregating, through incarceration, unlawful non-citizens from the Australian community.[148] In *Al-Kateb* two (minority) judges decided that preventing the entry of unlawful non-

141 Ibid 239 [58].
142 Ibid 232 [29] (The Court).
143 Ibid 227–8 [10] (emphasis added).
144 *M61/2010E v Commonwealth* (2010) 243 CLR 319, 341–2 [35] (The Court).
145 Ibid 339–40 [29].
146 *CPCF* (2015) 89 ALJR 207, 249 [218] (Crennan J). This assumes that immigration (and maritime) detainees can overcome the practical difficulties of accessing legal services and initiating litigation. It is not an assumption that should be drawn readily.
147 See *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, 14 [26] (Gleeson CJ); *M76* (2013) 251 CLR 322, 385 [207] (Kiefel and Keane JJ); *Jaffarie* (2014) 226 FCR 505, 532–3 [95] (Flick and Perram JJ), citing *Al-Kateb* (2004) 219 CLR 562, 584 [44]–[45] (McHugh J).
148 See, eg, *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, 75–7 [222]–[228] (Hayne J).

citizens into the community *pending* an entry or removal decision, was an ancillary purpose underpinning detention.[149] Three (majority) judges went further, observing that entry, removal *and* exclusion from the community could justify detention; that is, exclusion could justify detention absent other statutory purposes (which might be spent) related to entry, or removal.[150] Exclusion was said to advance *protective* purposes, preventing undesired infiltration of or presence in the community, and (more tenuously) the attainment of *de facto* citizenship.[151]

Another protective purpose was implied and advanced by Heydon J in *M47*: 'The detention of unlawful non-citizens who threaten the safety or welfare of the community because of the risks they pose to Australia's security'.[152] One of the difficulties with this preventative justification is that detainees may be incarcerated – on protective grounds ('pending removal') – due to adverse security or character assessments, in circumstances where they pose no real threat to the safety of the Australian community.[153] For instance, in *M47* Bell J observed that the case was conducted on the basis that:

> the plaintiff is not a person about whom there are reasonable grounds for regarding as a danger to the security of Australia. Nor is he a person who having been convicted of a particularly serious crime constitutes a danger to the Australian community.[154]

This type of situation is, notoriously, compounded by the fact that non-citizens who are recipients of adverse security assessments and subject to

149 *Al-Kateb* (2004) 219 CLR 562, 576 [17] (Gleeson CJ), 609 [126]–[127] (Gummow J).

150 Ibid 584–5 [45]–[46] (McHugh J), 644–5 [247] (Hayne J), 658–9 [289] (Callinan J).

151 Ibid 584 [46] (McHugh J), 659 [289] (Callinan J). See also, *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, 46–7 [115] (McHugh J).

152 (2012) 251 CLR 1, 136 [346]. This purpose correlates to government policy: see *PAM3*, above n 25.

153 Relatedly, see Part VI below, and the discussion of *NBMZ* (2014) 220 FCR 1, where the Minister failed to consider whether the plaintiff posed any risk to Australian society *when refusing a protection visa* on character grounds, with consequential detention of uncertain duration pending the plaintiff's removal.

154 (2012) 251 CLR 1, 194 [534]. ASIO's security assessments capture a larger cohort of refugees than those falling within the exclusionary provisions of the *Refugees Convention*. Plaintiff M47/2012 was identified by the Director General of Security as someone who would likely continue supporting Liberation Tigers of Tamil Eelam activities in and from Australia. But the Immigration Department was satisfied that Plaintiff M47/2012 was not excluded from refugee protection by *Refugees Convention* art 1F which states that the Convention provisions do not apply to a person if there are serious reasons for considering that the person has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the country of refuge or other acts contrary to the purposes and principles of the United Nations.

removal are procedurally disabled; they do not enjoy merits review before an independent tribunal and judicial review is practically ineffective.[155]

In *M76*, Kiefel and Keane JJ also identified exclusion as a discrete purpose underlying detention. Significantly, their Honours observed that even if the legislative scheme (*Migration Act 1958* (Cth) sections 189, 196 and 198) were read as constrained by a purposive (*removal*) and temporal limitation (*reasonably practicable*) *and* an implied qualification that this be effected *within a reasonable timeframe*, continued detention would, nonetheless, continue to be lawful. This was attributed to the 'evident purpose' (underlying section 189) of *preventing unauthorised entry* into the Australian community.[156]

Justifying detention in broad, exclusionary terms appears to sit uneasily alongside the HCA's recent unanimous judgment in *S4* which stated, unambiguously, that lawful detention serves *only* three statutory purposes: removal, investigation and determination of a visa application, and to determine whether to permit a valid visa application. The legislature could provide that various purposes (such as exclusion, segregation or even deterrence of irregular migration) support detention.[157] But Parliament has not done so expressly and unambiguously.

