Case Note

Immigration Detention in Australia – An Indefinite Future for Indefinite Detention: *Plaintiff M76's Case*

ROHAN NANTHAKUMAR*

I INTRODUCTION

Plaintiff M76/2013 v Minister For Immigration, Multicultural Affairs and Citizenship & Ors[1] ('*Plaintiff M76'*) dealt with the issue of indefinite detention of unlawful non-citizens. This case presented the High Court with the opportunity to reopen and re-examine the correctness of *Al-Kateb v Godwin* ('*Al-Kateb*')[2], which stands as authority for the permissibility of indefinite detention in Australia. The decision in *Al-Kateb* has been the subject of much academic debate and thus *Plaintiff M76* was viewed with anticipation. The Court, likely to the disappointment of many academics and practitioners, largely sidestepped an examination of *Al-Kateb's* correctness, demonstrating a reluctance in most serving High Court judges to reopen *Al-Kateb*. Hayne, Kiefel and Keane JJ confirmed the holding in *Al-Kateb*, while the remaining four judges avoided deciding on the correctness of the case. In light of the recent decision in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* ('*Plaintiff S4*')[3] and the ongoing rapid change in the composition of the High Court Bench, the approach to *Al-Kateb* may well be different in the future. The future of indefinite detention in this country is, therefore, itself indefinite.

The value of *Plaintiff M76* presently, however, is that it reconciles and confirms the decisions of *M61/2010E v Commonwealth of Australia* ('*Offshore Processing Case*')[4] and *Plaintiff M47/2012 v Director-General*

---

* Final year BEc-LLB (Hons I) student at the University of Tasmania and Co-editor of the *University of Tasmania Law Review* 2014. The author wishes to thank Michael Stokes for his helpful comments in the preparation of this case note. The author is responsible for any errors in this case note.

[1] [2013] HCA 53.

[2] (2004) 219 CLR 562.

[3] [2014] HCA 34.

[4] (2010) 243 CLR 319.

of Security ('Plaintiff M47')[5]. Ultimately, detention will be authorised for the duration of administrative processes associated with determining whether an asylum seeker should be granted a visa or removed from Australia. As the government made a legal error, rendering Plaintiff M76's administrative process unfinished, her continuing detention remained authorised.

II FACTUAL BACKGROUND

Plaintiff M76 is a Sri Lankan Tamil woman who arrived at Christmas Island on 8 May 2010. She was characterised as an 'unlawful non-citizen' under ss 5(1) and 14 of the *Migration Act 1958* (Cth) ('the Act'). As she arrived at Christmas Island, an 'excised offshore place', she was an 'unauthorised maritime arrival'.[6] Upon her arrival, Plaintiff M76 was lawfully detained under s 189 of the Act. Like all asylum seeker arrivals by boat, she underwent a Refugee Status Assessment ('RSA') process.[7] Her RSA determined that she was a genuine refugee within the meaning of the *Refugee Convention*[8] ('the Convention'), attracting Australia's protection. Plaintiff M76 received an adverse security assessment from the Australian Security Intelligence Organisation ('ASIO'), presumably because of her previous involvement with the Liberation Tigers of Tamil Eelam, a rebel group in the Sri Lankan civil war. Due to her adverse security assessment, she did not satisfy Public Interest Criterion 4002, which in turn permitted the Department of Immigration and Citizenship ('DIAC') to refuse to refer her to the Minister to consider allowing her to make an application for a protection visa.

DIAC chose not to refer Plaintiff M76 to the Minister. She was to remain in immigration detention until her removal from Australia. Since she was a genuine refugee, Australia's obligations under the Convention prevented her return to Sri Lanka. No third country was willing to engage in regional processing, likely due to her negative ASIO security assessment. She had nowhere to go. Her continued detention appeared indefinite. Plaintiff M76 brought an action against the government arguing that such continuing detention was unauthorised or invalid.

---

[5] (2012) 86 ALJR 1372.

[6] *Migration Act 1958* (Cth) s 5(1) (definition of 'unauthorised maritime arrival'). 'Unauthorised maritime arrival' is the current term for 'offshore entry person'.

[7] The RSA process was introduced in 2008. It aimed to assess those arriving to Australia by boat without a valid visa claiming protection under the *Convention relating to the Status of Refugees*.

