CASE NOTE

NZYQ V MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS: THE END OF INDEFINITE IMMIGRATION DETENTION IN AUSTRALIA?

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I INTRODUCTION

On 8 November 2023, the High Court of Australia ('High Court') ordered the immediate release of a stateless refugee known as 'NZYQ' from immigration detention. The order, decided by the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'),[1] overturned almost two decades of legal precedent established in the case of *Al-Kateb v Godwin*.[2] *Al-Kateb v Godwin* had previously held that stateless people in Australia faced the prospect of being detained indefinitely in executive immigration detention. The decision in *NZYQ* marks a watershed moment in Australian jurisprudence imposing limits on the power of the executive and ending indefinite immigration detention.

This case note provides background to the Australian legal framework and policy of immigration detention. It situates this policy within the context of the central constitutional principle of the separation of powers and provides an overview of how the High Court has interpreted this principle as it applies to immigration detention. This case note then provides a summary of the facts, reasoning and decision in the case of *NZYQ* and touches on the implications for stateless people in Australia and the political ramifications of the decision.

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1 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 ('*NZYQ*').

2 *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*').

II BACKGROUND

Since the early 1990s, Australia has had a policy of mandatory immigration detention and mandatory removal from Australia of 'unlawful non-citizens'. Under s 189(1) of the *Migration Act 1958* (Cth) ('*Migration Act*' or 'the Act'), officers of the Department of Home Affairs have a duty to detain persons who are known or 'reasonably suspected' to be unlawful non-citizens. Unlawful non-citizens are defined as persons within Australia who are non-citizens (or 'aliens') and do not hold a valid visa to travel to, enter or remain in Australia.[3] Section 196(1) of the *Migration Act* requires that a person 'must be kept in immigration detention until' they are either granted a visa or removed from Australia.[4] Notably, s 198 requires an officer to remove an unlawful non-citizen from Australia as 'soon as reasonably practicable' after a final determination refusing to grant a visa is made.[5] While this obligation arises irrespective of *non-refoulement* obligations, an officer is not authorised to remove a person to a specific country where it has been found that Australia's protection obligations have been enlivened because that person is a refugee.[6]

The validity and scope of Australia's system of executive immigration detention is defined by the foundational principle of the separation of powers, which is central to Australia's Constitution and system of government. The *Australian Constitution* ('*Constitution*') structures the separation of legislative (Chapter I), executive (Chapter II) and judicial (Chapter III) powers. Chapter III of the *Constitution* vests judicial power solely in the courts and functions as 'an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested ... No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap[ter] III.'[7] It has been long recognised that the most central and important aspect of both judicial power and functions is the adjudication of and punishment for criminal guilt; the latter of which includes detention.[8]

The validity of Australia's system of immigration detention within this framework was most notably considered by the High Court more than 30 years ago in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*').[9] The Court in *Lim* constructed a central constitutional exception to the judicial dominion over detention, finding that laws prescribing for executive detention of aliens 'will be valid laws if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for

3 *Migration Act 1958* (Cth) ss 14(1), 29(1) ('*Migration Act*').

4 ibid s 196(1). 'Removal' may be for a number of stipulated reasons under ss 198 or 199 of the *Migration Act*. It may also include removal to an offshore processing centre or deportation due to a criminal conviction or for security grounds: see ibid ss 198AD, 201–202.

5 ibid s 198(6). Note the other circumstances prescribed under s 198.

6 ibid s 197C.

7 *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

8 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 ('*Lim*'), citing *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434, 444; *R v Davison* (1954) 90 CLR 353, 368, 383; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

9 *Lim* (n 8).

the purpose of deportation or necessary to enable an application for an entry permit to be made and considered'.[10]