The Commonwealth's detention policy supplements the legislative scheme and clearly supplies a limited rationale for detention. The detention policy provides that indefinite detention is unacceptable,[158] and ongoing deprivation of liberty is only resorted to *when appropriate*. Accordingly, three specific groups are subject to mandatory detention (and segregation from the community):[159] first, all unauthorised arrivals (on arrival), for management of health, identity and security risks to the community; secondly, unlawful non-citizens who present

155 See *Jaffarie* (2014) 226 FCR 505, 521–2 [48] (Flick and Perram JJ); 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* 658; Ben Saul, 'The Kafka-Esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia' (2010) 33 *University of New South Wales Law Journal* 629. In 2012 an Independent Reviewer of Adverse Security Assessments was appointed. This non-statutory office holder provides an advisory review mechanism re-examining adverse security assessments relating to non-citizens who engage Australia's protection obligations: see Attorney-General's Department (Cth), *Independent Reviewer of Adverse Security Assessments* <http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx>.

156 *M76* (2013) 251 CLR 322, 379–80 [182]–[183] (The Court).

157 See *Al-Kateb* (2004) 219 CLR 562, 659 [291] (Callinan J). Whether detention laws for deterrence purposes would be constitutionally valid is doubtful. In *Behrooz* Kirby J doubted that harsh detention conditions for the purpose of deterring other would-be unlawful arrivals would conform with the *Constitution*: (2004) 219 CLR 486, 531 [130]. Before the Australian Human Rights Commission, current and former Immigration Ministers have claimed that the detention of children was not intended as part of a deterrence policy, nor would it work as such: see *Forgotten Children Inquiry*, above n 44, 29.

158 *Annual Report 2013–14*, above n 70, 174.

159 See *Re Woolley; Ex parte M276/2003* (2004) 225 CLR 1, 13 [19] (Gleeson CJ), 75 [222], 77 [227] (Hayne J); *Al-Kateb* (2004) 219 CLR 562, 584 [45], 586 [49] (McHugh J), 648 [255]–[256] (Hayne J), 658 [289] (Callinan J). Segregation was advanced as the response to unlawful arrivals by the Commonwealth in *M76*: see Transcript of Proceedings, *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCATrans 201 (4 September 2013) 1515–25.

unacceptable risks to the community; and thirdly, unlawful non-citizens who have repeatedly refused to comply with their visa conditions.[160] It is apparent that a broad exclusionary justification for detention of non-citizens is not advanced in government policy. Rather, there are more discrete administrative and, ostensibly, protective purposes relating to screening, enforcement and risk management (health, security and flight). The trajectory of government policy since 2008 has, in principle if not in practice,[161] been away from an exclusionary model of imprisonment by segregation towards detention alternatives: community-based detention and bridging visas.[162]

Under current law and policy governing immigration detention it is, therefore, difficult to justify detention by reference to a legislative intention that non-citizens should simply not be at large. Plainly, unlawful non-citizens are present in the community (around 3000).[163] By operation of residence determinations, community membership is possible for vulnerable immigration detainees pending a determination of their status, as Kiefel and Keane JJ have recognised.[164] By making provision for alternative places of detention, residence determinations and bridging visas,[165] the legislature has determined that detainees may, subject to conditions, reside (either 'in fact' or 'in 'law') in the community because incarceration in an IDC is unnecessary or undesirable. The possibility and (regular) practice of making residence determinations for certain non-citizens legitimates their presence in the community even though they are not a visa holder.

V CONSTITUTIONAL ASPECTS OF IMMIGRATION DETENTION

The HCA has held that a constitutional head of power – section 51 (xix) – supports the administrative confinement of unlawful non-citizens in immigration detention.[166] But what is the relationship between the trilogy of provisions

160 *Annual Report 2013–14*, above n 70, 174.

161 Due to the increasing number of asylum seekers and application of deterrence policies, including the moratorium on processing during 2010 (Sri Lankans and Afghans) and 'offshore solutions' for maritime arrivals.