[8] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1 (implemented into Australian law through the *Migration Act 1958* (Cth) s 36(2)(a)).

III LEGISLATIVE BACKGROUND

A *Authorised Detention of an 'Unlawful Non-Citizen' – Sections 189, 196 and 198 of the Act*

Section 189 of the Act concerns the detention of 'unlawful non-citizens'. The provision requires an officer to detain a person in an 'excised offshore place' if they know or reasonably suspect that person to be an 'unlawful non-citizen'. As Plaintiff M76 did not have a visa upon her arrival at Christmas Island, she was as 'unlawful non-citizen'.[9] She was, therefore, validly detained under s 189.

Once an 'unlawful non-citizen' has been detained under s 189, s 196(1) requires that person to remain in immigration detention until one of the following events occur:

- The 'unlawful non-citizen' is removed from Australia under ss 198 or 199; [10]
- An officer begins to deal with the 'unlawful non-citizen' under s 198AD(3);[11]
- The 'unlawful non-citizen' is deported under s 200; or
- The 'unlawful non-citizen' becomes lawful by way of the granting of a visa.

Where an 'unlawful non-citizen' has either not made a valid application for a visa, or their application has been finally determined against them, s 198(2) requires their removal from Australia 'as soon as reasonably practicable'. As Plaintiff M76 had nowhere to go, 'as soon as reasonably practicable' was an indefinite timeframe. She was to remain in detention until she could be removed in accordance with ss 189, 196 and 198 of the Act.

B *Lifting the 'Statutory Bar' – Section 46A of the Act*

Section 46A(1), commonly referred to as the 'statutory bar', invalidates any application for a visa made by an 'unauthorised maritime arrival' who is an 'unlawful non-citizen' in Australia. Section 46A(2) provides the Minister with the power to lift the statutory bar when it is in the public

[9] According to s 13(1) of the Act, a non-citizen in the migration zone who holds a valid visa is a lawful non-citizen. Section 14(1) provides that a non-citizen who is not a lawful non-citizen is an unlawful non-citizen.

[10] Section 198 contains provisions relevant to the removal of 'unlawful non-citizens' and s 199 relates to the removal of dependants of removed non-citizens.

[11] Section 198AD(3) provides that an officer may place and restrain the 'offshore entry person on a vehicle or vessel, remove them from their place of detention or a vehicle or vessel and use such force as necessary and reasonable'.

interest to do so. This decision is a personal decision by the Minister.[12] The Minister is under no duty to consider exercising the s 46A(2) power.[13] It is the exercise of this power which had the potential to relieve Plaintiff M76 from her continuing detention.

C *Public Interest Criterion 4002*

Section 501 of the Act imposes a character test on all applications for all visas. Pursuant to s 31(3) of the Act, which allows the government to pass further regulations with respect to the character test for certain classes of visa, *Public Interest Criterion 4002* ('PIC 4002') became part of the character test. PIC 4002 was introduced through *Migration Regulations 1994* (Cth) ('the Regulations') sch 4. It did not form part of the Act itself. In order to satisfy PIC 4002, an applicant could not have been assessed by ASIO to be directly or indirectly a risk to security within the meaning of s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('the ASIO Act'). Failure to satisfy PIC 4002 resulted in DIAC not referring the matter to the Minister to decide whether to lift the statutory bar. *Plaintiff M47*, however, invalidated PIC 4002.[14] It was the failure of DIAC to change administrative practice after PIC 4002 was invalidated which gave rise to the legal error in Plaintiff M76's case.

IV JURISPRUDENTIAL BACKGROUND

Three cases are of great relevance to *Plaintiff M76*. Firstly, the *Offshore Processing Case*, which considered the relationship between the RSA process and the power under s 46A(2) to lift the statutory bar. The court held that the former amounts to the first step in exercising that Ministerial power. Secondly, *Plaintiff M47*, which invalidated PIC 4002. Thirdly, *Al-Kateb*, which serves as authority for Plaintiff M76's indefinite detention under ss 189, 196 and 198 of the Act.

