Chapter 1. Legal Frameworks of Australia’s Administrative Migration Law

What is administrative law?

Administrative law is one of the three fields of law that deal with the relationship between the individual and the State. These three areas of law are as follows:

1. **Constitutional law** deals with the ability of the State to pass and enforce laws, and the judicial interpretation of constitutional documents, and not directly with any particular decision made by the Department of Immigration and Border Protection (DIBP). For example, *Singh v Commonwealth* (‘Tania Singh’) considered the interpretation of s 51(xix) of the Australian constitution, and in particular the meaning of the word ‘alien’.

   Constitutional law also deals with what rights and freedoms individuals can have against the government. In other words, constitutional law sets boundaries on the legislative, executive and judicial power of the state in relation to the individuals. For example, s 116 of the Constitution states:

   The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

2. **Criminal law** deals with the prosecution of an individual or a corporation by the State after allegations of behaviour that is deemed to be criminal either by statute or common law. Criminal offences are regarded as injurious not just to another party, but to society as a whole, and action against a person accused of a criminal offence is therefore undertaken by the State, and not just a victim of crime, or their relatives.

3. **Administrative law** deals with decisions made by the executive arm of government in relation to individuals or corporations, usually acting under the authority of a particular Act of Parliament. For example, immigration law is one kind of administrative law, because it deals with decisions made by a Minister, usually through his or her delegates, or independent

---

tribunals created by an Act of Parliament (in this case the *Migration Act 1958*). Administrative law classically tends to focus on judicial review of administrative decisions – that is, review of decisions made by the executive by the courts – but merits review is an equally important concept.

**The three arms of government**

The **legislature** is responsible for enacting laws, and for supervision of secondary legislation (regulations). In Australia, the Federal legislature consists of the House of Representatives and the Senate. To become law, a bill must pass both Houses, and also obtain the consent of the Governor-General, who is a member of the Executive Government. Regulations are made by the executive, for example the Minister for Immigration, but can be disallowed by either House of Parliament (in practice, always the Senate).

Like other countries with a Westminster system of government, such as the UK, New Zealand and Canada, in Australia the government of the day is the party that controls the House of Representatives, either by having an absolute majority in that House (as at present), or by obtaining the confidence of a number of non-government party members (as happened during the Gillard government). Further, Ministers including the Prime Minister, who are members of the executive, are appointed from amongst Members of the House of Representatives or Senators, meaning that there is a considerable overlap between the legislature and the executive. Compare this situation with, say, the United States, where the President and the Secretaries of State (the equivalent of Ministers) may not sit in Congress.

The **executive** consists of the Governor-General, Ministers (including, by convention, the Prime Minister), government departments and independent tribunals created by statute. The executive is responsible for enforcing and applying the law, by means such as making regulations (which can only be done under a power provided for by an Act of Parliament), or determining the application of a particular law to an individual or corporation (e.g. by deciding an application for a visa). As noted above, the Governor-General’s assent is also required before an Act of Parliament can come into effect, but this assent, known as Royal assent, has never been withheld in Australia.

The **judiciary** consists of all courts, whether created by the Constitution, such as the High Court and the State Supreme Courts, or by an Act of Parliament, such as the Federal Court, Federal Circuit Court and the Family Court. While there is an overlap between the legislature and the executive, the judiciary is always completely independent of both in Australia and other Westminster system countries. The judiciary is responsible for determining the meaning of the law and applying it to individual cases. In a common law jurisdiction
like Australia, a decision of a court has what is known as precedential value. Precedent, to put it in simple words, means an earlier decision of a court that may be either binding or persuasive in solving similar legal issues in later situations. A decision of a higher court binds all lower courts within the same jurisdiction. For example, a decision of the High Court binds all other courts in Australia, and a decision of the Full Federal Court binds all other federal courts (other than the High Court). Other decisions may have persuasive value even though they are not binding. For example, a decision of the US Supreme Court or the Supreme Court of Victoria is not binding on but may have persuasive value to the High Court of Australia.

The ‘administrative state’

The ‘administrative state’ is a concept that is frequently referred to but curiously rarely defined in the literature, at least by lawyers. Indeed, Alan Cairns tells us that ‘the modern administrative state defies simple description’, and that ‘the attempt to pin down the contemporary administrative state is doomed to failure’. Nevertheless, Seymour Wilson and Onkar Dwivedi make the following attempt:

The administrative state denotes the phenomenon by which state institutions influence many aspects of the lives of citizens, especially those aspects which relate to the economic and social dimensions. It describes a system of governance through which public policies and programs, affecting all aspects of public life, are influenced by the actions of public officials.

It is now nearly impossible for citizens to avoid interaction with the state, and in many cases they simply could not survive without it. This is not to argue that such regulation is always and everywhere a bad thing, but there can be no denying the increasing pervasiveness of the state into the everyday life of the individual. The following passage from Cory J, writing for the Supreme Court of Canada in Newfoundland Telephone Company v Newfoundland (Board of Commissioners of Public Utilities), captures the theme well:

Administrative Boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and

---

the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the functions they fulfill are legion.

The dependence by individuals on the state is another reason why it is now impossible to dispense with review of administrative decisions altogether – the consequences to an individual of an unreasonable or even simply incorrect decision can be disastrous. The courts and review tribunals therefore have a crucial role to play in ensuring that individuals can obtain government services that are no longer a privilege for most people, but necessary for survival. However, the courts face competing public policy objectives in that the government, the elected representatives of the people, have decided to give the power to make the decision in question to an administrative decision maker, and, more pragmatically, that government decision makers need to be able to do their work without being under constant close judicial scrutiny.

It should be noted that judicial review has real impacts on administrative agencies. Some of this impact is beneficial. For example, the emphasis on the review of administrative reasons has required agencies to provide detailed reasons for the decisions they make. On the other hand, the same processes have probably helped lead to the use of bland ‘boilerplate’ or ‘standard’ paragraphs, that are now common features of the reasons of administrative decision makers. While courts have generally rejected the proposition that the use of standard paragraphs is either unreasonable or an error of law in itself,5 it may be an unfortunate trend in administrative decision-making. Courts also rarely seem to have much appreciation of the financial impacts of their decisions.

