HIGH COURT OF AUSTRALIA

Chu Kheng Lim

Vs.

The Minister for Immigration, Local Government and Ethnic Affairs

(Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and, Mchugh JJ.)

08.12.1992

JUDGMENT

MASON C.J.

1. The agreed facts, the questions stated and the relevant statutory provisions are set out in the reasons for judgment prepared by Brennan, Deane and Dawson JJ. I shall not repeat them except in so far as it is necessary to make my own views clear.

2. I agree with their Honours that the legislative power conferred by s.51(xix) of the Constitution extends to conferring upon the Executive authority to detain an alien in custody for the purposes of expulsion or deportation and that such authority constitutes an incident of executive power. I also agree that 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 and that such limited authority to detain an alien in custody can be conferred upon the Executive without contravening the investment of the judicial power of the Commonwealth in Ch.III courts.

3. Likewise, I agree that the powers of detention in custody conferred by ss.54L and 54N of the Migration Act 1958 (Cth) ("the Act") are an incident of the executive powers of exclusion, admission and deportation of aliens and are not part of the judicial power of the Commonwealth. I disagree, however, with their Honours' conclusion that s.54R of the Act cannot be read down and is therefore invalid.

4. Section 54R provides:

"A court is not to order the release from custody of a designated person." certain situations, be subject to the regime of custody, s.54R is to be understood as a direction to the courts "not to order the release of a designated person lawfully held in custody pursuant to Div.4B". So understood, the section does not derogate or purport to derogate from the exercise of the judicial power of the Commonwealth by Ch.III courts.

5. The expression "designated person" is defined to mean ((1) s.54K):

"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

(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".

6. Sections 54J to 54U inclusive, some eleven sections in all, constitute Div.4B which bears the heading "Custody of certain non-citizens". Section 54J declares that the Division was enacted because:

"the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in custody until he or she:

(a) leaves Australia; or (b) is given an entry permit".

To that end, Div.4B makes provision for a regime of compulsory detention in custody of persons who fall within the category of designated persons. The Act does not contain any provision which terminates a person's status as a designated person. Once a person attains that status, he or she retains it. In conformity with the declaration contained in s.54J, Div.4B provides for the release of a designated person from custody in two specific situations. Thus, a designated person must be released from custody if removed from Australia under s.54P or given an entry permit under s.34 or s.115 ((2) s.54L(2)). However, apart from those two specific situations, Div.4B also provides that, subject to certain qualifications, a designated person who has been in "application custody" for 273 days is not subject to compulsory detention (or removal from Australia) ((3) s.54Q(1) and (2)). According to s.54L, a designated person must be kept in custody unless he or she comes within one of the situations just mentioned. If there were no other circumstances in which a designated person could not be lawfully held in custody under Div.4B, there would be no difficulty in reading down s.54R in the way I have indicated, that is, regarding it as a direction not to release a designated person lawfully detained in custody pursuant to Div.4B. Indeed, it would be a mischievous interpretation to read s.54R literally when the plain intention of Parliament, as manifested by the particular provisions to which I have referred, is that a designated person should be released from custody in the situations with which those provisions deal.

7. However, it seems that those responsible for drafting s.54R not only failed to express s.54R accordingly, but also failed to perceive that there are other circumstances beyond those already mentioned in which a designated person may not be lawfully held in custody under Div.4B. What initially begins as lawful custody under Div.4B may cease to be lawful by reason of the failure of the Executive to take steps to remove a designated person from Australia in conformity with Div.4B. Thus, a failure to remove a designated person from Australia "as soon as practicable" pursuant to s.54P(1), after that person has asked the Minister in writing to be removed, would, in my view, deprive the Executive of legal authority to retain that person in custody. So also would a failure to remove a designated person from Australia pursuant to the terms of s.54P(2) and (3).

8. The possibility that Parliament did not appreciate, or may not have appreciated, that, in some circumstances, lawful authority for continued detention of a designated person would terminate is not a reason for giving s.54R a literal interpretation. As I have already pointed out, the fact that Parliament did specifically provide for other circumstances in which lawful custody would terminate necessarily requires that s.54R be qualified so as to require the courts not to order the release of a designated person held in lawful custody under Div.4B.

9. Even if that were not so, it would be quite extraordinary to ascribe to Parliament an intention to require a court not to release a person held in unlawful custody. Unless a clear and unambiguous intention to do so appears from a statute, it should not be construed so as to infringe the liberty of the subject. Furthermore, such a clear and unambiguous intention is not sufficiently manifested by the use of general words. In Potter v. Minahan O'Connor J. cited with approval ((4) [1908] HCA 63; (1908) 7 CLR 277, at p 304) the following passage from Maxwell on the Interpretation of Statutes ((5) 4th ed. (1905), p 122):

"It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness ... and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."

10. The only argument against the interpretation of s.54R which I find compelling is that the section, so interpreted, may achieve nothing. The section achieves nothing if it does no more than instruct the courts to act in conformity with the substantive provisions of Div.4B, that being something which the courts would be bound to do in any event. To construe the section in this way, it is suggested, would be to ignore the presumption that words are not used in a statute without a meaning and are not superfluous. Put another way, the argument is that, if possible, some meaning and effect should be given to all the words used ((6) The Commonwealth v. Baume [1905] HCA 11; (1905) 2 CLR 405, per Griffith C.J. at p 414.). However, this presumption or rule of construction is of limited application. In Hill v. William Hill (Park Lane) Ltd. Viscount Simon explained it in these terms ((7) (1949) AC 530, at pp 546-547):

"When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out." (emphasis added)

His Lordship went on to point out that, if the language offered a choice between tautology and

retrospectivity, it would be natural to prefer a construction implying the reproach that Parliament had said the same thing twice over.

11. In this case, s.54R presents a somewhat similar choice between one construction which involves superfluity and another which infringes the liberty of the individual and purports to require the courts not to release a person held in unlawful custody, thereby setting at naught the fundamental principle that no person shall be imprisoned except pursuant to lawful authority. Plainly enough, the presumption or rule of construction is not strong enough to enable the second construction to prevail.