In 2004, against this backdrop, the High Court considered the case of *Al-Kateb*,[11] in which a stateless Palestinian man faced indefinite immigration detention. In this case, the High Court held that ss 189(1) and 196(1) of the *Migration Act*, when properly constructed, enable continuing and indefinite immigration detention even in instances where there is no real prospect of removal occurring.[12] Further, by a narrow majority, the Court found that this construction did not impinge on the separation of powers within Chapter III of the *Constitution* as the purpose of the detention was non-punitive in nature.[13] The decision of the High Court in *Al-Kateb* received strident criticism at the time, with the reasoning of the majority being labelled as 'alarming' and exhibiting 'a blinkered approach to the text of the legislation, keeping out of view relevant principles of international law and the approaches of other common law courts'.[14]

Despite this criticism, in the two decades following the decision being handed down, Australia's policy of mandatory and indefinite immigration detention continued to receive bipartisan support. This policy has a specific impact on stateless people in Australia, as without a Statelessness Determination Procedure ('SDP') or associated visa pathway, stateless persons seeking protection in Australia must do so through Australia's Refugee Status Determination ('RSD') procedure. Being stateless is not an 'independent ground for being granted' a Protection Visa, as not all stateless people meet the definition of refugee.[15] Further to this, the Minister for Immigration, Citizenship and Multicultural Affairs ('the Minister') has broad powers to make visa cancellations and refusals on character grounds under the *Migration Act*, meaning that a stateless person may be unable to be granted a protection visa or may face subsequent visa cancellation even if they are found to be a refugee. Because stateless people do not have citizenship and are not considered as 'belonging' anywhere, there is no

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10 ibid 33. This finding is underpinned by three 'background principles'. The first principle is that an officer of the executive that attempts to detain an alien 'without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision'. The second principle is that, apart from a few exceptional cases, 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'. The third principle stipulates that the level of vulnerability to exclusion and deportation is the difference between aliens and non-aliens for the purpose of Chapter III of the *Constitution of Australia Constitution Act* ('*Constitution*'). This vulnerability, the majority in *Lim* found, provides the executive with a 'limited authority' to detain aliens for the purpose of removal, which Chapter III precludes for non-aliens. See ibid 19, 27–8, 29–32.

11 *Al-Kateb* (n 2).

12 ibid: see Justice Hayne's leading majority ruling at [229].

13 The decision in *Al-Kateb* was upheld in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

14 Juliet Curtin, '"Never Say Never": *Al-Kateb v Godwin*' (2005) 27(2) *Sydney Law Review* 355, 364.

15 Peter McMullin Centre on Statelessness, 'Statelessness in Australia' (Factsheet, February 2024) 3. For further details on Australia's Refugee Status Determination process, see Refugee Advice & Casework Service ('RASC'), 'An Overview of the Current Legal Situation For People Seeking Asylum in Australia' (Fact Sheet, October 2023); Michelle Foster, Jane McAdam and Davina Wadley, 'Part One: The Protection of Stateless Persons in Australian Law — The Rationale for a Statelessness Determination Procedure' (2016) 40(2) *Melbourne University Law Review* 401; Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (Oxford University Press 2019) ch 4.

country to which they can be returned if their visa is refused or cancelled. The combination of these factors increases the risk that first, stateless people will be placed in immigration detention, and second, that immigration detention is likely to be prolonged or (until *NZYQ*) indefinite. At the time of the High Court's decision in *NZYQ*, the average length of time a person was held in immigration detention was 708 days, with more than 360 people (or more than a third of the population) held for more than two years and 124 people held for more than five years.[16] Of those detained in immigration detention, at least 31 were stateless.[17]

III FACTS

The plaintiff, NZYQ, is a stateless Rohingya man who was born in Myanmar in the mid-1990s. NZYQ arrived in Australia by boat in 2012 and was detained in immigration detention under ss 189 and 196 of the *Migration Act.* In 2014, NZYQ was granted a bridging visa allowing him to temporarily stay in Australia and to be released from immigration detention. In 2015, NZYQ was charged with sexual offences against a child and had his bridging visa cancelled pursuant to s 116(1)(g) of the *Migration Act*.[18] The plaintiff pleaded guilty to the offence and was sentenced to five years imprisonment with a non-parole period of three years and four months. Following release, NZYQ was once more immediately detained in immigration detention under s 189(1) of the Act as he was reasonably suspected of being an unlawful non-citizen.[19]