Another distinctive feature of the modern administrative state is, of course, the administrative tribunal. A tribunal is not a court, and is indeed often required by legislation not to act like one. For example, s 420(1) of the Migration Act 1958 requires the Refugee Review Tribunal (RRT) to conduct itself in a manner that is ‘just, fair, economical, informal and quick’,6 and s 420(2) provides that it ‘is not bound by technicalities, legal forms or rules of evidence’ and ‘must act according

5 In Minister for Immigration and Citizenship v SZQHH (2012) FCAFC 45, the Full Federal Court of Australia rejected the argument that the use of standard paragraphs in a decision record refusing an applicant refugee status amounted to a reasonable apprehension of bias. By way of contrast, see LVR (WA) Pty Ltd v Administrative Appeals Tribunal (2012) FCAFC 90.
6 Many of these goals are obviously contradictory – see Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611.
Chapter 1. Legal Frameworks of Australia’s Administrative Migration Law

to substantial justice and the merits of the case’. It is important to note that tribunals are creatures of the executive, not the judiciary, despite the fact that their procedures may mimic those of courts to a greater or lesser extent.

As Australia has a Federal system of government, each of the Australian States and mainland Territories has its own legislature, and can pass its own Acts of Parliament. There are many State and Territory Acts that require Ministers or their delegates to make decisions on the basis of applications made to their departments. There are also many State and Territory administrative tribunals, the Victorian Civil and Administrative Tribunal (VCAT) probably being the best known. However, as immigration is a federal jurisdiction, the focus of this book is on federal administrative law.

The Constitutional basis of migration law in Australia

The main provision of the Australian Constitution that grants the Parliament to make laws is found in s 51. Section 51 does not provide for a grant of power to the Commonwealth Parliament to the exclusion of the States – powers that can only be exercised by the Commonwealth Parliament are found in s 52 of the Constitution, and immigration is not amongst those powers. This leaves open the theoretical possibility of a State concurrently enacting its own immigration legislation, as the Canadian province of Quebec has done. However, any State or Territory legislature that attempted to pass immigration laws inconsistent with the Migration Act 1958 would very likely be found invalid under s 109 of the Constitution, which provides that ‘[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’. It is therefore best to regard immigration as a solely federal area of law.

Section 51 of the Constitution provides three powers that give the Parliament power over matters relating to immigration. The section relevantly provides as follows:

7 Eshetu (supra) found that this was merely an exhortatory provision and did not impose legal duties on the RRT. However, the Full Federal Court has since found in Minister for Immigration and Citizenship v Li (2012) FCAFC 74 that a failure to grant an adjournment in a Migration Review Tribunal (MRT) hearing was a breach of s 353 of the Migration Act 1958 (which is in similar terms to s 420) in the facts of that case, and amounted to a jurisdictional error.

8 See for example on this point Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch) (2001) 2 SCR 781 and Minister for Immigration and Multicultural Affairs v Jia (2001) 205 CLR 507.

9 Quebec’s immigration Act is entitled, in the French civil law style, ‘An Act Respecting Immigration to Quebec’ (Loi sur l’immigration au Québec).
The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: …

(xix) Naturalization and aliens …

(xxvii) Immigration and emigration

(xxviii) The influx of criminals

Immigration laws passed by the Australian Parliament were based on s 51(xxvii) from 1901 to 1984, and s 51(xix) thereafter. Paragraph 51(xxviii) has been relied on very rarely, and more frequently in extradition matters than immigration cases.10

Early history of Australian migration laws

A useful early history of Australian immigration legislation can be found in the Full Federal Court case of NAAV v Minister for Immigration and Multicultural and Indigenous Affairs,11 in which the Court, in a unanimous judgment, stated as follows:

[387] One of the first statutes enacted by the Commonwealth Parliament after federation was the Immigration Restriction Act 1901 (Cth). It was described in its long title as:

‘An Act to place certain restrictions on Immigration and to provide for the removal from the Commonwealth of prohibited Immigrants.’

[388] It prohibited the immigration into the Commonwealth of ‘any person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in a European language directed by the officer’ (s 3(a)). Persons excepted were, inter alia, those possessed of a Certificate of Exemption signed by the Minister or an officer (s 3(h)). The Act was of modest length by contemporary standards comprising in all some nineteen sections. It was subjected to various amendments in the years that followed its enactment but by 1935 still only comprised some nineteen sections, albeit it was to be read with the Pacific Island Labourers Act 1901 (Cth) and the Contract Immigrants Act 1905 (Cth). By 1950, it had undergone further amendments and expanded to sixty-four sections. The ‘dictation’ test provision was still in force as was the system of entry

under Certificate of Exemption. That system was the precursor of the entry permit and visa regimes which were successive features of later migration legislation.


The Act established a completely new statutory scheme for migration. Entry into Australia was regulated by entry permits, the grant of which was within the power of officers of the Department of Immigration (s 6(2)). An immigrant entering Australia without an entry permit was a prohibited immigrant (s 6(1)). The Act provided for the issue of temporary entry permits (s 6(6)) and for their cancellation by the Minister ‘in his absolute discretion’ (s 7(1)). It also provided for the deportation of aliens and immigrants under various conditions (ss 12, 22)). It created powers of examination, search and detention in relation to suspected prohibited immigrants and persons subject to deportation orders (ss 32–45). It set up a system for the registration of immigration agents (ss 46–53). Somewhat more complex than its immediate predecessor, the Act comprised some sixty-seven sections. …

[391] In 1989 the Migration Legislation Amendment Act 1989 (Cth) was enacted. The amendments were comprehensive including new provisions for the control of entry into Australia involving entry permits and visas. A new Part III related to review of decisions. This Part created the Immigration Review Tribunal and provided for a process of internal review. The Federal Court was given jurisdiction to entertain appeals on questions of law from decisions of the Tribunal (new ss 64V and 64X). The general jurisdiction of the Court to review administrative decisions made under the Act, conferred by the Administrative Decisions (Judicial Review) Act 1977 (Cth) and the Judiciary Act, remained intact …

[392] The next major amendment to the Act was effected by the Migration Reform Act 1992 (Cth) (‘Migration Reform Act’) which was passed in November 1992 … The amending Act introduced an objects clause into the Migration Act and made the visa the single authority under which, for the most part, a non-citizen could be permitted to enter into or remain in Australia. It also established what was described in the Second Reading Speech as ‘… a uniform regime for detention and removal of persons illegally in Australia’ (Parliamentary Debates, House of Representatives, 4 November 1992, p 2621). The 1992 Act established a statutory mechanism for merits review of decisions relating to the grant
of protection visas to persons claiming to be refugees. For this purpose it created the Refugee Review Tribunal. The provisions relating to the Tribunal commenced on 1 July 1993. The rest were to come into effect on 1 November 1993 but their operational date was deferred by subsequent amendment to 1 September 1994 – *Migration Laws Amendment Act 1993 (Cth) (No 59 of 1993).*

An important matter not considered in *NAAV* was amendments to the *Migration Act 1958* made in 1984 that shifted the constitutional basis of the Act from s 51(xxvii) to s 51(xix) of the Constitution. This change was made by way of the *Migration Amendment Act 1983*, which came into effect on 2 April 1984. The reason for this change was the decisions of the High Court in *Salemi v Mackellar (no 2)*\(^{12}\) and *Pochi v MacPhee,*\(^ {13}\) which found that an ‘immigrant’ can be ‘absorbed’ into the Australian community over time and thereby cease to be an immigrant.\(^ {14}\) The change has been vindicated by later High Court decisions, such as *Shaw v Minister for Immigration and Multicultural Affairs*\(^ {15}\) and *Tania Singh,*\(^ {16}\) which have found that an alien can only cease to be an alien by becoming an Australian citizen – an interesting example of the High Court allowing the Parliament to define words in the Constitution.