162 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 11 February 2013, 21 (Martin Bowles, Secretary, Department of Immigration and Citizenship).

163 Official data demonstrates that there are comparable numbers of non-citizens living in community detention and in immigration detention facilities. See *Immigration Detention and Community Statistics Nov 2014*, above n 39.

164 *M76* (2013) 251 CLR 322, 379 [182].

165 A code of behaviour for Bridging Visa E holders was implemented with the introduction of regulations and a legislative instrument on 14 December 2013: *Migration Amendment (Bridging Visas – Cod of Behaviour) Regulation 2013* (Cth); Minister for Immigration and Border Protection (Cth), *Migration Regulations 1994: Code of Behaviour for Public Interest Criterion 4022*, IMMI 13/155, 12 December 2013. Under this policy, people began to be released from detention in February 2014 after administrative arrangements to support the signing of the code had been developed.

166 See *Lim* (1992) 176 CLR 1.

regulating immigration detention (sections 189, 196 and 198) and Chapter III of the *Constitution*? The effect of Chapter III is, arguably, that aside from certain exceptional categories, deprivation of liberty can only be made by judicial order on conviction for an offence after adjudication of guilt.[167] Among the acknowledged exceptions to the general prohibition on executive detention is that non-citizens' liberty may be constrained – consistently with Chapter III – for the purposes of determining questions about entry and the person's removal/deportation. The constitutional issue is whether detention can validly continue when statutory purposes are exhausted (or, frustrated) and incapable of fulfilment within a reasonable time frame. In short, will deprivation of liberty, after a time or in some circumstances, *become* punitive and so constitutionally invalid?[168]

The majority in *Al-Kateb* (and *Al Khafaji*) held that immigration detention was not invalid, where removal was not reasonably practicable in the foreseeable future, because detention was for a non-punitive purpose: 'to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community'.[169] Equally, in *M47* Heydon J rejected the plaintiff's 'proportionality' argument, premised on the constitutional reasoning in *Lim*, observing that 'detention until deportation is reasonably practicable – is reasonably proportionate to that end'.[170] By contrast, two dissentients in *Al-Kateb* (Gummow J with Kirby J agreeing) also considered that Chapter III required the courts to police the ongoing viability of statutory purposes of entry/removal and, therefore, the legality of immigration detention under the *Constitution*.[171] Additionally, in *Al Khafaji*, Kirby J (dissenting) asserted that, effectively, self-defining powers of indefinite detention were incompatible with both Chapter III requirements *and* international law obligations.[172]

The legislative requirement that detention is required until 'removal is undertaken as soon as reasonably practicable' may be read as importing a 'reasonable time' qualification, else the requirement risks infringing Chapter III

167 For a robust defence of the general principle that, subject to limited exceptions, involuntary detention by the executive is constitutionally impermissible: see 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 author notes that there is a body of judicial and academic opinion that questions the general prohibition on executive – non-criminal – detention: at 42–3.

168 In *Behrooz*, the HCA rejected an argument that prolonged detention in allegedly harsh and inhumane *conditions* amounted to punishment and, therefore, changed the character of administrative immigration detention from non-punitive to punitive. This argument rested on the constitutional reasoning in *Lim* insofar as it was argued that harsh or inhumane detention conditions were not reasonably necessary for the purpose of migration control, and could not validly be authorised except as a consequence of the exercise of judicial power.

169 *Al-Kateb* (2004) 219 CLR 562, 584 [45], 595 [74] (McHugh J), 649–51 [261], [263]–[268] (Hayne J), 659 [291] (Callinan J), 662–3 [303] (Heydon J).

170 *M47* (2012) 251 CLR 1, 137 [348].

171 (2004) 219 CLR 562, 613 [140] (Gummow J), 615 [146] (Kirby J), observing that indefinite detention, at the will of the executive, was alien to Australia's constitutional arrangements. Justice Gummow considered the punitive/non-punitive characterisation of detention as misleading, preferring to focus on deprivation of liberty at the behest of the executive and the reach of ch III: at 612–13 [137]–[140].