A *Offshore Processing Case*

In this case, Plaintiffs M61 and M69 were, like Plaintiff M76, Sri Lankan Tamils who arrived at Christmas Island by boat. Unlike Plaintiff M76, however, their RSAs did not determine them to be genuine refugees within the meaning of the Convention. Australia did not owe them protection. Plaintiffs M61 and M69 reviewed this decision through an Independent Merits Review ('IMR'), but the same conclusion was reached.

---

[12] *Migration Act 1958* (Cth) s 46A(3).
[13] Ibid s 46A(7).
[14] See *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 (*'Plaintiff M47'*).

The relevance of the *Offshore Processing Case* is that it considered in detail the Ministerial power to 'lift the statutory bar' under s 46A. The High Court emphasised that the Minister's power to lift the statutory bar was a two-stage process:

(1) A decision to *consider* exercising the power to lift the statutory bar; and

(2) A decision whether or not to do so.[15]

The court held that the purpose of the RSA (and the IMR) is to advise the Minister whether to exercise the discretion to 'lift the statutory bar' conferred upon him by s 46A. By establishing the RSA process, the Minister had decided to *consider* exercising the power in relation to every unauthorised maritime arrival who claims protection. Further, as the RSA is part of the s 46A process, it is brought under the umbrella of the Act and must be conducted in a manner that is procedurally fair.[16] The upshot of the *Offshore Processing Case,* therefore, is that it is authority that the initiation of an RSA in itself performed the function of the first stage of the two-stage process and informs the Minister's decision of whether or not to lift the statutory bar.[17]

B *Plaintiff M47*

Plaintiff M47 concerned another Sri Lankan Tamil, arriving at Christmas Island by boat. Plaintiff M47 applied for a protection visa and, like Plaintiff M76, was determined to be a genuine refugee within the meaning of the Convention. Also like Plaintiff M76, Plaintiff M47 received an adverse security assessment by ASIO, resulting in his continuing detention under the Act. As he could not be removed to a third country, he remained in detention for three years before bringing an action challenging the validity of PIC 4002.

Plaintiff M47 is important to *Plaintiff M76* because it invalidated PIC 4002; ultimately signifying that adverse character is irrelevant to whether a person can be referred to the Minister to apply for a visa. The High Court held that PIC 4002 went beyond the regulation-making power conferred to the Executive by s 31(3) of the Act and was, therefore, *ultra vires*.[18] PIC 4002 precluded applications for a visa made by those who were assessed by ASIO to be a risk to security, within the meaning of s 4 of the ASIO Act. Section 4 extends to foreign country security obligations. The character test in s 501 of the Act allows the Minister to

---

[15] *M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 350 [70] ('*Offshore Processing Case'*).
[16] Ibid 354 [77].
[17] Ibid 350 [70].
[18] *Plaintiff M47* (2012) 86 ALJR 1372 1396–1397 [71] (French CJ); 1418–1419 [206] (Hayne J); 1455 [399] (Crennan J); 1465 [455], [458]–[459] (Kiefel J).

refuse or cancel a protection visa on national security grounds, but there is no reference to an ASIO security assessment. As the scope of 'security' in the Act (and the Convention)[19] does not extend to foreign country security obligations like in the ASIO Act, PIC 4002 prescribed a criterion in the Regulations which went beyond the ambit of the Act. Consequently, the Regulations were inconsistent with the Act, and PIC 4002 was deemed invalid.[20]

C *Al-Kateb v Godwin*

Al-Kateb involved a Palestinian man born in Kuwait who moved to Australia in 2000. He applied for a temporary protection visa, but was refused. Al-Kateb expressed that he wanted to return to Kuwait or Gaza. However, as no country would accept him, he was declared stateless and was, therefore, detained. Plaintiff M76's situation is similar to Al-Kateb's in that both plaintiffs faced the reality of indefinite detention as they were classified as 'unlawful non-citizens' and had no prospect of removal to a third country.

In *Al-Kateb*, the majority of the High Court of Australia held that ss 189, 196 and 198 of the *Migration Act* authorised the detention of 'unlawful non-citizens', even if removal was *not* reasonably practicable in the foreseeable future. The majority also held that the Act was constitutionally valid in authorising indefinite detention. Plaintiff M76 challenged the majority decision in *Al-Kateb*, hoping for it to be reopened and overturned by the High Court.