12. Read as I would read it, s.54R does not preclude a court from making an interlocutory order for the release of a designated person who makes out a suitably strong prima facie case that he or she is not being held in lawful custody pursuant to Div.4B. The section operates only when the designated person is lawfully held in custody pursuant to that Division. The Federal Court has, on numerous occasions, affirmed that it has power to make an interlocutory order for the release of a person held in custody pending a final determination by way of review of a decision to deport that person ((8) See the cases referred to in Minister for Immigration, Local Government and Ethnic Affairs v. Msilanga [1992] FCA 41; (1992) 105 ALR 301, per Burchett J. at p 317.). With that in mind, it is conceivable that Parliament may have intended, by the enactment of s.54R, to deny jurisdiction to the courts to make an interlocutory order for the release of a designated person so that the courts' jurisdiction to order the release of such a person was confined to the making of an order pronounced after a final determination that the person's detention was unlawful. Whether Parliament could validly legislate to that effect is not a question which needs to be explored here because s.54R is not expressed in a form apt to achieve that result.

13. The interpretation which I would give to s.54R is supported by the presumption in favour of validity. To repeat the words of Isaacs J. in Federal Commissioner of Taxation v. Munro; British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation ((9) [1926] HCA 58; (1926) 38 CLR 153, at p 180):

"There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail." ((10) This part of the

judgment of Isaacs J. was specifically approved by the Judicial Committee on appeal: Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation [1930] UKPCHCA 1; (1930) 44 CLR 530, at p 545; (1931) AC 275, at p 298.) Dixon J. wrote to the same effect in Attorney-General (Vict.) v. The Commonwealth ("the Pharmaceutical Benefits Case") ((11) (1945) 71 CLR 237, at p 267) when he said:

"In discharging our duty of passing upon the validity of an enactment, we should make every reasonable intendment in its favour. We should give to the powers conferred upon the Parliament as ample an application as the expressed intention and the recognised implications of the Constitution will allow. We should interpret the enactment, so far as its language permits, so as to bring it within

the application of those powers and we should not, unless the intention is clear, read it as exceeding them."

That approach accords with s.15A of the Acts Interpretation Act 1901 (Cth).

14. In the result, I am of the opinion that ss.54L, 54N and 54R are valid. I would answer the questions asked as follows:

Question 1: No.Question 2: Does not arise.

BRENNAN, DEANE AND DAWSON JJ. By writ and statement of claim dated 22 May 1992, the plaintiffs instituted proceedings in this Court seeking declaratory and injunctive relief against the defendants, the Minister for Immigration, Local Government and Ethnic Affairs ("the Minister") and the Commonwealth of Australia. On 26 June 1992, the Chief Justice stated the present case for the consideration of a Full Court. The questions of law which it raises are:

(1) Are ss.54L, 54N or 54R of the Migration Act 1958 (Cth), as amended, invalid in respect of the applications for release from custody made by the plaintiffs in the Federal Court of Australia? (2) If yes, are the defendants under a legal duty to decide the plaintiffs' applications for release from custody: (a) having regard to the Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967; (b) having regard to the International Covenant on Civil and Political Rights set out in Sched.2 of the Human Rights and Equal Opportunity Commission Act 1986 (Cth)?

The facts, in the context of which those questions fall to be answered, were agreed by the parties for the purposes of the stated case. In the following summary of them, the quotations are from the stated case.

Agreed Facts

2. The plaintiffs are all Cambodian nationals. They fall into two groups. The first group ("the firstnamed plaintiffs") arrived in Australian territorial waters by boat on or about 27 November 1989. All but one of the second group ("the secondnamed plaintiffs") arrived in Australian territorial waters by boat on or about 31 March 1990. The other member of that second group, the plaintiff Lim William, is the infant son of the plaintiff Phau Heang and was born after his mother's arrival in Australia. No separate argument has been advanced in relation to him or his status and it is unnecessary to make any further separate reference to him.

3. None of the plaintiffs "entered Australia holding a valid entry permit". They have all "been detained in custody since their arrival". On or about 8 December 1989, the firstnamed plaintiffs applied to the Minister, as the Minister responsible for administering the Migration Act 1958 (Cth) ("the Act"), for refugee status within the meaning of the international Convention and Protocol Relating to the Status of Refugees ("the Refugee Convention and Protocol"). On or about 9 and 10 May 1990, the secondnamed plaintiffs made similar applications. The applications by the firstnamed

plaintiffs for refugee status were all rejected by delegates of the Minister on or about 3 and 4 April 1992. Those of the secondnamed plaintiffs were all rejected by delegates of the Minister on or about 5 and 6 April 1992.

4. Proceedings seeking an order of review in respect of the decision to reject the applications for refugee status were instituted by the plaintiffs in the Federal Court of Australia. Between 6 and 14 April 1992, a judge of that court made orders preventing the removal of the plaintiffs from Australia. On 15 April 1992, pursuant to s.16(1)(a) and (b) of the Administrative Decisions (Judicial Review) Act 1977 (Cth), the Federal Court set aside each of the decisions rejecting the plaintiffs' applications for refugee status and ordered that the matters to which those decisions related be referred back to a delegate of the Minister for determination. The Federal Court also ordered that outstanding applications, which the plaintiffs had made in the proceedings, for orders that they be released from custody be adjourned for hearing commencing on 7 May 1992.

5. On 5 May 1992, that is to say two days before the hearing of the plaintiffs' applications for orders for release from custody was due to commence in the Federal Court, the Parliament of the Commonwealth passed the Migration Amendment Act 1992 (Cth) ("the Amending Act") which inserted a new Division - Division 4B - after Div.4A of Pt 2 of the Act. The Amending Act received the Royal assent on 6 May 1992. Division 4B became operative from that date. As will be seen, it provides, inter alia, for the compulsory detention in custody of certain non-citizens who come within the definition of a "designated person" for the purposes of Div.4B. The stated case expressly states that the "plaintiffs fall within" that definition. The applications before the Federal Court were adjourned on 7 May 1992 sine die.

6. At all relevant times, Australia has been a party to the Refugee Convention and Protocol and the International Covenant on Civil and Political Rights ("the Human Rights Covenant"). The English texts of the Refugee Convention and Protocol are set out as attachments to the case stated. The English text of the Human Rights Covenant is set out as Sched.2 to the Human Rights and Equal Opportunity Act 1986 (Cth).