172 (2004) 219 CLR 664, 674 [28]. See also *Al-Kateb* (2004) 219 CLR 562, 623–4 [170]–[176], 626 [183], 629 [190] (Kirby J).

constraints. This proposition stems from the majority reasoning in *Lim*; it has been affirmed in several cases and was not overruled by *Al-Kateb*.[173] In *Lim* a majority of the HCA held that immigration detention is constitutionally valid *only if* the laws that require and authorise administrative detention are: 'limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[174]

Detention that is not so limited is constitutionally infirm. In *Lim* Brennan, Deane and Dawson JJ identified, and attributed constitutional significance to, several significant statutory provisions that constrained the power of detention,[175] including a provision that expressly restricted the total maximum period that a non-citizen could be detained for. The clear temporal restrictions went '*a long way towards* ensuring that detention … is limited to what is reasonably capable of being seen as necessary for the purpose of' deportation or application for entry.[176]

In *M76*, Crennan, Bell and Gageler JJ revisited the constitutional holding in *Lim*, which provided that the conferral of limited powers of detention on the executive (that are incidental to administrative processes and determinations relating to entry, removal and deportation) 'is consistent with Ch III if, but only if, the detention in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes'.[177]

The joint judgment identified a clear temporal limitation on immigration detention:

> The necessity referred to in that holding in *Lim* is not that detention *itself* be necessary for the purposes of the identified administrative processes but that the *period* of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified. The temporal limits and the limited purposes are connected such that the power to detain is not unconstrained.[178]

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173 (2004) 219 CLR 562. Indeed, in *CPCF* , Crennan J observed:

> Following *Chu Kheng Lim*, the connection between the temporal limits and the limited purposes of executive detention of persons who are non-citizens has been affirmed by this Court on many occasions where the achievement of a statutory obligation has been conditioned on temporal limits.

(2015) 89 ALJR 207, 249 [217].

174 (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ); see also *M47* (2012) 251 CLR 1, 59 [115] (Gummow J).

175 See Gordon, above n 167, 78.

176 *Lim* (1992) 176 CLR 1, 33 (Brennan, Deane and Dawson JJ) (emphasis added). The fixed time limits on detention (and removal) are only applicable to a very limited cohort – 'designated persons' subject to mandatory detention: see *Migration Act 1958* (Cth) ss 178, 182.

177 *M76* (2013) 251 CLR 322, 370 [140].

178 Ibid 369 [139] (emphasis in original). See also *S4* (2014) 253 CLR 219, 231 [26], where French CJ, Hayne, Crennan, Kiefel and Keane JJ referred to the cited passage from *Lim* with apparent approval. Compare with Justice Callinan's interpretation of the joint judgment's constitutional reasoning in *Lim*, which makes no connection between lawful purposes and temporal constraints: *Behrooz* (2004) 219 CLR 486, 559 [218].

Crennan, Bell and Gageler JJ (and French CJ)[179] left open the question of whether laws requiring or authorising indeterminate immigration detention would survive a future constitutional challenge in appropriate factual circumstances.[180] Conversely, in *M76* Hayne J confirmed *Al-Kateb*, stating that the power to detain unlawful non-citizens was not unbounded, pinpointing the 'primary temporal limitation' (the statutory duty to remove 'as soon as reasonably practicable') and purposive constraints which must be 'ascertainable, and enforceable, [by the courts] at all times during its continuance'.[181] Accordingly, detention for whatever period the Minister may choose was impermissible under the Act. But his Honour harboured no doubts about the validity of laws authorising indefinite detention until removal for non-citizens without permission to travel to Australia, concluding that the question of the law's merits and consistency 'with basic tenets of common humanity' was for Parliament and the polity to ponder.[182] Equally, Kiefel and Keane JJ considered that the laws were valid; detention, where removal was currently unfeasible, did not violate Chapter III.[183]

The HCA has made clear that detention laws have temporal limits and that such limits are necessary if the laws are to survive a constitutional challenge.[184] Where the judges appear to differ is on the question of whether 'reasonable practicability of removal' must be read, subject to constitutional constraints, so as to require removal within a 'reasonable time-frame' in order to be valid. In *M76* three judges (Crennan, Bell and Gageler JJ) offer support for the view that detention provisions are constitutionally valid laws if they are for relevant statutory purposes and if they are subject to clear 'reasonable time' constraints.[185] No members of the HCA, in *M76* or *S4*, have embraced the interpretive approach to the *Constitution* advocated by Kirby J in *Al-Kateb*. Accordingly, identified constitutional constraints on immigration detention were not illuminated by or referable to international obligations, such as article 9 of the *ICCPR*.