V THE DECISION OF THE HIGH COURT

A *An Error of Law*

As Plaintiff M76 was an unauthorised maritime arrival, s 46A was applicable to the administrative procedure surrounding her entry into Australia. In line with the *Offshore Processing Case*, the court confirmed that the RSA process itself fulfilled the first stage of the two-stage decision to lift the statutory bar. Initiating the RSA amounted to a Ministerial decision to consider exercising the s 46A(2) power for every

[19] The Act acknowledges special rights of review for decisions to grant or cancel a protection visa relying on articles of the Convention, which deal with national security concerns only. For example, article 32 of the Convention provides that a refugee lawfully in the territory shall not be expelled except on grounds of 'national security or public order'. Also, article 33(2) provides that *non-refoulement* does not apply in cases where there is 'reasonable grounds for regarding [a refugee] as a danger to the security of the county in which he is'.

[20] *Plaintiff M47* (2012) 86 ALJR 1372 1396–1397 [71] (French CJ); 1418–1419 [206] (Hayne J); 1455 [399] (Crennan J); 1465 [455], [458]–[459] (Kiefel J).

unauthorised maritime arrival who claims protection.[21] Hence, Plaintiff M76 should have been referred to the Minister. She was not.

The decision not to refer Plaintiff M76 to the Minister was made on the authority of PIC 4002, which prevented someone with an adverse ASIO security assessment from applying for a visa. By adopting this course of action, DIAC failed to give proper effect to *Plaintiff M47*, which invalidated PIC 4002. The court considered that the administrative process for Plaintiff M76 was affected by a legal error and had, therefore, not yet been completed.[22]

Hayne J came to the same conclusion that the administrative process was affected by a legal error, but looked beyond *Plaintiff M47* and considered the purpose of the RSA process itself. His Honour reasoned that considerations beyond determining whether a person was a genuine refugee within the meaning of the Convention were irrelevant to whether the claim was to be referred to the Minister.[23] The RSA process was directed solely to determining whether Australia owed protection obligations to an unauthorised maritime arrivals. Such persons were informed that this was the purpose of the RSA process. The RSA could not extend beyond its purpose.[24] His Honour rejected the Commonwealth's argument that the Minister could lawfully take *any* consideration relevant to the public interest into account. In identifying only one consideration relevant to the decision to lift the bar (that is, whether or not the person was a genuine refugee within the meaning of the Convention), the Minister could not turn to any additional consideration in making that decision.[25] The RSA Manual itself acknowledges that character assessments and health checks become relevant at the point of application for a protection visa.[26] They cannot inform the decision of whether to allow an application at all.

B *Plaintiff M76's Detention is Authorised*

Despite the legal error committed by DIAC, Plaintiff M76's continuing detention remained authorised. The High Court unanimously held that ss 189, 196 and 198 of the Act authorised detention of an 'unlawful non-citizen' for the duration of the statutory process determining whether they can apply for a visa, or are to be removed.[27] Given the legal error, the

[21] *Plaintiff M76* [2013] HCA 53 (12 December 2013) [6]; [93]; [215].
[22] Ibid [27] (French CJ); [223]–[232] (Kiefel and Keane JJ); [134] (Crennan, Bell and Gageler JJ).
[23] Ibid [87]–[91].
[24] Ibid [62].
[25] Ibid [91]–[92].
[26] Ibid [69].
[27] Ibid [30]–[31]; [124]–[127]; [136]; [178].

statutory process remained unfinished for Plaintiff M76 and her detention remained authorised.

C *The Authorisation and Validity of Indefinite Detention – Refusing to Reopen Al-Kateb*

Al-Kateb caused a divide between judges of the High Court when heard. In *Al-Kateb*, the majority held that ss 189, 196 and 198 of the Act authorised indefinite detention and that the Act was constitutionally valid in doing so. Hayne J is the last remaining judge who sat in *Al-Kateb*, all others have since retired. In arguing that her continuing detention was invalid, Plaintiff M76 was seeking to reopen and reverse *Al-Kateb.* Most judges, with the exception of Kiefel and Keane JJ, however, did not heed the invitation to reconsider the correctness of that case.