Division 4B of the Act

7. The new Div.4B of the Act is headed "Custody of certain non-citizens". It contains eleven sections (ss.54J - 54U ((12) For obvious reasons, s.54P follows s.54N)). Those sections constitute a single legislative scheme in relation to the compulsory detention in custody of persons who come within the Division's definition of "designated person". For present purposes, the most important provisions read:

"54J. This Division is enacted because the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in custody until he or she: (a) leaves Australia; or (b) is given an entry permit. 54K. In this Division:

...
'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 (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;

'entry application', in relation to a person, means an application for: (a) a determination by the Minister that the person is a refugee; or (b) an entry permit for the person. 54L.(1) Subject to subsection (2), after commencement, a designated person must be kept in custody. (2) A designated person is to be released from custody if, and only if, he or she is: (a) removed from Australia under section 54P; or (b) given an entry permit under section 34 or 115. (3) This section is subject to section 54Q. 54M.(1) If, immediately after commencement, a designated person is in a place described in paragraph 11(a) or a processing area, he or she then begins to be in custody for the purposes of section 54L. (2) If, immediately after commencement, a designated person is in the company of, and restrained by, a person described in paragraph 11(b), the designated person then begins to be in custody for the purposes of section 54L. 54N.(1) If a designated person is not in custody immediately after commencement, an officer may, without warrant: (a) detain the person; and (b) take reasonable action to ensure that the person is kept in custody for the purposes of section 54L. (2) Without limiting the generality of subsection (1), that subsection even applies to a designated person who was held in a place described in paragraph 11(a) or aprocessing area before commencement and whose release was ordered by a court.

...
54P.(1) 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. (2) An officer must remove a designated person from Australia as soon as practicable if: (a) the person has been in Australia for at least 2 months or, if a longer period is prescribed, at least that prescribed period; and (b) there has not been an entry application for the person. (3) An officer must remove a designated person from Australia as soon as practicable if: (a) there has been an entry application for the person; and (b) the application has been refused; and (c) all appeals against, or reviews of, the refusal (if any) have been finalised.

...
(8) This section is subject to section 54Q. 54Q.(1) Sections 54L and 54P cease to apply to a designated person who was in Australia on 27 April 1992 if the person has been in application custody after commencement for a continuous period of, or periods whose sum is, 273 days. (2) Sections 54L and 54P cease to apply to a designated person who was not in Australia on 27 April 1992, if:

(a) there has been an entry application for the person; and (b) the person has been in application custody, after the making of the application, for a continuous period of, or periods whose sum is, 273 days. (3) For the purposes of this section, a person is in application custody if:

(a) the person is in custody; and (b) an entry application for the person is being dealt with; unless one of the following is happening: (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. 54R. A court is not to order the release from custody of a designated person. ... 54T. If this Division is inconsistent with another provision of this Act or with another law in force in Australia, whether written or unwritten, other than the Constitution: (a) this Division

applies; and (b) the other law only applies so far as it is capable of operating concurrently with this Division. 54U. A statement by an officer, on oath or affirmation, that the Department has given a particular person a designation described in paragraph (e) of the definition of 'designated person' in section 54K is conclusive evidence that the Department has given that person that designation." The reference to "paragraph 11(a)" and "paragraph 11(b)" in s.54M is to pars (a) and (b) of s.11 of the Act. Section 11 reads:"For the purposes of this Act, a person shall not be taken to be in custody under this Act, or in the custody of an officer, unless the person is: (a) being held:

(i) in a detention centre established under this Act; (ii) in a prison or remand centre of the Commonwealth, of a State or of a Territory;

(iii) in a police station or watch house; or (iv) in another place approved by the Minister in writing; or (b) in the company of, and restrained by: (i) an officer; or (ii) another person directed by the Secretary to accompany and restrain the person."

The plaintiffs' custody at the commencement of Div.4B

8. Under the common law of Australia and subject to qualification in the case of an enemy alien in time of war ((13) See, e.g., R. v. Vine Street Police Station Superintendent; Ex parte Liebmann (1916) 1 KB 268; R. v. Bottrill; Ex parte Kuechenmeister (1947) KB 41.), an alien who is within this country ((14) cf. Musgrove v. Chun Teeong Toy (1891) AC 272 (discussed in Legomsky, Immigration and the Judiciary, (1987), pp 88-91) as to the position of an excluded alien.), whether lawfully or unlawfully, is not an outlaw. Neither public official nor private person can lawfully detain him or her or deal with his or her property except under and in accordance with some positive authority conferred by the law ((15) See, generally, Kioa v. West [1985] HCA 81; (1985) 159 CLR 550, at p 631; Ex parte Lo Pak (1888) 9 NSWR 221, at pp 244-245; Ex parte Walsh and Johnson; In re Yates [1925] HCA 53; (1925) 37 CLR 36, at pp 79-80; Re Bolton; Ex parte Beane (1987) 162 CLR 514, at pp 528-529.). Since the common law knows neither lettre de cachet nor other executive warrant authorizing arbitrary arrest or detention, any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision. Nor, in the absence of legislative provision to the contrary, does an alien within the country lack standing or capacity to invoke the intervention of a domestic court of competent jurisdiction if he or she is unlawfully detained ((16) See Somerset v. Stewart ("the Negro Case") [1772] EngR 57; (1772) Lofft 1 (98 ER 499); Johnstone v. Pedlar [1921] UKHL 1; (1921) 2 AC 262, at pp 273, 276, 284-285, 296; Reg. v. Home Secretary; Ex parte Khawaja [1982] UKHL 5; (1984) AC 74, per Lord Scarman at pp 110-112.). If the unlawful detention is by a person who is an officer of the Commonwealth, the status of that person as such an officer will of itself neither confer immunity from proceedings against him or her personally in the ordinary courts of the land nor provide an answer to an application for habeas corpus in any court of competent jurisdiction. If an officer of the Commonwealth is acting in the ostensible exercise of his or her authority as such, the detained alien can invoke the original jurisdiction of this Court under s.75(iii) of the Constitution.