In summary, assuming the right fact matrix arises in the future – the effluxion of time coupled with a detainee's circumstances and the exhaustion of removal potentialities (through international diplomacy) – the HCA may be persuaded that the constitutional boundary line, demarcating detention that is connected to

179 'In the event that the Minister makes a decision under s 46A(2) adverse to the plaintiff, the question may arise whether her detention thereafter is authorised if she is unable to be removed to another country':*M76* (2013) 251 CLR 322, 344 [31] (French CJ).

180 Ibid 334–5 [4]–[5], 371–2 [145]–[149] (Crennan, Bell and Gageler JJ). Cf *Al-Kateb* (2004) 219 CLR 562, 584 [49] where McHugh J opined that the reasoning in *Lim* did not assist a person in the position of Mr Al-Kateb – ie, a non-citizen detained with no reasonable prospect of removal in the foreseeable future.

181 *M76* (2013) 251 CLR 322, 359 [98]–[99].

182 Ibid 367 [130].

183 Ibid 384–5 [205]–[208].

184 In *NBMZ* (2014) 220 FCR 1, 24 [114], Buchanan J concluded that *five* of the seven judges in *M76* construed the Act as incorporating some form of temporal limitation on the power to detain. With respect, and the benefit of reading *S4*, my view is that *all* judges recognise temporal limitations in the Act, the critical question is whether, in view of the 'constitutional holding' in *Lim*, a narrower interpretation of 'reasonable practicability' is warranted in certain circumstances.

185 Cf *Lim* (1992) 176 CLR 1, 73, where McHugh J doubted a long period of detention (over two years) could transform the character of immigration detention from administrative (non-punitive) to punitive.

entry/removal and detention that is not, has been crossed. Put differently, there may come a point in time when the link between immigration detention and entry, removal or deportation is so tenuous[186] that detention cannot be characterised as limited to what is reasonably capable of being seen as necessary, rendering it inconsistent with Chapter III. The difficulty confronting would-be litigants is raising and establishing facts before a court that confirms that the statutory purpose of detention (either entry, removal or deportation) has been or should be regarded, by the reviewing court, as abandoned, frustrated, or effectively exhausted and incapable of fulfilment within a reasonably foreseeable period. Should they do so the court could issue habeas corpus and may do so on terms and conditions appropriate to the individual's circumstances.[187]

VI ADMINISTRATIVE DECISION-MAKING: HEEDING THE CONSEQUENCES (INDEFINITE DETENTION) OF VISA REFUSALS

Visas may be refused or cancelled where a non-citizen does not pass the character test,[188] rendering them liable to detention and removal from Australia.[189] Traditionally, section 501 of the *Migration Act 1958* (Cth) has been commonly used where a non-citizen has a substantial criminal record, and non-citizens are transferred into immigration detention upon completion of their prison sentence. As Nethery has identified '[p]eople have spent months or years in immigration detention after completing their prison sentences waiting for the completion of diplomatic and administrative processes to enable their deportation'.[190] Basikbasik's case provides a striking example. At the time the Australian Human Rights Commission reported on his complaint about arbitrary detention, Basikbasik had been detained in an immigration detention centre for seven years following his release from prison and cancellation of his protection visa. He could not be returned to Indonesia on non-refoulement grounds. Apparently third country options had not been explored by the government which

186 Due to the executive's action/inaction, non-citizen's circumstances, political course of events abroad and/or fruitless diplomatic negotiations to secure the non-citizen's admission in another country. See also *Park Oh Ho v Minister of State for Immigration and Ethnic Affairs* (1989) 167 CLR 637, where detention was held to be unlawful because it was for an impermissible, ulterior, purpose (keeping the non-citizen available to be a witness in a pending criminal prosecution), and not to secure removal.

187 *M47* (2012) 251 CLR 1, 193–4 [534] (Bell J), agreeing with Gleeson CJ in *Al-Kateb* (2004) 219 CLR 562, 579–80 [27]. Cf at 643–4 [242]–[243] (Hayne J). Breach of conditions would be contempt of court. The executive, of course, retains power to grant visas subject to (very stringent) conditions pursuant to s 195A – but pursuant to its detention policy it chooses not to exercise these discretionary powers where there is adverse security or character concerns.

188 The ways non-citizens may fail the character test are set out in *Migration Act 1958* (Cth) s 501(6).

189 In 2003 Parliament authorised (via the *Migration Amendment (Duration of Detention) Act* 2003 (Cth)) for the continued detention of criminal deportees: at s 200, and those whose visas are cancelled under s 501 (on character grounds) even where a detainee could not be removed: at ss 196(4)–(7).