**Current structure of migration legislation**

The current migration legislation consists of the *Migration Act 1958* and the *Migration Regulations 1994.* Some key features of the current legislation are as follows:

1. All non-citizens entering Australia require a visa (s 29 of the Act).

2. Any non-citizen in the ‘migration zone’ (roughly the Australian territorial landmass) without a visa is an ‘unlawful non-citizen’ (ss 13, 14 of the Act) and must be detained (s 189).

3. Criteria for the grant of visas are set out primarily in the Regulations, but in some cases in the Act itself. If an applicant for a visa meets all legislative criteria for the visa applied for, the Minister must grant that visa; if not, it must be refused (s 65).

---

\(^ {12}\) (1977) 137 CLR 396.

\(^ {13}\) (1982) 151 CLR 101. See also *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, which reached a similar conclusion. The reasoning behind these decisions can be traced back at least as far as *Ex parte Walsh and Johnson* (1925) 37 CLR 36.


\(^ {16}\) Supra n1.
4. All onshore refusals and cancellations, and refusal decisions where the applicant is sponsored by an Australian resident, are subject to merits review by the Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) or the Administrative Appeals Tribunal (AAT), depending on the kind of visa in question (Parts 5 and 7, and s 501 of the Act respectively).

5. The scope of judicial review of migration decisions is limited (or intended to be limited) by the privative clause in s 474 of the Act.

6. The Act and Regulations distinguish between criteria going to the validity of an application and those going to grant. The requirements for making a valid application are mostly set out in s 45 of the Act and Schedule 1 of the Regulations. Failure to meet validity requirements means that the application is a legal nullity and cannot be considered by the Minister (s 47 of the Act).

7. Criteria for grant are generally further divided into criteria to be met at the time of application, and those that must be met at the time of decision. Some newer visa subclasses have done away with this distinction (see for example Parts 186 and 187 of Schedule 2 of the Regulations).

8. Criteria for grant of a visa are primarily set out in Schedule 2 of the Regulations.

9. Visas are grouped into classes and subclasses. The validity criteria for each class of visa are set out in Schedule 1 of the Regulations, while grant criteria are set out by subclass in Schedule 2.

Who is an ‘alien’?

The definition of the term ‘alien’ can best be seen by examining three High Court decisions from the 2000s: Re Patterson Ex parte Taylor,17 Shaw v Minister for Immigration and Multicultural Affairs18 and Tania Singh.19

Taylor

Graham Taylor was a British citizen who had been resident in Australia since the 1960s. In 1996, he pleaded guilty to a number of sexual offences against children and was sentenced to three-and-a-half years imprisonment. Whilst he was in prison, Senator Patterson, the Parliamentary Secretary to the Minister, cancelled his visa under s 501 of the Act. On release from prison, Taylor was taken into immigration detention pending his removal from Australia, and he sought

---

18 Supra n15.
19 Supra n1.
judicial review of Senator Patterson’s decision. Taylor argued several grounds, including that Senator Patterson was not ‘the Minister’ for the purposes of the Act (an argument that failed), but only one is relevant here.

A bare majority of the High Court (Gaudron, McHugh, Kirby and Callinan JJ) accepted Taylor’s argument that he was not an ‘alien’ for the purpose of the Commonwealth’s power to make laws with respect to aliens (s 51(xix) of the Constitution) and that the visa and deportation provisions of the Migration Act were therefore not valid in their application to him. In doing so, they overruled the High Court’s decision in Nolan.20

Although non-citizen British subjects who migrate to Australia today would be within the aliens power, the effect of the four majority judgments is that the deportation and removal provisions of the Migration Act could not apply to a person such as the applicant as a British subject who migrated to Australia before, at the earliest, 1973 (when the Royal Style and Titles Act 1973 (Cth), referring to the Queen of Australia, was passed) and, in the view of three of the majority, 1987 (when changes to the Australian Citizenship Act 1949, which removed any special status for British citizens, came into effect), at least where the person has been ‘absorbed’ into the Australian community (remembering that prior to 1984 the Act was based on s 51(xxvii) of the Constitution). Prior to 1973, there was no ‘Queen of Great Britain’ or ‘Queen of Australia’, and instead a person in Taylor’s position was simply a ‘British subject’. The majority viewpoint is well encapsulated by the following comments from Kirby J:

[306] For the respondent it was conceded, correctly in my view, that there were limits on the power of the Parliament to determine who is to be an alien. That must be so. For example, it would not, in my view, be competent to the Parliament to enact a law declaring that all Aboriginal persons were aliens; or that all persons of Chinese descent in Australia were aliens – although necessarily all such latter persons came to Australia, or were descended from those who came, from outside Australia. If, as this Court has held, the legislative power over immigrants does not, for the purposes of deportation, extend once such persons are absorbed into the Australian community, I see no reason of principle why a less protective rule should be applied to persons in the class of British subject migrating to Australia prior to 1987 ...

[307] If when that person arrived, he or she was a British subject when that status was accorded constitutional and statutory equivalence to Australian nationality, that person was likewise beyond the operation of the naturalisation and aliens power. If such application could be

20 Supra n13.
revived in such a person’s case, and applied retrospectively, it could (in terms of principle) be revived and applied to other persons and groups within Australia who themselves, or whose families, were made up of immigrants and those descended from, or adopted by, them. A line must be drawn, as it was in *Ex parte Walsh and Johnson.* In my view, that line excludes a person such as the prosecutor. He never was an ‘alien’ for the purposes of the Constitution. At least in his case, when the attempt was made to treat him as an ‘alien’ (if that was the purpose of the *Migration Act*) he had been absorbed into the people of the Commonwealth. Once so absorbed, he could not *ex post facto* be deprived of his nationality status as a non-alien. In particular, he was not subject to legislative or executive power to order his deportation, any more than this could be done in the case of another Australian whose nationality status is now that of a citizen. Only after due process of law and a judicial order (as in extradition) may a citizen be involuntarily removed from Australia.