9. In the present case, there is no suggestion that any of the plaintiffs is an enemy alien. The only authority upon which the Minister and the Commonwealth rely to justify either the original taking of the plaintiffs into custody or their detention in custody prior to the commencement of Div.4B is that conferred by the provisions which constituted sub-ss.(1) and (1A) of s.36 of the Act at the time the firstnamed plaintiffs were taken into custody and which had, subject to minor alterations,

become sub-ss.(1) and (2) of s.88 of the Act at the time the secondnamed plaintiffs arrived ((17) See Migration Legislation Amendment Act 1989 (Cth), ss.17 and 35 which took effect from 19 December 1989 and 20 December 1989 respectively.). The differences between the provisions of the old s.36(1) and (1A) and the subsequent s.88(1) and (2) are not significant for the purposes of the present case ((18) The main difference is that references to "illegal entrant" and "prohibited entrant" in s.88(1) replace references to "prohibited non-citizen" in s.36(1).) and it will, on occasion, be convenient to refer to s.88 as if it were the applicable section at the time of arrival of both groups of plaintiffs. Section 88(1) and (2) (in the form applicable to the present case) provided ((19) sub-ss.(1) and (8), inter alia, of s.88 were amended by s.18 of the Migration Amendment Act 1991 (Cth) with effect from 26 June 1991. However, the effect of s.27 of that Act was that those amendments were inapplicable to the plaintiffs.):

"(1) A person who is on board a vessel (not being an aircraft) at the time of the arrival of the vessel at a port, whether or not that port is the first port of call of the vessel in Australia, being a stowaway or a person whom an authorized officer reasonably believes to be seeking to enter Australia in circumstances in which the person would become an illegal entrant (in this section called the 'prohibited entrant'), may - (a) if an authorized officer so directs; or (b) if the master of the vessel so requests and an authorized officer approves, be kept in such custody as an authorized officer directs at such place as the authorized officer directs until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs. (2) Where a person ... who has travelled to a port in Australia on board a vessel (not being an aircraft), whether or not that port is the first port of call of the vessel in Australia, has, after the arrival of the vessel at its first port of call in Australia, sought and been refused an entry permit, the person may, if an authorized officer so directs, be kept in such custody as an authorized officer directs at such place as the authorized officer directs until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs."

Section 88(8) (which broadly corresponded with the earlier s.36(4)) relevantly provided:

"A person who is taken ashore pursuant to subsection (1) (or) (2) ... is to be deemed for the purposes of this Act not to enter Australia unless and until the person is granted a valid entry permit."

10. Section 88's heading, which is part of the Act ((20) Acts Interpretation Act 1901 (Cth), s.13(1)), reads: "Custody of prohibited entrant during stay of vessel in port" ((21) The corresponding heading to the old s.36 referred to a "prohibited non-citizen" instead of a "prohibited entrant".) (emphasis added). As that heading indicates, the provisions of the section are intended to have a strictly temporary operation. Thus, sub-ss.(1) and (2) authorized the detention of the particular person in custody only until the departure of the vessel from Australia or "until such earlier time as an authorized officer directs" (emphasis added). The effect of sub-s.(8) was that a person "taken ashore" in custody under s.88(1) or (2) was deemed, for the purposes of the Act, to be in a kind of statutory limbo and not to have entered Australia. Up until the time the particular vessel departed, the person held in custody under s.88 could be returned to the vessel or placed on some other vessel

(including an aircraft). Once the particular vessel had departed from Australia, the provisions of s.88(1) and (2) had run their course and the person could no longer lawfully be held in custody pursuant to them.

11. The plaintiffs had, at the time of the commencement of Div.4B, been held in custody for almost two and one-half years in the case of the firstnamed plaintiffs and a little over two years in the case of the secondnamed plaintiffs. The explanation of that prolonged detention in custody in purported pursuance of s.88 is that the vessels on which the plaintiffs arrived will never be leaving Australia. They were, the Court was informed, burned. The view was apparently taken by the Minister's Department that, in a case where a vessel can never leave because it has been destroyed, temporary custody under s.88(1) and (2) can continue indefinitely. As has been seen, however, that approach to the construction of the section was mistaken. The period of custody authorized by s.88 was merely a transitory one pending the departure of the relevant vessel after a temporary visit to a port or ports in this country. Once the relevant vessel no longer existed (or, for that matter, once it became apparent that the relevant vessel would never depart), the temporary period pending departure, in which a person could lawfully be held in custody pursuant to s.88, came to an end. If the person was thereafter to be lawfully held in custody in Australia, the justification, if there was one, had to be found in some other statutory provision.

12. As has been said, the Minister and the Commonwealth have not relied upon any statutory provision other than s.88 to justify the retention of the plaintiffs in custody after the destruction by burning of their respective vessels. In particular, it has not been suggested on behalf of the Minister or the Commonwealth that any of the plaintiffs was arrested pursuant to the old s.38 ("Arrest of prohibited non-citizen") or the subsequent s.92 ("Arrest of illegal entrant") of the Act or that any order for the detention of any of the plaintiffs in custody was ever made under either of those sections. The result is that the continued detention of each plaintiff in custody after the destruction of the boat on which he or she arrived in Australia was unlawful. Thereafter, and continuing to the time of the commencement of Div.4B, each of the plaintiffs was entitled to approach this Court, or any other court of competent jurisdiction, to obtain an order for his or her release ((22) See, generally, R. v. Macfarlane; Ex parte O'Flanagan and O'Kelly [1923] HCA 39; (1923) 32 CLR 518, at pp 540-551.).

The Act, s.54K: definition of "designated person"

13. The definition of "designated person" in s.54K comprises six cumulative elements: (i) "non-citizen"; (ii) "has been on a boat in the territorial sea of Australia" in the specified period ((23) After 19 November 1989 and before 1 December 1992); (iii) "has not presented a visa"; (iv) "is in Australia"; (v) "has not been granted an entry permit"; and (vi) has been given "a designation" by the Department. The first five elements, if construed literally, would be satisfied by a large number and variety of people in Australia. For example, New Zealand citizens who visit this country do not, the Court was informed, ordinarily present a visa or obtain an entry permit. Accordingly, if the first five elements of the definition are construed literally, the ordinary New Zealand visitor would satisfy them if, during the specified period, he or she had arrived by sea or were to go on a boat in the territorial sea. The same could be said of other non-citizens who fall within one or other of the various categories of "exempt non-citizen" ((24) See definition of "exempt non-citizen" in s.4 of the Act) and who happen, during the designated period, to go fishing, or otherwise to be on a boat, in any part of the territorial sea.