Crennan, Bell and Gageler JJ chose not to reopen *Al-Kateb* on this occasion. Their Honours looked to settled principles from *Chu Kheng Lim v Minister for Immigration*[28] ('*Chu Kheng Lim*') regarding the authorisation of detention of non-citizens.[29] In *Chu Kheng Lim*, the court held that detention was valid under the law only if it was necessary for purposes of deportation or necessary to enable an application for a visa.[30] Their Honours interpreted 'necessity' not as meaning that the detention itself must be necessary, but rather that the *period of detention* must be limited to the time *necessarily* taken in administrative processes.[31] Any detention beyond this period of time becomes unlawful.[32] The issue in *Al-Kateb* was whether detention of a non-citizen can lawfully continue once the statutory process had finished.[33] Due to the effect of the legal error in this case, the statutory process for Plaintiff M76 remained unfinished. Therefore, Plaintiff M76's situation was governed by *Chu Kheng Lim* as opposed to *Al-Kateb* and discussing the correctness of *Al-Kateb* was premature.[34] French CJ similarly refused to reopen or reverse *Al-Kateb* because the construction and constitutional issues of ss 189, 196 and 198 had not yet arisen in the present circumstances, due to the legal error.[35]

Hayne J saw no reason to articulate once again his views on the validity of ss 189, 196 and 198 of the Act which were expressed in *Al-Kateb*.[36] However, his view from *Al-Kateb* was adopted by Kiefel and Keane JJ,

---

[28] (1992) 176 CLR 1.
[29] *Plaintiff M76* [2013] HCA 53 (12 December 2013) [137].
[30] *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 33.
[31] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 14 [26].
[32] *Plaintiff M76* [2013] HCA 53 (12 December 2013) [140].
[33] Ibid [142].
[34] Ibid [145]–[148].
[35] Ibid [31].
[36] Ibid [129].

the only judges to expressly discuss the correctness of *Al-Kateb*. Their Honours endorsed the view that simply because efforts to remove an 'unlawful non-citizen' were unsuccessful does not justify ending detention. Instead, continuing detention becomes for the purpose of future removal.[37] Their Honours rejected the minority view in *Al-Kateb* that continued detention where removal is not reasonably practicable within a reasonable time was inconsistent with Chapter III of the Constitution.[38] Such an argument rests on the unfounded assertion that Chapter III of the Constitution applies to citizens and non-citizens alike.[39] Reading the three sections together provides a clear illustration that detention is mandatory and must continue until removal or the grant of a visa.[40]

D *Reopening Prior Decisions*

Hayne, Kiefel and Keane JJ were the only judges to discuss the appropriateness of reopening prior High Court cases. Hayne J reasoned that all that had changed since *Al-Kateb* was heard was a change in the composition of the High Court and that such a reason is not sufficient to reopen the case.[41] Kiefel and Keane JJ went further to consider when it is appropriate to reopen cases. Generally, the court should be informed by a strongly conservative cautionary principle, considering continuity and consistency in the law, when looking to reopen and overturn previous decisions.[42] Their Honours considered the factors from *John v Federal Commissioner of Taxation*[43] to determine whether it was appropriate to reopen *Al-Kateb*.[44] Those factors are as follows:

> The first was that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases. The second was a difference between the reasons of the justices constituting the majority in one of the earlier decisions. The third was that the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience. The fourth was that the earlier decisions had not been independently acted on in a manner which militated against reconsideration…[45]

Kiefel and Keane JJ thought that there was no serious divergence between the reasoning adopted by the judges who constituted the majority in *Al-Kateb*.[46] They also noted that the fact *Al-Kateb* had stood for nine years

---

[37] Ibid [176]–[177].
[38] Ibid [205]–[208].
[39] Ibid [206].
[40] Ibid [175]–[178].
[41] Ibid [125].
[42] *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).
[43] (1989) 166 CLR 417, 438–439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
[44] *Plaintiff M76* [2013] HCA 53 (12 December 2013) [191].
[45] Ibid.
[46] *Plaintiff M76* [2013] HCA 53 (12 December 2013) [193].

without legislative action weakened any suggestion that the majority view did not give effect to the will of Parliament.[47] Importantly, they considered that the enactment of s 195A, which provides the Minister with a power to grant a visa to a person being held in immigration detention when it is in the public interest to do so, showed an attempt to relieve any unwarranted adversity following from the decision in *Al-Kateb*.[48] For these reasons, Kiefel and Keane JJ concluded that any controversy associated with *Al-Kateb* has been resolved over the past nine years and it would be inappropriate to reopen the case.[49]