Gleeson CJ, Gummow and Hayne JJ dissented on this point and upheld *Nolan.*

**Shaw**

The High Court reversed itself only two years later in *Shaw.* That case also concerned a British citizen who was a long-term permanent resident of Australia, and whose visa had also been cancelled under s 501 of the Act. A significant feature of the High Court bench was that Gaudron J, who was a member of the majority in *Taylor,* had retired and been replaced by Heydon J.

In the end, Heydon J adopted the position of the *Patterson* dissenters. The new majority (Gleeson CJ, Gummow and Hayne JJ in a joint judgment, with whom Heydon J agreed) held that Mr Shaw entered Australia as an alien in the constitutional sense, and remained an alien because he did not become an Australian citizen (a status created purely by statute). Accordingly, his visa could be cancelled, and he could be removed in accordance with the provisions of the *Migration Act.*

In *Shaw,* Gleeson CJ, Gummow and Hayne JJ stated, ‘[t]his case should be taken as determining that the aliens power has reached all those persons who entered this country after the commencement of the Citizenship Act on 26 January 1949 and who were born out of Australia of parents who were not Australian citizens and who had not been naturalised’. That is, the constitutional term ‘alien’ was to be interpreted in the light of the statutory term ‘citizen’. Whether one agrees with the outcome in *Shaw* or not, this is a peculiar form of reasoning. Will the High Court also allow the Parliament to define words like ‘taxation’ or

---

21 Ibid.
22 Supra n15 at paragraph 151.
‘trade and commerce’ as it has allowed the Parliament to define the term ‘alien’? The High Court made a similar finding in Commonwealth v Australian Capital Territory (the ‘same-sex marriage case’),23 in which the High Court struck down the ACT’s same-sex marriage legislation under s 109 of the Constitution, finding it to be inconsistent with the Commonwealth Marriage Act 1961, but also stated that the Commonwealth Parliament had the power to define the term ‘marriage’.

McHugh, Kirby and Callinan JJ all dissented (writing separate judgments), holding that Mr Shaw was not an ‘alien’. McHugh J stated that he remained of the view that Patterson was correctly decided, despite having no clear ratio.24 Furthermore, all three judges pointed out that the majority in Patterson had clearly overruled Nolan on the meaning of ‘alien’. In affirming the correctness of the majority position in Patterson, Kirby J made an appeal to judicial restraint, and criticised the ‘spectacle of deliberate persistence in attempts to overrule recent constitutional decisions on identical questions on the basis of nothing more intellectually persuasive than the retirement of a member of a past majority and the replacement of that Justice by a new appointee who may hold a different view’.25 The spectacle of Kirby J criticising ‘judicial activism’ was rather amusing in itself.

It should be noted that the High Court, Re Minister for Immigration and Multicultural Affairs; Ex parte Te,26 also rejected the proposition that a person who is accorded refugee status is not an ‘alien’ in the country that grants him or her that status. The definition of ‘alien’ was clearly narrowing before the crucial decision in Tania Singh.

**Tania Singh**

_Tania Singh_ concerned a then five-year-old girl born in Australia to Indian parents, who held temporary visas at the time of her birth. The Singh family argued that Tania, having been born in Australia, was not an alien, and the provisions of the Australian Citizenship Act 1949 that prevented her from obtaining Australian citizenship were simply irrelevant to her.

The High Court rejected this argument, finding that as Tania was not an Australian citizen, she was an alien. The High Court seemed at pains to point out that the Australian Parliament could not simply define the word ‘alien’ as it wished, but gave no real indication of where the boundaries of that power might be. For example, Gleeson CJ stated as follows early in his judgment:

---

23 (2013) HCA 55.
24 Supra n15 at paragraph 155.
25 Ibid at 161–62.
[4] I have previously stated my view that, subject to a qualification, Parliament, under pars (xix) and (xxvii) of s 51, has the power to determine the legal basis by reference to which Australia deals with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode. In that regard, Brennan, Deane and Dawson JJ said in *Chu Kheng Lim v Minister for Immigration*[^27^] that the effect of Australia’s emergence as a fully independent sovereign nation with its own distinct citizenship was that alien in s 51(xix) of the Constitution had become synonymous with non-citizen. The qualification is that Parliament cannot, simply by giving its own definition of ‘alien’, expand the power under s 51(xix) to include persons who could not possibly answer the description of ‘aliens’ in the Constitution. Within the class of persons who could answer that description, Parliament can determine to whom it will be applied, and with what consequences. Alienage is a status, and, subject to the qualification just mentioned, Parliament can decide who will be treated as having that status for the purposes of Australian law and, subject to any other relevant constitutional constraints, what that status will entail.

[5] Everyone agrees that the term ‘aliens’ does not mean whatever Parliament wants it to mean. Equally clearly, it does not mean whatever a court, or a judge, wants it to mean.

The key judgment, however, was probably the joint judgment of Gummow, Hayne and Heydon JJ. Their Honours took the view that Tania was an Indian citizen and therefore owed an allegiance to India. This in and of itself made her an alien, unless she was also an Australian citizen (which she was not). Their Honours stated as follows at paragraph 195:

> Whatever may be the outcome of debate about the validity of laws alleged to depend upon other powers given to the federal Parliament, it is central to the plaintiff’s argument that the constitutional word ‘aliens’ has a meaning which cannot include a person born within Australia. If that is the proper construction of ‘aliens’ the result would be that, through the exercise of the naturalization aspect of the power conferred by s 51(xix), the class of persons born outside Australia who otherwise would be aliens can be altered or reduced by valid federal legislation, but the class of non-aliens contains an irreducible core. Understood in that way, the naturalization and aliens power would provide a one-way

[^27^]: (1992) 176 CLR 1. This was the case that upheld the Constitutional validity of Australia’s first mandatory immigration detention laws.
street: empowering legislation permitting persons to become non-aliens but not empowering legislation that would affect the status of a person born in Australia, regardless of that person’s ties to other sovereign powers.

Their Honours summed up by stating as follows at paragraph 205:

It was common ground that the plaintiff is a citizen of India. She is, therefore, a citizen of a foreign state. She is a person within the naturalisation and aliens power.

Kirby J, seemingly shifting from his reliance on historical interpretation of the word ‘alien’ that was on display in Taylor and Shaw, argued that the meaning of the word ‘alien’ had to be interpreted in the light of changes in law and society since 1901. His Honour stated that the legislative power with respect to aliens is ‘capable of application to a larger, contemporary condition of things beyond what might have been the generally accepted meaning of the word at the time of Federation’28 and that Parliament’s ability to make laws relating to citizenship could not be ‘forever to be limited to the approach of birthright’.29

McHugh and Callinan JJ, in separate judgments, dissented and took a diametrically opposite approach to that of Kirby J, by focusing on what they believed to be the intention of the drafters of the Constitution. They each took the view that in 1901 the concept of alienage was, with few and irrelevant exceptions, limited to birth outside a particular country. In their view, Tania Singh was therefore not an alien.