14. It was suggested in argument on behalf of the Minister and the Commonwealth that the

definition of "designated person" should be read down so that it only applies to non-citizens who "arrive in Australia" by boat from a foreign country and "do require a visa and an entry permit". That suggestion must, however, be rejected. The unambiguous language which the Parliament has used leaves no room for confining the prima facie width of the first five elements of the definition by the implication of such an unexpressed qualification. There is nothing to indicate the absence of a legislative intent that those first five elements should cast such a wide net. To the contrary, one plausible explanation of their literal scope was identified by the Commonwealth Solicitor-General in the course of argument, namely, that it was desired to avoid problems of proof in particular cases such as the need to prove that "a person (who) happens to be within the territorial sea in a boat ... came from somewhere else". That explanation is consistent with the Supplementary Explanatory Memorandum circulated in relation to the Bill for the Amending Act which indicates that it was desired to cast the net of the first five elements of the definition as widely as possible to avoid any complications of the type involved in "(t)he current arrest and custody provisions in the Migration Act (which) are complex with different custodial consequences flowing from whether a person was apprehended before or after entering Australia". Presumably, it was assumed that the Department would exercise the executive power entrusted to it responsibly and refrain from giving "a designation" to a person who satisfied the first five elements of the definition unless it was clear that that person was one of what the Supplementary Explanatory Memorandum describes as "boat people".

15. As has been seen, the stated case asserts that the plaintiffs are all "designated persons" for the purposes of Div.4B. Statements to that effect are also contained in pars 25 and 37 of the plaintiffs' statement of claim which is set out as an annexure to the stated case. It emerged in the course of argument, however, that it may have been mistakenly assumed by the plaintiffs' advisers that, at the time of the commencement of Div.4B, the plaintiffs were "illegal entrants" who were being lawfully held in custody pursuant to an order or orders made under s.92 (or the earlier s.38) of the Act. We have considered whether, in a context where personal liberty is involved, the plaintiffs should, even at this late stage, be given an opportunity to seek amendment of the statement of claim and variation of the stated case in order to raise an argument that, in all the circumstances including the unlawfulness of their detention in custody at the commencement of Div.4B, they do not fall within the definition of "designated person" for the purposes of the Division. We have come to the conclusion that it would be inappropriate to follow that course. Our reason for that is that we have formed a firm view that the plaintiffs' concession that they fall within the definition was rightly made.

16. It is true that it can be argued that the provisions of Div.4B should not be construed as applying to persons who, like the plaintiffs, have entered the country by being "taken ashore" in custody pursuant to s.88 of the Act. For one thing, such persons are deemed "not to enter" ((25) s.88(8)) or "not to have entered" ((26) s.36(4) (before amendment of the Act in 1989: see n.(17)).) the country whereas, as has been seen, an element of the definition of a "designated person" is that the person concerned "is in Australia". For another, it can be argued that it is unlikely that the emphatic provisions of Div.4B that a "designated person must be kept in custody" ((27) s.54L(1)) and that a court "is not to order the release from custody of a designated person" ((28) s.54R) would have been intended by the Parliament to be applicable to a person who was not an "illegal entrant" for the purposes of the Act and who had committed no offence. Careful examination of the terms of Div.4B seems to us, however, to disclose a clear legislative intent that the provisions of the Division should apply regardless of whether the person concerned had been "taken ashore" pursuant to s.88 or had become an "illegal entrant" for the purposes of the Act. Thus, the provisions of Div.4B contain neither a requirement of "entry" or "unlawful entry" nor any reference to an "illegal entrant". Nor do

those provisions contain any reference to a designated person being held "in custody" or "in lawful custody" at the commencement of Div.4B. To the contrary, the effect of s.54M, which is headed "Beginning of custody of certain designated persons", is that any person who was, as a matter of fact, "in a place described in paragraph 11(a) ((29) See above) or a processing area" at the commencement of the Division, automatically began "to be in custody for the purposes of s.54L". Finally, and most significantly, s.54N authorizes the arrest and detention in custody of a designated person notwithstanding that he or she was "not in custody" ((30) s.54N(1)) at the commencement of Div.4B and "even" if he or she had been released from custody pursuant to an order "by a court" ((31) s.54N(2)). Indeed, in the context of the pending proceedings in the Federal Court, it appears that one of the objects of the Act was to clothe with legislative authority the custody in which the "boat people" were being kept, a custody that might have been brought to an abrupt end once a court ascertained that that custody was unlawful.

17. Accordingly, the questions reserved by the stated case must be approached on the basis that: (i) none of the plaintiffs is an "illegal entrant"; (ii) none of the plaintiffs has committed any offence against the Act or any other law; (iii) each of the plaintiffs was unlawfully held in custody at the commencement of Div.4B; and (iv) if the provisions of Div.4B are completely valid, they authorize the Department, by administrative "designation", effectively to direct and enforce the compulsory detention in custody ((32) ss.54L, 54M, 54N) of any person in the situation of the plaintiffs, under a regime where no court can, while such a person remains "a designated person", "order (his or her) release from custody" ((33) s.54R).

Constitution, s.51(xix): aliens

18. In Nolan v. Minister for Immigration and Ethnic Affairs ((34) [1988] HCA 45; (1988) 165 CLR 178, esp at pp 183-184), it was recognized that the effect of Australia's emergence as a fully independent sovereign nation with its own distinct citizenship was that the word "alien" in s.51(xix) of the Constitution had become synonymous with "non-citizen". In the joint judgment of the majority ((35) Mason C.J., Wilson, Brennan, Deane, Dawson and Toohey JJ.), it was said ((36) ibid., at p 183):

"As a matter of etymology, 'alien', from the Latin alienus through old French, means belonging to another person or place. Used as a descriptive word to describe a person's lack of relationship with a country, the wordmeans, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state': Milne v. Huber ((37) (1843) 17 Fed Cas 403, at p 406 (US)). Thus, an 'alien' has been said to be, for the purposes of United States law, 'one born out of the United States, who has not since been naturalized under the constitution and laws' ((38) ibid). That definition should be expanded to include a person who has ceased to be a citizen by an act or process of denaturalization and restricted to exclude a person who, while born abroad, is a citizen by reason of parentage. Otherwise, it constitutes an acceptable general definition of the word 'alien' when that word is used with respect to an independent country with its own distinct citizenship."