VI COMMENT

A *A Silent Use of 'Legitimate Expectations'?*

Hayne J adopts a 'legitimate expectations' argument in his reasoning without expressly stating so. Unauthorised maritime arrivals can legitimately expect to be referred to the Minister to decide to lift the statutory bar if deemed a genuine refugee through the RSA process. By announcing the RSA process and the grounds on which assessments were to be conducted, Hayne J essentially held that the Minister bound himself to the same considerations when deciding whether to exercise the s 46A(2) power. That is, his Honour had created a legitimate expectation with respect to the first step of exercising the s 46A(2) power.

The doctrine of 'legitimate expectations' has been contentious in Australia when used to give rise to substantive rights.[50] 'Legitimate expectations' giving rise to procedural rights, however, has been less controversial.[51] Developments in England have seen the extension of the doctrine to the provision of substantive benefits.[52] Such developments have been resisted by Australian judges.[53] The doctrine of 'legitimate expectations' in Australia is limited only to procedural rights.[54]

---

[47] Ibid [194].
[48] Ibid [195]–[197].
[49] Ibid [199].
[50] See, eg, *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 (*'Lam'*).
[51] See, eg, *Lam* (2003) 214 CLR 1.
[52] See, eg *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
[53] *Lam* (2003) 214 CLR 1 [67].
[54] The distinction between a 'substantive' and 'procedural' legitimate expectation and the position in Australia is well explained in W B Lane & Simon Young, *Administrative Law in Australia* (Lawbook Co., 2007) 110: 'You may "expect" an outcome (for example, that you will not be deported), a course of conduct (for example, that your children's carer will be contacted), or simply a hearing before some outcome occurs or course is taken. Critically however, all that the doctrine [of legitimate expectations in Australia] actually

In the present case, the legitimate expectation of Plaintiff M76 is merely to undergo the appropriate statutory procedure in accordance with law. There is no guarantee of a substantive outcome – simply being referred to the Minister does not guarantee that the statutory bar will be lifted, nor does it guarantee that an application for a visa will be successful. Hayne J has created a legitimate expectation to be referred to the Minister, but it avoids controversy as it is procedural in nature.

B *The Resurrection of PIC 4002*

The legal error in *Plaintiff M76* is a legal error no more. On 14 May 2014, the *Migration Amendment Bill 2013* passed both houses of Parliament. This Bill proposes to introduce a new s 36(1B) to the *Migration Act 1958* (Cth) which re-introduces the effect of PIC 4002. The new provision provides that a criterion for the grant of a protection visa is that the applicant has not been assessed by ASIO to be directly or indirectly a risk to security. Though the wording of s 36(1B) almost mirrors PIC 4002, it will not so easily suffer the same fate of invalidity as its predecessor. This is because s 36(1B) exists within the Act itself, rather than in the Regulations. Hence, the inconsistency with the Act that invalidated PIC 4002 in *Plaintiff M47* is no longer present.

Section 36(1B) renders the invalidation of PIC 4002 in *Plaintiff M47* somewhat futile. However, the *Offshore Processing Case* and *Plaintiff M76* remain relevant in that the RSA process still forms the first step of exercising the Ministerial power to 'lift the statutory bar' under s 46A(2). On Hayne J's 'legitimate expectations' reasoning, however, it is possible that s 36(1B) will still not encroach upon an applicant's legitimate expectation to be referred to the Minister to decide whether to exercise the s 46A(2) power if their RSA deems them a genuine refugee, irrespective of an adverse character assessment. This is a procedural right which may remain intact. The substantive outcome of being granted a protection visa, however, remains unlikely due to s 36(1B).

C *The Future of Al-Kateb – Hanging in the Balance*

The correctness of *Al-Kateb* has not been conclusively decided upon in *Plaintiff M76.* The High Court has left open the possibility that it may be reopened and reversed in the future. The contentious debate surrounding the case lives on for another day. As a result, those in immigration detention remain hanging in the balance. For *Al-Kateb* to be reopened, the factual circumstances will need to be virtually identical. That is, the case would require detention of an 'unlawful non-citizen' under s 189 of the *Migration Act* in circumstances where all administrative processes in relation to any claim for protection have been completed and where

---

affords you in any instance is a right to a hearing, that is, a procedural right. In other words, it is only in th third type of situation that your expectation is fully satisfied.'

removal from Australia was not reasonably practicable in the foreseeable future.