Prior to his release from criminal custody, NZYQ applied for a protection visa. NZYQ's application was considered in 2020 by a delegate of the Minister, who found him to be a refugee to whom Australia had protection obligations as he had a well-founded fear of persecution in Myanmar.[20] The delegate also found that NZYQ was a danger to the Australian community due to his criminal conviction and as such did not meet the criteria for the grant of a protection visa under s 36(1C)(b) of the *Migration Act*. This decision was affirmed by the Administrative Appeals Tribunal and a subsequent application for judicial review was dismissed by the Federal Court of Australia, marking a final determination of refusal.[21]

With this final determination, the obligation to remove NZYQ from Australia as soon as reasonably practicable under s 198 of the *Migration Act* was engaged. However, the plaintiff was unable to be removed to Myanmar due to his status as both a refugee and stateless. As a stateless person, NZYQ has no right to enter or reside within Myanmar, while as a refugee to whom protection obligations are owed, s 197C of the *Migration Act* applies and removal is prevented. Importantly, the High Court also noted that there was 'no real prospect' of his removal to another country due to the combination of his criminal offending and his

16 See Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, August 2023) 12 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-august-2023.pdf>, archived at <perma.cc/X564-8TTX>.

17 ibid 9.

18 *Migration Act* (n 3) s 116(1)(g); *Migration Regulations 1994* (Cth) reg 2.43(1)(p)(ii).

19 For a full timeline of events, see NZYQ, 'Form 27B — Appellant's Chronology', Submission in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*, S28/2023, 1 September 2023.

20 *NZYQ* (n 1) [3].

21 ibid [4].

statelessness, noting that 'the Department had never successfully removed from Australia any person convicted of a sexual offence against a child to a country other than a country which recognised the person as a citizen'.[22]

IV ISSUES AND HOLDING

NZYQ commenced proceedings against the Minister under the High Court's original jurisdiction, claiming that his continued detention was not authorised under the proper construction of ss 189(1) and 196(1) of the *Migration Act* or, alternatively, that these provisions contravened the principle of the separation of powers as contained in Chapter III of the *Australian Constitution*. The plaintiff's case requested the reopening of both the statutory construction and constitutional separation of powers holdings of the Court in *Al-Kateb*.[23]

A hearing was held before the Full Bench of the High Court over two days on 7 and 8 November 2023. At the conclusion of the hearing and in a departure from tradition, the Court made oral orders agreed upon by 'at least a majority' before the finalisation of a written judgment. The High Court rejected the plaintiff's first request to reopen the statutory construction findings in *Al-Kateb*, but accepted the request to reopen the constitutional validity of the findings of *Al-Kateb* and overturned the decision. In doing so, the Court found the detention of the plaintiff to be unlawful and ordered an immediate writ of habeas corpus requiring the plaintiff's release.[24]

V REASONING

The High Court released unanimous written reasons for their decision on 28 November 2023, less than three weeks after the hearing. In rejecting the plaintiff's request for leave to reopen *Al-Kateb*'s findings on the statutory construction of ss 189(1) and 196(1) of the *Migration Act*, the High Court found that the majority did not overlook 'any principle of statutory construction on which the minority' relied.[25] The Court further referred to the continual 'legislative reliance and implicit legislative endorsement' as well as the support of the Court's prior decision in *Commonwealth of Australia v AJL20*[26] to uphold the construction.[27]

In recognising a 'tension' between the constitutional holdings in *Al-Kateb* and the central constitutional principle of *Lim* (as discussed previously), the High Court determined it appropriate to reopen the findings of the former.[28] While the majority in *Al-Kateb* did not reject the central holding of *Lim* — which the Court also highlights has been 'repeatedly acknowledged and frequently applied' in the

22 ibid [5].

23 ibid [15]–[16], [18].

24 See Transcript of Proceedings, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 154 (Gleeson CJ).

25 *NZYQ* (n 1) [19].

26 *Commonwealth of Australia v AJL20* (2021) 273 CLR 43 [33]–[34], [49].

27 *NZYQ* (n 1) [19]–[23].