19. The legislative power conferred by s.51(xix) with respect to "aliens" is expressed in unqualified terms. It prima facie encompasses the enactment of a law with respect to non-citizens generally. It also prima facie encompasses the enactment of a law with respect to a particular category or class of non-citizens, such as non-citizens who are illegal entrants or non-citizens who are in Australia without having presented a visa or obtained an entry permit. Such a law may, without trespassing beyond the reach of the legislative power conferred by s.51(xix), either exclude the entry of non-citizens or a particular class of non-citizens into Australia or prescribe conditions upon which they

may be permitted to enter and remain; and it may also provide for their expulsion or deportation ((39) See, e.g., Robtelmes v. Brenan [1906] HCA 58; (1906) 4 CLR 395, at pp 400-404, 415, 420-422; Ex parte Walsh and Johnson; In re Yates (1925) 37 CLR, at pp 83, 94, 108, 117, 132-133; O'Keefe v. Calwell (1949) 77 CLR 261, at pp 277-278, 288; Koon Wing Lau v. Calwell [1949] HCA 65; (1949) 80 CLR 533, at pp 555-556, 558-559; Pochi v. Macphee [1982] HCA 60; (1982) 151 CLR 101, at p 106.).

20. As has been seen, the first element of the definition of "designated person" for the purposes of Div.4B of the Act is "non-citizen". The provisions of Div.4B are concerned solely with non-citizens who satisfy the other elements of that definition. Their object and operation are, in the words of s.54J, to ensure that "each non-citizen who is a designated person should be kept in custody until he or she" leaves Australia or is given an entry permit. They constitute, in their entirety, a law or laws with respect to the detention in custody, pending departure or the grant of an entry permit, of the class of "designated" aliens to which they refer. As a matter of bare characterization, they are, in our view, a law or laws with respect to that class of aliens. As such, they prima facie fall within the scope of the legislative power with respect to "aliens" conferred by s.51(xix). The question arises whether, nonetheless, their enactment was not authorized by that grant of legislative power by reason of some express or implied restriction or limitation to be found in the Constitution when read as a whole. For the plaintiffs, it is argued that such a restriction or limitation is implicit in Ch.III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates.

Chapter III of the Constitution

21. The Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers. Chapter III gives effect to that doctrine in so far as the vesting of judicial power is concerned. Its provisions constitute "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 III" ((40) Reg. v. Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 CLR 254, per Dixon C.J., McTiernan, Fullagar and Kitto JJ. at p 270.). Thus, it is well settled that the grants of legislative power contained in s.51 of the Constitution, which are expressly "subject to" the provisions of the Constitution as a whole, do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth. Nor do those grants of legislative power extend to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power ((41) See, e.g., Polyukhovich v. The Commonwealth [1991] HCA 32; (1991) 172 CLR 501, at pp 607, 689, 703-704.).

22. There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to ((42) Waterside Workers' Federation of Australia v. J.W. Alexander Ltd. [1918] HCA 56; (1918) 25 CLR 434, at p 444.) and "could not be excluded from" ((43) Reg. v. Davison [1954] HCA 46; (1954) 90 CLR 353, at pp 368, 383.) the judicial power of the Commonwealth ((44) See, also, Polyukhovich v. The Commonwealth (1991) 172 CLR, at pp 536-539, 608-610, 613-614, 632, 647, 649, 685, 705-707, 721.). That being so, Ch.III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s.51 of the Constitution, of any law purporting to vest any part of that function in the

Commonwealth Executive.

23. In exclusively entrusting to the courts designated by Ch.III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, 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. Every citizen is "ruled by the law, and by the law alone" and "may with us be punished for a breach of law, but he can be punished for nothing else" ((45) Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (1959), p 202.). As Blackstone wrote ((46) Commentaries, 17th ed. (1830), Bk.1, pars 136-137.), relying on the authority of Coke ((47) Institutes of the Laws of England, (1809), Pt 2, p 589.):

"The confinement of the person, in any wise, is an imprisonment. So that the keeping (of) a man against his will ... is an imprisonment ... To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a habeas corpus."

24. There are some qualifications which must be made to the general proposition that the power to order that a citizen be involuntarily confined in custody is, under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch.III courts. The most important is that which Blackstone himself identified in the above passage, namely, the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts. Such committal to custody awaiting trial is not seen by the law as punitive or as appertaining exclusively to judicial power. Even where exercisable by the Executive, however, the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts, including the "ancient common law" jurisdiction, "before and since the conquest", to order that a person committed to prison while awaiting trial be admitted to bail ((48) See Blackstone, op cit, Bk.4, par. 298.). Involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power. Otherwise, and putting to one side the traditional powers of the Parliament to punish for contempt ((49) See Reg. v. Richards; Ex parte Fitzpatrick and Browne [1955] HCA 36; (1955) 92 CLR 157; Polyukhovich v. The Commonwealth (1991) 172 CLR, at p 626.) and of military tribunals to punish for breach of military discipline ((50) See R. v. Bevan; Ex parte Elias and Gordon [1942] HCA 12; (1942) 66 CLR 452; Re Tracey; Ex parte Ryan [1989] HCA 12; (1989) 166 CLR 518; Re Nolan; Ex parte Young [1991] HCA 29; (1991) 172 CLR 460; Polyukhovich v. The Commonwealth (1991) 172 CLR, at pp 626-627.), the citizens of this country enjoy, at least in times of peace ((51) It is unnecessary to consider whether the defence power in times of war will support an executive power to make detention orders such as that considered in Little v. The Commonwealth [1947] HCA 24; (1947) 75 CLR 94.), a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.