1 *Plaintiff S4*

The recent High Court case of *Plaintiff S4*, handed down on 11 September 2014, provides some clarity on the construction of ss 189, 196 and 198 of the Act. A unanimous High Court, comprising of French CJ, Hayne, Crennan, Kiefel and Keane JJ held that detention under those provisions can only be for the purposes of the *Migration Act*.[55] Those purposes were removal from Australia; receiving, investigating and determining an application for a visa; and determining whether to permit a valid application.[56] The court emphasised that the requirement to remove 'as soon as reasonably practicable' a non-citizen under s 198 is the leading provision of the Act, of which others are subordinate.[57] Departure from that requirement entails departure from the purpose of detention and results in unlawful detention.[58]

Plaintiff S4 was not a case concerned with indefinite detention. As a result, the court does not at any point mention *Al-Kateb* (or *Plaintiff M76*). Despite the clarity provided by *Plaintiff S4*, the construction and constitutionality of the Act with respect to indefinite detention remains controversial. Kiefel, Keane and Hayne JJ had no desire to provide independent reasons in *Plaintiff S4*, suggesting that *Plaintiff S4*, *Plaintiff M76* and *Al-Kateb* are completely consistent in their eyes. It will be interesting to see how, if at all, the reasoning in *Plaintiff S4* changes the approach of a new High Court Bench dealing with a situation of indefinite detention.

2 *The Changing Composition of the High Court Bench*

Further uncertainty arises due to the upcoming changes to the composition of the High Court. Within the next three years, three High Court judges will retire from the Bench (Hayne J on 5 June 2015, Crennan J on 1 July 2015 and French CJ on 19 March 2017).[59] Hayne J's retirement marks the departure of the last remaining judge from *Al-Kateb* and has the potential to signify a new direction for the High Court and *Al-Kateb.*

Kiefel and Keane JJ have demonstrated that they will carry the *Al-Kateb* majority torch with some rigour into the future. Further, they have also made very clear that they will approach the reopening and overturning of

---

[55] Ibid [29].
[56] Ibid.
[57] Ibid [35].
[58] Ibid [34].
[59] High Court of Australia, *About the Justices* (2014) <http://www.hcourt.gov.au/justices/about-the-justices>.

prior cases with great caution, as established principle requires.[60] Though she did not make such an expression in *Plaintiff M76*, in *Plaintiff M47* Bell J suggested that *Al-Kateb* should be revisited, preferring the minority construction of the Act.[61] She considered that the majority interpretation of s 196 did not reflect the principle of legality, as an intention to abrogate fundamental rights 'must be clearly manifested by unmistakable and unambiguous language'.[62] Therefore, there will be two judges in favour of the majority view in *Al-Kateb*, one in favour of the minority view and four unknown.

VII CONCLUSION

Strictly speaking, Plaintiff M76 was successful in her action against the Minister. However, it was a bittersweet result. The decision of the High Court is of little assistance to her and others facing indefinite detention. Even if Plaintiff M76 is permitted to apply for a visa, her negative ASIO security assessment is likely to prevent her application from being successful. Further, the recent legislative amendment in s 36(1B) has rendered the legal error committed by DIAC a legal error no more. Regardless of any legitimate expectation to be referred to the Minister, s 36(1B) strips Plaintiff M76 of any real likelihood of being granted a protection visa. She will remain in detention until removal from Australia becomes a viable option.

To have true success, Plaintiff M76 needed the High Court to reopen and reverse *Al-Kateb*. The Court has made it abundantly clear, however, that it will not do so until all administrative processes have been exhausted according to law. If and when such a situation presents itself, it will be a High Court composed of many new judges that grapples with the correctness of *Al-Kateb*. Currently, indefinite detention is authorised and valid under Australian law. Its future, however, is indefinite.

---

[60] See, eg, *Wurridjal v The Commonwealth* (2009) 237 CLR 309 and the factors relevant to overturning prior cases as laid out in *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-439.

[61] *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372, 1479 [532]–[534].

[62] Ibid [528].