190 Amy Nethery, 'Partialism, Executive Control, and the Deportation of Permanent Residents from Australia' (2012) 18 *Population, Space and Place* 729, 737.

had declined to issue a bridging visa or utilise community detention with specific management conditions. The Australian Human Rights Commission concluded that ongoing detention was arbitrary in breach of article 9(1) of the *ICCPR*.[191] The problem of indefinite and arbitrary detention has been intensified as successive governments have amended the character test and widened the net so that the commission of quite minor criminal offences means a person fails the character the test; *NBMZ*, discussed below, is a case in point.[192]

Two, related, decisions of the FCA have determined that the exercise of ministerial discretion under section 501 is conditioned by a requirement to carefully heed the direct and immediate consequences of decision-making.[193] For example, in *NBMZ* an Iranian asylum seeker who arrived unauthorised by boat was assessed, by immigration officials, as a refugee but declined a protection visa on character grounds. He had no substantial criminal record in Australia (or Iran, seemingly)[194] but 'failed' the character test by reason of his conviction for an offence of damaging Commonwealth property at a detention centre.[195] Accordingly, the Immigration Minister exercised his discretion and declined to grant him a protection visa.

The FCA held that this decision was affected by a jurisdictional error because the Minister had failed to take into account of the consequences of a refusal of a protection visa,[196] which included the indefinite detention of the applicant pending removal. The Minister had erred because he had given effect to a policy (general deterrence of criminal conduct in immigration detention)[197] without sufficient regard for the merits of the applicant's case. Justice Buchanan stated:

> it was not open to refuse a visa merely to give effect to a policy preference, without attention to the merits of the application. And if regard was to be paid to the individual circumstances of the applicant (as it purportedly was when reference was made to his conduct) then it had to extend to the consequences for him as a refugee. Apart from the consequences for the applicant of refoulement or detention some account had also to be paid to the acknowledgment that he was a refugee in respect of whom Australia had voluntarily accepted protection

191 Gillian Triggs, Australian Human Rights Commission, *Basikbasik v Commomwealth of Australia (DIBP): [2014] AusHRC 77* (June 2014), 7 [45].

192 Eg, in 2011 the character test was altered so that a person does not pass the test if they have been convicted of an offence while in immigration detention: *Migration Act 1958* s 501(6)(aa), as amended by *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth) sch 1 cl 4. This new limb embraces consideration of conduct that cannot be characterised as of an objectively serious character, with the same force as a person with a substantial criminal record: *NBMZ* (2014) 220 FCR 1, 41–2 [201] (Buchanan J).

193 *NBMZ* (2014) 220 FCR 1; *NBNB v Minister for Immigration* (2014) 220 FCR 44 ('*NBNB*').

194 *NBMZ* (2014) 220 FCR 1, 14 [62] (Buchanan J).

195 *Migration Act 1958* (Cth) s 501(6)(aa).

196 (2014) 220 FCR 1, 4–5 [9]–[10], 6 [17]–[18] (Allsop CJ and Katzmann J), 37 [164]–[178] (Buchanan J); see also *NBNB* (2014) 220 FCR 44, 46 [2] (Allsop CJ and Katzmann J), 78–9 [126]–[128] (Buchanan J). Cf *Jaffarie* (2014) 226 FCR 505, 538 [128]–[129] (White J).

197 *NBMZ* (2014) 220 FCR 1, 8 [30]–[31], where Allsop CJ and Katzman J sounded a note of caution in respect of whether a visa refusal underpinned by the notion of general deterrence was a legitimate consideration in respect of a decision under *Migration Act 1958* (Cth) s 501(1) and left open the question of whether a decision *substantially* motivated by deterrence is impermissible.

> obligations. There is no indication in the Minister's reasons that any regard was paid to those matters.[198]

The Minister's unswerving pursuit of a policy preference and 'invincible disregard' for the applicant's circumstances was an error compounded by a failure to consider whether the applicant would really present a future risk to the Australian the community, in the event of a visa grant.[199]

In summary, following an adverse character assessment refugees face the prospect of prolonged and indefinite detention, in circumstances where recidivism is unlikely and it is doubtful that they pose a future risk to society. The dire prospect of indefinite detention cannot be overlooked by the executive; it is a consideration that must be put on the scales and weighed. The circumstance of indefinite detention for a refugee constitutes a mandatory relevant consideration for the Immigration Minister and a failure to have proper regard to this consideration constitutes unlawful decision-making. Further, giving proper attention to the merits of such cases warrants: (a) genuine consideration of whether to refuse a visa to a refugee, and (b) whether that particular person should be detained indefinitely in view of the offence for which they were convicted and given the circumstances in which the offence took place. In keeping with my earlier observations about judicial reviews of administrative action affecting detainees, these decisions do not offer substantive relief from prolonged detention.