25. If the first element - i.e. "non-citizen" - of the definition of "designated person" for the purposes of Div.4B had been omitted with the consequence that those provisions purported to apply to Australian citizens, Div.4B would be plainly beyond the legislative competence of the Parliament and invalid. The reason for that would not only be the absence of any relevant head of Commonwealth legislative power to found the application to citizens of this country of laws of the kind contained in Div.4B. It would also be that Div.4B, if not confined to non-citizens, would purport both to authorize involuntary imprisonment of citizens by executive designation and to deprive the courts of jurisdiction to order that a citizen, who had been so designated by the Executive, be released from custody if his or her detention in custody was found to be unlawful. Such a conferral upon the Executive of an essentially unexaminable power to imprison a citizen would, for the reasons given above, be inconsistent with the Constitution's doctrine of the separation of judicial from executive and legislative power and its exclusive vesting of judicial power in the courts. Ultimately, the critical question in the present case is whether the effect of the confinement of the application of the provisions of Div.4B to non-citizens or aliens is to avoid such conflict between the provisions of Div.4B and Ch.III of the Constitution.

Exclusion, deportation and detention of an alien

26. While an alien who is actually within this country enjoys the protection of our law, his or her status, rights and immunities under that law differ from the status, rights and immunities of an Australian citizen in a variety of important respects. For present purposes, the most important difference has already been identified. It lies in the vulnerability of the alien to exclusion or deportation ((52) See n.(39).). That vulnerability flows from both the common law and the provisions of the Constitution. For reasons which are explained hereunder, its effect is significantly to diminish the protection which Ch.III of the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process.

27. The power to exclude or expel even a friendly alien is recognized by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a strong Judicial Committee of the Privy Council, said in Attorney-General for Canada v. Cain ((53) (1906) AC 542, at p 546.):

"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: Vattel, Law of Nations, book 1, s.231; book 2, s.125."

His Lordship added ((54) ibid):

"The Imperial Government might delegate those powers to the governor or the Government of one of the Colonies, either by royal proclamation which has the force of a statute - Campbell v. Hall ((55) [1774] EngR 5; [1774] EngR 5; (1774) 1 Cowp 204 (98 ER 1045)) - or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them." (emphasis added)

28. The question for decision in Attorney-General for Canada v. Cain was whether the Canadian statute 60 and 61 Vict. c.11 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 emphasized 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 ((56) See, also, Blackstone, op cit, Bk 1, pars 259-260; Chitty, Prerogatives of the Crown, (1820), p 49; Musgrove v. Chun Teeong Toy (1891) AC, at pp 282-283; Johnstone v. Pedlar (1921) 2 AC, at pp 292, 296; Ex parte Walsh and Johnson; In re Yates (1925) 37 CLR, at pp 96, 108; R. v. Bottrill; Ex parte Kuechenmeister (1947) KB, at pp 51, 52; O'Keefe v. Calwell (1949) 77 CLR, at p 278; Salemi v. Mackellar (No.2) [1977] HCA 26; (1977) 137 CLR 396, at p 421.). The outcome of the appeal was that their Lordships upheld the lawfulness of the arrest and confinement of the respondents pursuant to executive "warrants", issued by the Attorney-General, "to take the respondents, then residing in the province of Ontario, and return them to the United States of America" ((57) (1906) AC, at p 543.).

29. In this Court, it has been consistently recognized that the power of the Parliament to make laws with respect to aliens includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorizing the Executive to restrain an alien in custody to the extent necessary to make the deportation effective. The clearest example is Koon Wing Lau v. Calwell ((58) [1949] HCA 65; (1949) 80 CLR 533; and see, also, Attorney-General for Canada v. Cain (1906) AC, at p 546; Chu Shao Hung v. The Queen [1953] HCA 33; (1953) 87 CLR 575, at p 589; Znaty v. Minister for Immigration [1972] HCA 14; (1972) 126 CLR 1, at pp 9-10.). There, it was held by the Court that the War-time Refugees Removal Act 1949 (Cth) was a valid exercise of the legislative power of the Parliament of the Commonwealth. That Act provided ((59) s.5):

"The Minister may at any time within (a specified period) make an order for the deportation of a person to whom this Act applies and that person shall be deported in accordance with this Act".

Among the persons to whom the Act applied was "every person ... who entered Australia during the period of hostilities and is an alien" ((60) s.4(1)(a)). Section 7 provided, among other things, that a "deportee may ... pending his deportation ... be kept in such custody as the Minister or an officer directs". It was held that, in their application to aliens, the relevant provisions were all within the "full power" of the Commonwealth Parliament "to make laws with respect to aliens" ((61) See, e.g., (1949) 80 CLR, at pp 551, 585.). For present purposes, the direct relevance of the case lies in what was said about the validity of s.7's authorization of imprisonment by executive order pending deportation. In the course of his judgment, Latham C.J. ((62) ibid., at pp 555-556), with the concurrence of McTiernan J. ((63) ibid., at p 583) and Webb J. (64), said:

"A particular attack was made upon s.7 of the Act, which has already been quoted. This section is substantially identical with s.8c of the Immigration Act 1901-1940. It is contended that it is invalid because it permits unlimited imprisonment. Any deprivation of liberty must be shown to be authorized by law before it can be justified. But deportation legislation is a necessary element in the control of immigration into a country. 'The power to deport,' Barton J. said in Robtelmes v. Brenan ((65) [1906] HCA 58; (1906) 4 CLR 395, at p 415), 'is the complement ofthe power to

exclude.'

Deportation under legislation of this character, whether it is regarded as legislation relating to aliens or legislation relating to immigration, is not imposed as punishment for being an alien or for being an immigrant ... Section 7 does not create or purport to create a power to keep a deportee in custody for an unlimited period. The power to hold him in custody is only a power to do so pending deportation and until he is placed on board a vessel for deportation and on such a vessel and at ports at which the vessel calls. If it were shown that detention was not being used for these purposes the detention would be unauthorized and a writ of habeas corpus would provide an immediate remedy."

Comments to similar effect were made by Williams J. ((66) (1949) 80 C LR, at pp 586-587), with the concurrence of Rich J. ((67) ibid., at p 570).

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. Such limited authority to detain an alien in custody can be conferred on the Executive without infringement of Ch.III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates. The reason why that is so is that, to that limited extent, authority to detain in custody is neither punitive in nature ((68) See, generally, Ex parte Walsh and Johnson; In re Yates (1925) 37 CLR, at pp 60-61, 96; O'Keefe v. Calwell (1949) 77 CLR, at p 278; Koon Wing Lau v. Calwell (1949) 80 CLR, at p 555; Chu Shao Hung v. The Queen (1953) 87 CLR, at p 589.) nor part of the judicial power of the Commonwealth. When conferred upon the Executive, it takes its character from the executive powers to exclude, admit and deport of which it is an incident.