The remaining issue is, if Parliament cannot simply define the term ‘alien’ however it sees fit, what are the limits on its power? As the joint judgment seemed to be most concerned with the fact that Tania Singh was already a citizen of a foreign country, it may be the case that a future court could, consistently with Tania Singh, find that a stateless child born in Australia is not an alien. Presumably a law depriving people of Australian citizenship simply because of their membership of a class (say, persons of Aboriginal descent) would also be unconstitutional. However, this issue will have to be determined at a later date.30

---

28 Supra n1 at paragraph 249.
29 Ibid at paragraph 251.
Other issues relating to the scope of the immigration and aliens powers

The High Court has considered on a number of occasions what the scope of the immigration and aliens powers might be. Immigration cases came early to the High Court. The 1908 decision of *Potter v Minahan*\(^{31}\) concerned an applicant who had been born in Australia to a Chinese father and European mother, and who had accompanied his father back to China. Minahan attempted to return to Australia after the death of his father, and was detained as a ‘prohibited immigrant’ under the *Immigration Restriction Act 1901*. By majority, the High Court found that the applicant was not an immigrant, and O’Connor J stated as follows at 305:

> A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlative to its all the rights and benefits which membership of the community involves, amongst which is a right to depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary.

Two cases from the 1990s and a series of related cases in the early 2000s demonstrate that the High Court has taken quite a wide view of the immigration and aliens powers, especially when considered alongside the ‘incidental power’ in s 51(***xxxix**) of the Constitution.

*Cunliffe v Commonwealth*

*Cunliffe v Commonwealth*\(^{32}\) considered the constitutional validity of Part 2A (now Part 3) of the *Migration Act 1958*, which is the part of the Act regulating the practice of migration agents. At paragraph 19 of his judgment, Mason CJ set out the constitutional arguments of the applicants as follows:

(a) it [Part 2A] is beyond the legislative powers of the Parliament;

(b) it is contrary to the implied freedom of communication of information and opinions relating to the government of the Commonwealth; and

(c) it contravenes the freedom of intercourse guaranteed by s 92 of the Constitution.

In (a) Mr Cunliffe argued that ss 51(xix) and 51(xxvii) of the Constitution only empowered the Parliament to make laws that directly affected aliens or

---

\(^{31}\) (1908) 7 CLR 277.

\(^{32}\) (1994) 182 CLR 272.
immigrants, not Australian citizens who were providing services to such persons. The High Court unanimously rejected this argument. Mason CJ stated as follows at paragraphs 24 and 25 of his judgment:

[24] [T]hose provisions in Pt 2A which regulate the conduct of persons who provide immigration assistance to aliens by prohibiting them from providing that assistance otherwise than in accordance with the requirements of Pt 2A are not laws which stand outside the core or heart of the subject-matter of the power. The provision of immigration assistance to aliens, especially by persons who act on their behalf and for them by representing them and giving them advice, is, in my view, at the core of both the aliens power and the immigration power. It can make no difference that the law operates by way of creating rights, duties and privileges on non-aliens in terms of the services they wish to provide to aliens rather than by way of creating rights, duties and privileges on aliens in terms of the services they wish to receive from non-aliens. The point is that Pt 2A seeks to regulate the provision of immigration assistance to aliens and to no one else.

[25] It matters not that one can also describe Pt 2A as containing provisions which are laws with respect to the conduct which they proscribe. It is well established that a law may bear several characters (Actors and Announcers Equity Association (1982) 150 CLR at 192 per Stephen J; Tasmanian Dam Case (1983) 158 CLR at 151 per Mason J). And as the conduct proscribed here is that of persons acting as migration agents for aliens who seek to enter Australia, the conduct is within the subject-matter of the aliens power. To the extent to which those aliens are also immigrants, the proscribed conduct is also within the immigration power. But, an alien who has been absorbed into the Australian community ceases to be an immigrant, though remaining an alien. Because some entrance applicants are not immigrants, Pt 2A cannot completely be supported as an exercise of the immigration power. However, the immigration power can be put to one side because the aliens power provides a more expansive source of power.

None of the other judges gave any greater analysis to this argument. For example, Brennan J stated at paragraph 17 of his judgment as follows:

By regulating the provision of services to entrance applicants, Pt 2A both operates selectively upon aliens and does so in respect of activities peculiarly significant to aliens. That is enough to establish the character of Pt 2A as a law with respect to aliens.
Gaudron and Deane JJ took a slightly different approach, and would have struck down Part 2A to the extent that it applied to lawyers and providers of pro bono immigration assistance, but would have done so under the ‘implied freedoms’ principle, not because the laws did not fall under ss 51(xix) or (xxvii) of the Constitution.

Immigration detention cases

A number of High Court cases have considered challenges to the legality of immigration detention. Only one has succeeded to date, and that was the first case of all, Park v Minister for Immigration and Ethnic Affairs. In Park, departmental compliance officers conducted a series of ‘raids’ on construction sites in the Sydney area, and found a large number of Koreans working illegally. Many were taken into immigration detention. Departmental officers formed the view that there was an organised ‘racket’ involving deliberate importation of illegal Korean labour in existence, and instead of immediately deporting the illegal workers, kept them in detention to attempt to discover the names of the organisers. This was held to be an impermissible purpose of immigration detention, and the detention of the illegal workers was found to be unlawful.

Lim v Minister for Immigration, Local Government and Ethnic Affairs

Lim concerned the constitutional validity of Division 4B of Part 2 of the Migration Act (now Division 6 of Part 2). These were the first mandatory immigration detention laws in Australia, and provided for the mandatory detention of ‘designated persons’. The term ‘designated persons’ was defined in s 54K as follows:

‘designated person’ means a non-citizen who:

(a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992; and

(b) has not presented a visa; and

(c) is in Australia; and

(d) has not been granted an entry permit; and

34 For further discussion on Lim and later High Court challenges to the legality of immigration detention, see Alan Freckelton, ‘Canada’s Implementation of Australian Immigration Detention Legislation’, (2013) 1 Frontiers of Legal Research 58.
35 Supra n27.
(e) is a person to whom the Department has given a designation by:

(i) determining and recording which boat he or she was on;
and

(ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat;

and includes a non-citizen born in Australia whose mother is a designated person.

It can be seen that all designated persons were unauthorised boat arrivals, meaning that Division 4B was the first legislative example of Australia’s continuing paranoia about such arrivals.