VII CONCLUSIONS

There are in excess of 5000 people currently in detention facilities or community detention in Australia pending decisions about entry or removal.[200] Though immigration detention is not stated to be intended or inflicted as punishment for irregular migration, the consequences for detainees are harsh and international human rights law violations proliferate; strikingly so for those detainees held indefinitely pending removal due to adverse security or character assessments. The increase in the number of detainees held in Australia for prolonged and indefinite periods over the past five years has revealed the inadequacies of the 2005 legislative amendments that were directed, in part, towards dealing with difficult cases (like Al-Kateb's).

The legal framework that supports ongoing detention during administrative inquiries into entry claims, and where there is, seemingly, no real prospect of removal from Australia has come under renewed legal scrutiny in the HCA. In *M76* the HCA determined that administrative inquiries and determinations relating to refugee protection claims had to be performed in a timely manner. But as *M76* and *S4* evidence the timely performance of administrative processes does

198 *NBMZ* (2014) 220 FCR 1, 40 [189]. See also at 7–8 [26] (Allsop CJ and Katzmann J); *NBNB* (2014) 220 FCR 44, 76 [111], 80 [142] (Buchanan J).

199 *NBMZ* (2014) 220 FCR 1, 41 [194], [198] (Buchanan J).

200 *Immigration Detention and Community Statistics Jan 2015*, above n 8, 3.

not appear to preclude excessive, arguably arbitrary, periods of detention. Furthermore, in respect of detention pending removal from Australia, the recent cases reveal that three judges have confirmed the correctness of *Al-Kateb* (Hayne, Kiefel and Keane JJ),[201] three judges have not yet considered it necessary to express a firm view (French CJ, Crennan and Gageler JJ),[202] and Gummow and Bell JJ determined the case was wrongly decided based on the principle of legality endorsing the minority judgments of Gleeson CJ and Gummow J in *Al-Kateb*.[203]

In my view Hayne J, and Kiefel and Keane JJ, respectively in *M76*, offer robust reasons that tell against revisiting the construction of the detention provisions in light of the principle of legality. In particular, it appears artificial to persist with the contention that the legislature has not turned its mind to the possibility that the legislation authorises prolonged and indefinite incarceration, where removal is impracticable, for refugees and asylum seekers among others. Inadequate though the 2005 legislative amendments were, in principle and practice, one of their objectives was to deal with hard cases of prolonged detention where removal was difficult to effect. However, government policy – that mandates that those deemed to pose a security risk or risk to community safety are to remain imprisoned – undercuts the efficacy of those reforms.

In the absence of legislative reforms mandating, inter alia, maximum limits to detention for processing and removal purposes, and timely, independent (merits) review for detainees, including those deemed to pose an unacceptable risk to society, implied constitutional limits offer the best prospect for curtailing ongoing detention. The reasoning of the joint judgment in *M76,* which resuscitated elements of the constitutional reasoning in *Lim* offers the prospect of relatively more intrusive judicial scrutiny over the duration of immigration detention. This is in order to ensure that valid statutory purposes are pursued (and not abandoned or frustrated by the executive)[204] and remain viable (not merely aspirational). If administrative processes directed to statutory purposes are not pursued in a timely manner or purposes are not realisable within a reasonably foreseeable period and so become unviable then the judiciary may issue habeas corpus with conditions if necessary. Laws authorising ongoing immigration detention when removal is not reasonably foreseeable are not laws incidental to the executive's powers of exclusion, admission and deportation of aliens. They are disconnected from the aliens power and punitive in nature, in disconformity with Chapter III of the *Constitution*.

201 Justice Hayne retired in June 2015.

202 Justice Crennan retired in February 2015.

203 Justice Gummow retired in October 2012. The rapid changes to the composition of the High Court compound the problem of predicting the outcome of a future constitutional challenge to mandatory detention laws and their operation.

204 There is, of course, the distinct possibility that exclusion/segregation may be implied as a freestanding statutory purpose authorising detention even when removal is not practicable.