28 ibid [31]–[37].

two decades since *Al-Kateb*[29] — the High Court in *NZYQ* found it 'difficult to reconcile' the holdings of *Al-Kateb* with the principles of *Lim*.[30] Most notably, the finding in *Al-Kateb* that 'ss 189(1) and 196(1) of the *Migration Act* have valid application to an unlawful non-citizen in respect of whom there is *no real prospect of removal* from Australia *becoming practicable in the reasonably foreseeable future*' sits at odds with the 'insistence in *Lim* that the detention of an alien *must be limited to a period that is "reasonably capable of being seen as necessary"* for one or other of two legitimate and non-punitive purposes'.[31] The Court notes that the tension between the two cases has been recognised in previous instances and has meant that 'the constitutional holding in *Al-Kateb* has come increasingly to appear as an outlier in the stream of authority which has flowed from *Lim*'.[32]

The High Court outlined that the question as to whether the constitutional holding of *Al-Kateb* should be overturned was to be based on the latter's consistency with the central constitutional principle of *Lim,* which the Court reformulated as:

> a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of the Commonwealth in the performance of the function of adjudging and punishing criminal guilt, will contravene Ch III of the *Constitution* unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose. In other words, detention is penal or punitive unless justified as otherwise.[33]

When engaging with the question of purpose, the High Court in *NZYQ* provides that the purpose of the law must be 'both legitimate *and* non-punitive'.[34] To be seen as such, consistently with the principle in *Lim*, the objective of the law 'must be capable of being achieved in fact' and the purpose 'must be regarded as exceptional' to displace 'the default characterisation of detention as punitive'.[35] The two exceptional purposes recognised by the Court were removal of an individual from Australia and the processing of a visa.[36] The question of purpose requires an 'assessment of both the means and ends, and the relationship between the two'.[37] In *Al-Kateb*, however, the majority of the Court undertook an 'incomplete and, accordingly, inaccurate' engagement with the *Lim* principle by upholding a law when that law's intended purpose had no real prospect of occurring in the reasonably foreseeable future.[38]

Six judges of the High Court found that this construction of the *Lim* principle would leave it 'devoid of substance', specifically when the principle was applied to uphold a law based on the purpose of removal from Australia in 'the absence of

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29 ibid [34], citing *Plaintiff M96A/2016 v Commonwealth of Australia* (2017) 261 CLR 582, 593 [21], and the cases there cited: *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 343–4 [29]. The Court also referenced more recent cases, citing *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560; *Benbrika v Minister for Home Affairs* [2023] HCA 33; *Jones v Commonwealth of Australia* [2023] HCA 34.

30 *NZYQ* (n 1) [31].

31 ibid [31] (emphasis added).

32 ibid [35].

33 ibid [39].

34 ibid [40].

35 ibid.

36 ibid [46].

37 ibid [44].

38 ibid [43]–[44].

any real prospect of achieving' that purpose.[39] The Court rejected the defendant's claim that another legitimate purpose included 'separation from the Australian community', finding this purpose synonymous with detention and thus illegitimate under the *Lim* principle.[40]

While part of the unanimous judgment and despite reaching the same conclusion as the remaining six judges of the High Court, one judge, Justice Edelman, provided a different interpretation of the *Lim* principle. He contended the purpose of 'detention pending removal' is legitimate in the context of the impugned laws.[41] The issue for Edelman J arose with the majority's lack of engagement with the question of proportionality, namely through a failure to apply the test of whether the law is 'reasonably capable of being seen as necessary' to achieve its purpose.[42]

VI CONCLUSION

The High Court in *NZYQ* unanimously reformulated the constitutional limitations on executive immigration detention, putting an end to indefinite detention in Australia. The Court found that 'the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia [comes] to an end when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future'.[43] Both common law and constitutional law principles mean that the burden sits with the Minister to prove that detention does not transgress these limitations.[44] As a consequence, the Court found that ss 189(1) and 196(1) of the *Migration Act* did not authorise for the continuing detention of the plaintiff — or others detained in immigration detention — beyond these limitations.