Section 54L then provided that a designated person must be ‘kept in custody’ until either removed from Australia or granted an entry permit. Section 54N permitted an officer to detain a designated person not already in detention, without a warrant, and recapture any escapee. Removal of designated persons from Australia was dealt with by s 54P, which provided for removal on written request of the person, when no application for an entry permit was made within two months of being detained, or when an application for an entry permit had been refused and all avenues of review had been exhausted.

The most confusing section was s 54Q, which purported to provide that a designated person could be detained for a maximum of 273 days (nine months). However, the 273-day ‘clock’ could be ‘stopped’ in the circumstances described in ss 54Q(3)(c)–(f), which provided as follows:

(c) the Department is waiting for information relating to the application to be given by a person who is not under the control of the Department;

(d) the dealing with the application is at a stage whose duration is under the control of the person or of an adviser or representative of the person;

(e) court or tribunal proceedings relating to the application have been begun and not finalised;

(f) continued dealing with the application is otherwise beyond the control of the Department.

In other words, the 273-day period only ran when the applicant had provided all relevant information to the Department. Paragraphs (d) and (f) in particular
were very vaguely worded, and indeed could mean nearly anything. It was extraordinarily difficult, therefore, to determine whether a particular detainee's 273-day period of detention had expired or not.

Finally, the most controversial provision of Division 4B was s 54R, which provided that 'a court is not to order the release from custody of a designated person'. This was ultimately the only provision of Division 4B found to be unconstitutional.

The applicant in Lim argued that the division was unconstitutional on a number of grounds, including that orders for detention were inherently punitive in nature, and therefore amounted to an exercise of the judicial power of the Commonwealth by the legislature and/or the executive. The High Court unanimously found that ss 54L and 54N were valid, as they were powers exercised in accordance with s 51(xix) of the Constitution, and were not an exercise of judicial power. They could therefore be exercised by administrative decision-makers.

The leading judgment was given by Brennan, Deane and Dawson JJ. At paragraph 27 of their judgment, their Honours quoted from a Canadian case that proceeded on appeal to the Privy Council, Attorney-General for Canada v Cain, in which Lord Atkinson stated as follows:36

One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.

Brennan, Deane and Dawson JJ explained this decision as follows:37

The question for decision in Attorney-General for Canada v Cain was whether the Canadian statute 60 and 61 Vict c11 had validly clothed the Dominion Government with the power to expel an alien and to confine him in custody for the purpose of delivering him to the country whence he had entered the Dominion. The Judicial Committee concluded that it had, as the emphasised words in the above passage indicate, the power to expel or deport a particular alien, and the associated power to confine under restraint to the extent necessary to make expulsion or deportation effective, were seen as prima facie executive in character.

36 (1906) AC 542 at 546.
37 Lim, supra n27 at paragraph 28 of the judgment of Brennan, Deane and Dawson JJ.
At paragraph 29, their Honours noted that previous Australian cases, dating back to *Koon Wing Lau v Calwell* in 1949, had upheld the Constitutional validity of legislation providing for discretionary immigration detention, and that s 51(xix) permitted the Parliament to make laws that ‘extend to authorising the Executive to restrain an alien in custody to the extent necessary to make the deportation effective’ – in other words, to ensure that the non-citizen cannot evade removal from Australia. Probably the key part of the judgment is set out in paragraph 30:

It can therefore be said that the legislative power conferred by s 51(xix) of the Constitution encompasses the conferral upon the Executive of authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation. Such authority to detain an alien in custody, when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of that executive power. By analogy, authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers.

Brennan, Deane and Dawson JJ also regarded the fact that the detainee could bring their detention to an end by requesting their own removal as important. Their Honours stated at paragraph 34 of their judgment as follows:

Section 54P(1) … provides that an officer must remove a designated person from Australia as soon as practicable if the designated person asks the Minister, in writing, to be removed. It follows that, under Div 4B, it always lies within the power of a designated person to bring his or her detention in custody to an end by requesting to be removed from Australia. Once such a request has been made, further detention in custody is authorized by Div 4B only for the limited period involved, in the circumstances of a particular case, in complying with the statutory requirement of removal ‘as soon as practicable’ … In the context of that power of a designated person to bring his or her detention in custody under Div 4B to an end at any time, the time limitations imposed by other provisions of the Division suffice, in our view, to preclude a conclusion that the powers of detention which are conferred upon the Executive exceed what is reasonably capable of being seen as necessary for the purposes of deportation or for the making and consideration of an entry application. It follows that the powers of detention in custody

38 (1949) 80 CLR 533.
conferred by ss 54L and 54N are an incident of the executive powers of exclusion, admission and deportation of aliens and are not, of their nature, part of the judicial power of the Commonwealth.

The result of this reasoning was that ss 54L and 54N of the Act were found to be valid. Section 54R, on the other hand, was struck down by Brennan, Deane and Dawson JJ because it could prevent a court from releasing a designated person who, by the terms of the Act itself, should have been released. Their Honours stated as follows at paragraph 37:

In fact, of course, it is manifest that circumstances could exist in which a ‘designated person’ was unlawfully held in custody by a person purportedly acting in pursuance of Div 4B. The reason why that is so is that the status of a person as a ‘designated person’ does not automatically cease when detention in custody is no longer authorized by Div 4B.

Brennan, Deane and Dawson JJ cited as examples of unlawful detention of designated persons situations where a designated person remained in detention despite making a written request to be removed from Australia, the 273-day limit had expired, or the person had not made an application for an entry permit within two months of the commencement of their detention. Their Honours summed up by stating that ‘[o]nce it appears that a designated person may be unlawfully held in custody in purported pursuance of Div 4B, it necessarily follows that the provision of s 54R is invalid’. 39

Gaudron J agreed that s 54R was invalid, 40 and her Honour would have read ss 54L and 54N somewhat more narrowly than the other judges, 41 but her reasoning did not prevent the application of these sections to the applicants. Mason CJ, and Toohey and McHugh JJ, who each wrote separate judgments, upheld the validity of s 54R by reading it down to cover only those designated persons who were being lawfully detained under Division 4B. 42

As a concluding point, Division 4B, as were many other provisions of the Migration Act, was renumbered by the Migration Reform Act 1992, which came into effect on 1 September 1994, and is now Division 6 of Part 2 of the Act. This is despite the fact that since the introduction of s 189 of the Act, which provides for mandatory detention of all unlawful non-citizens, with effect from the same date, Division 6 of Part 2 is redundant and has never been used since that date. Even more strangely, s 54R, now renumbered as s 183, remains in the Act despite it being found to be invalid.

---

39 Lim, supra n27, at paragraph 37 of the judgment of Brennan, Deane and Dawson JJ.
40 Ibid at paragraph 18 of the judgment of Gaudron J.
41 Ibid at paragraphs 15–17.
42 Ibid at paragraph 12 of the judgment of Mason CJ; paragraph 34 of the judgment of Toohey J; paragraph 35 of the judgment of McHugh J.
The **Al Masri/Al Kateb** litigation

The Australian immigration detention system has survived a number of domestic legal challenges, the best-known being the *Al Masri/Al Kateb* litigation. In *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs*, the applicant was a stateless Palestinian who had been refused a Protection Visa. He requested removal from Australia in accordance with s 198(1). However, no country could be found to which he could be removed, meaning that he had to remain in immigration detention. Al Masri challenged his continuing detention, arguing that *Lim* had found that immigration detention was justified for the purpose of ensuring the availability of an unlawful non-citizen for removal. If removal was impossible, detention was unlawful.

Both the Federal Court and the Full Federal Court accepted these arguments. Black CJ, Sundberg and Weinberg JJ, writing a combined judgment in the Full Court, found as follows at paragraphs 120 and 121:

[120] In our view, the language of s 196, either taken alone or in the context of the scheme as a whole, does not suggest that the Parliament did turn its attention to the curtailment of the right to liberty in circumstances where detention may be for a period of potentially unlimited duration and possibly even permanent. On the contrary, the textual framework of the scheme suggests an assumption by the Parliament that the detention authorised by s 196 will necessarily come to an end. Section 196 contemplates a ‘period of detention’, and that is how the section is headed. Whilst one purpose of the section is indisputably to authorise the detention of unlawful non-citizens, another purpose is to specify the circumstances in which the period of detention is to come to an end. The latter purpose assumes that the detention will have an end. The assumption is that the detention of unlawful non-citizens will come to an end by the actual occurrence of one of three events: removal, deportation or the grant of a visa.

[121] The language of s 198(1) supports the conclusion that Parliament proceeded on an assumption that detention would, in fact, end rather than upon an understanding that detention might possibly be of unlimited duration ... Indeed, as we have noted, the assumption made by members of the High Court about the scheme considered in *Lim* was that it had an element, the equivalent of the present s 198(1), that gave a person what was effectively a power to bring detention to an end.

---

44 *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1009.
45 Referring to *Lim*, supra n27, at paragraph 34 of the judgment of Brennan, Deane and Dawson JJ.
The Court therefore ordered Mr Al Masri’s release from detention. Somewhat ironically, he was successfully removed from Australia within a matter of weeks after the decision, which rendered the Minister’s application for special leave to appeal to the High Court moot. However, another stateless Palestinian, Mr Al Kateb, ended up in the High Court. Before the Full Federal Court decision in Al Masri, Mr Al Kateb had been refused release from immigration detention by the Federal Court, in which von Doussa J had found that the Federal Court’s decision in Al Masri was wrongly decided. Mr Al Kateb’s appeal was removed directly to the High Court.

The High Court, in a 4-3 judgment, overturned Al Masri and found that laws that may have the effect of imposing indefinite detention on unlawful non-citizens were constitutionally valid. A key passage can be found in the judgment of Hayne J at paragraph 268:

> It is essential to confront the contention that, because the time at which detention will end cannot be predicted, its indefinite duration (even, so it is said, for the life of the detainee) is or will become punitive. The answer to that is simple but must be made. If that is the result, it comes about because the non-citizen came to or remained in this country without permission. The removal of an unlawful non-citizen from Australia then depends upon the willingness of some other country to receive that person. If the unlawful non-citizen is stateless, as is Mr Al Kateb, there is no nation state which Australia may ask to receive its citizen. And if Australia is unwilling to extend refuge to those who have no country of nationality to which they may look both for protection and a home, the continued exclusion of such persons from the Australian community in accordance with the regime established by the Migration Act does not impinge upon the separation of powers required by the Constitution.

There was a split in the minority judgments. Gleeson CJ and Gummow J found that a law providing for indefinite immigration detention would be constitutionally valid, but that because s 196 did not expressly provide for this possibility, it had to be interpreted in such a way as to not permit it. Only Kirby J found that no legislation providing for indefinite immigration detention, no matter how clearly expressed, would be constitutionally valid.

---

46 SHFB v Goodwin and Ors (2003) FCA 294. ‘Goodwin’ is a typographical error – Mr Al Kateb brought an action against Philippa Godwin, the then Deputy Secretary of the Detention Services Division of the Department of Immigration.
47 Supra n61.
Other litigation prior to 2014

The High Court has, since *Lim*, considered a number of other cases in which the legality of immigration detention has been challenged. All have been unsuccessful.

*B v Minister for Immigration and Multicultural and Indigenous Affairs*\(^{49}\)

The High Court overturned a decision of the Full Bench of the Family Court,\(^{50}\) in which that court had found that s 67ZC of the *Family Law Act 1975* allowed the Family Court to make any orders it wished for the benefit of children. Having made this finding, it ordered a number of children from one family released from immigration detention. The High Court found on appeal that s 67ZC could only be invoked in the case of a ‘matrimonial cause’, such as a divorce, and as no matrimonial cause existed in this case, s 67ZC did not apply and the Family Court had no jurisdiction.

*Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*\(^{51}\)

Mr Behrooz, a detainee in the particularly infamous Woomera IDC, was charged with escaping from that IDC under s 197A of the *Migration Act*. He sought to defend the charge by arguing that the conditions inside the Woomera IDC were so poor as to be punitive, and not purely for the purpose of ensuring his availability for removal, and therefore not an exercise of the power to detain unlawful non-citizens. The High Court disagreed, finding that he had been legally detained, and that his allegations of ill-treatment in detention could be resolved by an action in tort against the Commonwealth and the private contractors managing the centre on behalf of the government.

*Re Woolley, Ex parte M276/2003*\(^{52}\)

Mr Woolley was the Manager of the Baxter IDC in South Australia. The applicants were a number of children detained in the centre who argued that they could not be detained because they lacked the legal capacity to request removal from Australia under s 198(1), and the inherent *parens patriae* jurisdiction of the court should be regarded as a constitutional principle that invalidated s 189 as far as it applied to children, or alternatively gave the court the power to release children from detention regardless of s 189. The High Court found that a minor child can be released from detention if their parent(s) request

\(^{50}\) *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604.
\(^{52}\) (2004) 225 CLR 1.
removal. Further, it found that the *parens patriae* role of the court was not a constitutional principle, and could therefore be overruled by statute. McHugh J summed up the decision at paragraph 106 by stating that ‘[a]lthough it may be accepted that children who are unlawful non-citizens do not pose a flight risk and are not a danger to the community, the Parliament, acting constitutionally, is entitled to prevent any unlawful non-citizen, including a child, from entering the Australian community while that person continues to have that status’. The applicants were unsuccessful once again.