As a result of the decision, 149 people — including NZYQ — have been released from immigration detention as of March 2024.[45] However, as the High Court itself recognised, '[r]elease from unlawful detention is not to be equated with a grant of a right to remain in Australia'.[46] Those releasees impacted by the decision have only been granted temporary 'bridging' visas with limited rights attached. Notably, Australia does not have a statelessness determination procedure, a distinct visa category for stateless people or a clear pathway to permanent residency. This means that stateless people impacted by this decision may remain in a form of limbo — unable to live in Australia long term, and unable to be 'returned' to another country. The insecurity of their status has been highlighted by an array of issues that have arisen post-release, including some

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39 ibid [45]–[46].

40 ibid [47]–[50]. The absurdity of this claim is highlighted by the Court who notes at [49] that: 'The submission that the detention of an alien can be justified by reference to a purpose which includes detention of an alien amounted to a submission that detention is justified consistently with Ch III of the *Constitution* if the detention is for the purpose of detention.'

41 ibid [53].

42 ibid [54].

43 ibid [55].

44 ibid [59]–[60].

45 See Josh Butler, 'Invalid Visas Issued to 149 People Released From Indefinite Detention, Labor Admits', *The Guardian* (online, 12 March 2024) <https://www.theguardian.com/australia-news/2024/mar/12/invalid-visas-issued-to-149-people-released-from-indefinite-detention-labor-admits>, archived at <perma.cc/ZZQ3-FJNV>.

46 *NZYQ* (n 1) [72].

detainees being released without visas and releasees being provided with invalid visas.[47]

Further, the decision by the High Court has been met with immense political backlash, including the implementation of a suite of draconian new laws that curtail the rights of releasees. Through legislation passed in the weeks following the decision, the Australian Government enacted laws that specifically targeted the cohort of releasees, criminalising breaches of strict visa conditions — which include curfews and the use of monitoring bracelets — and the implementation of a preventative detention regime enabling some releasees to be re-detained.[48] The Law Council of Australia has criticised the regime of laws as 'disproportionate and punitive in its application to a small group of non-citizens' and has called for the repeal of the laws that provide for mandatory minimum sentences for breaches of visa conditions due to the laws' arbitrariness and the limitations they have placed on the right to a fair trial.[49]

The political storm that has followed the decision has vilified releasees in many ways and overshadowed the positive human rights implications of the decision. In the two decades following the decision of *Al-Kateb*, stateless people faced the prospect of spending lengthy and potentially indefinite periods deprived of their liberty in immigration detention in Australia. The High Court's decision in *NZYQ* is a critical first step in protecting stateless people from being indefinitely deprived of their liberty. However, with no 'stateless' visa category or pathway to permanency and facing intense political backlash, stateless people will continue to face a life of uncertainty in the Australian community.

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47 Stephanie Borys, 'Detainees Released Without Visas after High Court Decision in Immigration Revelation', *ABC News* (online, 15 November 2023) <https://www.abc.net.au/news/2023-11-15/detainees-released-without-visas-after-high-court-decision/103107738>, archived at <perma.cc/Y35G-R7DA>; Butler (n 45); Jessica Bahr, '148 People Released From Immigration Detention Had Invalid Visas. How Did This Happen?', *SBS News* (online, 13 March 2024) <https://www.sbs.com.au/news/article/148-people-released-from-immigration-detention-had-invalid-visas-how-did-this-happen/zuljh97uv>, archived at <perma.cc/W99J-B6DS>.

48 See *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth); 'Summary: Migration Amendment (Bridging Visa Conditions) Bill 2023', *Human Rights Law Centre* (online, 17 November 2023) <https://www.hrlc.org.au/reports-news-commentary/2023/11/17/summary-migration-amendment-bridging-visa-conditions-bill-2023>, archived at <perma.cc/MDM5-G78L>; *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth).

49 'Extraordinary Step of Preventative Detention Requires Further Reflection', *Law Council of Australia* (online, 7 December 2023) <https://lawcouncil.au/media/media-releases/extraordinary-step-of-preventative-detention-requires-further-reflection>, archived at <perma.cc/LQE4-5PJ8>.