**S4/2014 v Minister for Immigration and Border Protection**

The High Court’s decision in *S4/2014 v Minister for Immigration and Border Protection* was handed down on the propitious date of 11 September 2014, and could potentially have a significant impact on the law relating to immigration detention in Australia. For the first time since *Lim*, the High Court has clearly imposed limits on the purpose, if not the duration, of immigration detention, and there seems little doubt that *S4/2014* will be used as a means for individuals to challenge the legality of their detention.

**Facts**

*S4/2014* was primarily concerned with the Minister’s attempts to prevent unauthorised boat arrivals from being granted permanent residence in Australia. The applicant, who was stateless, arrived in Australia by boat at Christmas Island in December 2011. This made him an ‘offshore entry person’ as defined by s 5 of the Act, and therefore unable to make a valid application for a visa, unless permitted to do so by the Minister – see s 46A of the Act.

Although s 46A is a non-compellable power, the Minister decided to consider exercising this power, and the plaintiff’s claims for refugee status were assessed through an administrative process. Two years later, the Department found that the applicant was a refugee and recommended that the Minister permit him to make an application for a visa. However, the Minister did not make a decision under s 46A. Instead, he granted the applicant two visas under s 195A of the Act, which permits the Minister to grant a visa to a detainee. These were a seven-day Temporary Safe Haven (TSH) visa and a three-year Temporary Humanitarian Concern (THC) visa. The effect of the grant of these visas was that the applicant was prevented, by s 91K of the Act, from making any further onshore application other than for another TSH visa.

---

54 (2014) HCA 34.
55 Supra n27.
It is important to note that the applicant did not challenge the legality of his immigration detention. Indeed, he conceded that if he was successful he would once again become an unlawful non-citizen and be re-detained.\textsuperscript{56} However, the applicant was obviously more concerned that he be considered for permanent residence in Australia.

**Validity of the grant of the temporary visas**

The applicant argued that the grant of the TSH and THC visas were invalid. The High Court agreed, finding that the Minister, having decided to consider exercising his s 46A power, had to make a decision to exercise or not exercise that power, and could not instead grant a visa under s 195A as the granting of the TSH visa (which specifically prevents the applicant from being able to apply for another visa) had the effect of negating the possible outcome of a decision under s 46A to allow the applicant to apply for a protection visa. This meant that the grant of the visas was invalid, and the applicant became once more an unlawful non-citizen. The High Court, in a rare joint judgment, stated as follows at paragraph 46:

> Reading s 195A as empowering the grant of a visa of the kind described wrongly assumes that the powers given by ss 46A and 195A are to be understood as wholly independent of each other. They are not. The Minister may not circumvent the provisions of s 46A by resort to s 195A. Not least is that so when, as in this case, the grant of a visa of the kind just described would deprive the prolongation of the plaintiff’s detention of its purpose.

In other words, once the Minister decides, under s 46A, to consider the grant of a visa to an offshore entry person, he or she must proceed to actually make a decision under that section. A person who applies for refugee status as an offshore entry person effectively gets permanent residence or nothing, as the *Migration Regulations 1994* do not currently provide for temporary protection visas.\textsuperscript{57}

\textsuperscript{56} Supra n54 at paragraph 9.

\textsuperscript{57} An amendment to the Regulations to reinstate temporary protection visas was disallowed by the Senate on 2 December 2013. See http://www.abc.net.au/news/2013-12-02/labor-votes-with-greens-to-block-temporary-protection-visa/5130188, extracted 15 September 2014. However, the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, introduced into the House of Representatives on 25 September 2014, would restore these visas, as well as create a new species of temporary humanitarian visa, the Safe Haven Enterprise Visa (SHEV). A SHEV would allow people found to be refugees to live and work in Australia for five years, with a possibility of renewal, if they lived and worked in regional Australia.
Immigration detention

The High Court also made some significant comments on the applicant’s detention. Making frequent reference to Lim,\(^{58}\) the High Court pointed out that detention is only lawful when it is carried out for the purposes of the Act. In particular, the court noted as follows at paragraph 24:

> An alien within Australia, whether lawfully or not, cannot be detained except under and in accordance with law. The detention which the Act authorises in respect of an alien who is an unlawful non-citizen can be described most generally as detention under and for the purposes of the Act. Detention under the Act is not an end in itself. It is not detention in execution of any conviction. Detention under the Act is in aid of the objects stated in s 4(1) of the Act.

Further, the Court stated at paragraph 26 as follows:

> Importantly, the Court further held [in Lim] that the provisions of the Act which then authorised mandatory detention of certain aliens were valid laws if the detention which those laws required and authorised was limited to what was reasonably capable of being seen as necessary for the purposes of deportation or to enable an application for permission to enter and remain in Australia to be made and considered. It follows that detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the detention. Lawfully, that purpose can only be one of three purposes: 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.

The Court added at paragraph 28 that these purposes ‘must be pursued and carried into effect as soon as reasonably practicable’. This is the first time that an Australian court has held that not only must a detainee be removed from Australia as ‘soon as reasonably practicable’ after one of the events described in s 198 of the Act has occurred, but that processes leading up to that stage must also be carried out as expeditiously as reasonably practicable.

In other words, the Department must be able to justify the detention of an unlawful non-citizen, at any time, by reference to one of the three purposes

---

\(^{58}\) Supra n2.
stated by the High Court. Deterrence of unlawful arrival is not a valid purpose. The High Court therefore found that the Minister needed to make an s 46A decision as soon as reasonably practicable in order for the applicant’s continued detention to be lawful.\textsuperscript{59}

**Implications of the decision**

The High Court did not expressly state that *Al Kateb* was wrongly decided, but it has clearly left the door open for any immigration detainee to challenge the legality of their detention by arguing that their detention is not for one of the purposes listed in *S4/2014*. For example, someone in Mr Al Kateb’s position – a stateless person who had been refused refugee status, and who could not be removed from Australia in the foreseeable future – would appear to be in a good position to argue that his or her detention is no longer for the purpose of removal, considering a visa application, or determining whether to permit an application to be made.

Media reporting of the decision varied. In Australia, the *Sydney Morning Herald* made little mention of the decision’s impact on immigration detention, instead focusing on the High Court’s findings on ss 46A and 195A.\textsuperscript{60} On the other hand, the UK *Guardian* newspaper ran an article entitled ‘High court verdict spells the end for Australian immigration detention as we know it’.\textsuperscript{61} The true impact of the decision will probably not be known until the first individual detainee attempts to challenge the legality of his or her detention by reference to *S4/2014*.

\textsuperscript{59} supra n54 at paragraph 35.