Are sections 54L, 54N and 54R valid?

31. As has been seen, question 1 of the stated case puts in issue the validity of ss.54L, 54N and 54R of Div.4B. It is convenient to deal first with ss.54L and 54N and subsequently with s.54R.

Sections 54L and 54N

32. Section 54L is the pivotal section of Div.4B. It requires that, subject to s.54Q., a "designated person must be kept in custody" unless and until he or she is removed from Australia or given an entry permit. Section 54N requires that a designated person who was not in custody immediately after the commencement of Div.4B must be detained in custody even if he or she was "a designated person who was held in a place described in paragraph 11(a) or a processing area before commencement and whose release was ordered by a court" ((69) s.54N(2)). In the light of what has been said above, the two sections will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of

deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch.III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.

33. The powers of detention in custody which are conferred upon the Executive by ss.54L and 54N are limited by a number of significant restraints imposed by other provisions of Div.4B. Section 54Q effectively limits the total period during which a designated person can be detained in custody under Div.4B to a maximum total period of 273 days after the making of an application for an entry permit. For the purposes of that maximum period, time does not run while events beyond the control of the Department, such as delay in the supply of information or delay in court or tribunal proceedings, are preventing the finalization of the entry application. Section 54P(2) requires that a designated person be removed from Australia as soon as practicable after he or she has been in Australia for at least two months (or a longer prescribed period) without making an entry application. Section 54P(3) requires the removal of a designated person from Australia as soon as practicable after the refusal of an entry application and the finalization of any appeals against, or reviews of, that refusal. Those limitations upon the executive powers of detention in custody conferred by ss.54L and 54N go a long way towards ensuring that detention under those powers is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or to enable an entry application to be made and considered. Nonetheless, in circumstances where the facts of the present case demonstrate that Div.4B could authorize detention in custody for a further 273 days of persons who had already been unlawfully held in custody for years before the commencement of the Division, those limitations would not, in our view, have gone far enough were it not for the provision of s.54P(1).

34. Section 54P(1) sets the context in which the other provisions of Div.4B operate. It 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". It is only if an alien who is a designated person elects, by failing to make a request under s.54P(1), to remain in the country as an applicant for an entry permit that detention under Div.4B can continue. 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 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.

35. It should be mentioned that it was argued on behalf of the plaintiffs that the provisions of Div.4B, including ss.54L and 54N, were invalid as "a usurpation" of the judicial power of the Commonwealth for the reason that they apply only to a class which is "so limited by definition as to amount in substance to a specification of individuals" and "were enacted in order to affect the

outcome of known or prospective legal proceedings by those individuals". In support of that argument, particular reliance was placed upon the words "whose release was ordered by a court" in s.54N(2), the provision of s.54R, the judgment of the Privy Council in Liyanage v. The Queen ((70) [1965] UKPC 1; (1967) 1 AC 259), the judgment of Street C.J. in BLF v. Minister for Industrial Relations ((71) (1986) 7 NSWLR 372, esp at pp 375-376) and comments in the judgments of some members of this Court in Polyukhovich v. The Commonwealth ((72) (1991) 172 C LR, esp. at pp 536, 612-613, 648-649, 685-686.). The conclusion that the powers to detain in custody conferred by Div.4B are an incident of the executive powers of exclusion, admission and deportation and, being non-punitive in character, are not part of the judicial power of the Commonwealth, effectively disposes of that argument except in so far as it relates to the severable provisions of ss.54R and (arguably) 54U, as to which see below. The fact that proceedings seeking an order for release of the plaintiffs were pending in the Federal Court did not have the effect that the conferral by Div.4B, or the subsequent exercise, of a new executive power of detention constituted a usurpation of, or an impermissible interference with, the exercise of the judicial power of the Commonwealth. In that regard, we would note that the words "whose release was ordered by a court" in s.54N(2) must, in our view, be construed as a reference to an order made by a court before the commencement of Div.4B and as not purporting to authorize an executive overriding of an order made by a court after the commencement of that Division.

Section 54R

36. Section 54R provides that a court "is not to order the release from custody of a designated person". The operation of the section is limited to the extent that it does not purport to exclude a person to whom the Department has purportedly given "a designation" from challenging his or her status as a "designated person". The section must, however, be read with s.54U which provides that a statement by a Departmental officer that the Department has given a person "a designation described in paragraph (e) of the definition (of designated person)" is "conclusive evidence" of that fact. Subject to the effect of that section, s.54R is inapplicable to a person who does not satisfy all of the six elements of the definition of a "designated person". On the other hand, if a person does satisfy all those elements and is a "designated person" for the purposes of the Division, s.54R purports to direct the courts, including this Court, not to order his or her release from custody regardless of the circumstances.

37. If it were apparent that there was no possibility that a "designated person" might be unlawfully held in custody under Div.4B, it would be arguable that s.54R did no more than spell out what would be the duty of a court of competent jurisdiction in any event. If that were so, s.54R would be devoid of significant content. 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. One example of such circumstances would be a case where a designated person continued to be held in involuntary custody notwithstanding that ss.54L and 54P had become inapplicable by reason of the provisions of s.54Q(1) or (2). Another would be a case where a designated person continued to be held in custody in disregard of a request for removal duly made under s.54P(1). Yet another would be a case where a designated person who had elected not to make an entry application continued to be held in custody against his or her will notwithstanding that the maximum period of two months prescribed by s.54P(2) had well and truly expired. In all of those cases, the person concerned would remain a designated person for the purposes of Div.4B (including s.54R) but could no longer be lawfully held in involuntary custody in Australia pursuant to the provisions of the

Division. It is unnecessary to seek further examples. Once 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.

38. Ours is a Constitution "which deals with the demarcation of powers, leaves to the courts of law the question of whether there has been any excess of power, and requires them to pronounce as void any act which is ultra vires" ((73) Reg. v. Richards; Ex parte Fitzpatrick and Browne (1955) 92 CLR, per Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ. at p 165.). All the powers conferred upon the Parliament by s.51 of the Constitution are, as has been said, subject to Ch.III's vesting of that judicial power in the courts which it designates, including this Court. That judicial power includes the jurisdiction which the Constitution directly vests in this Court in all matters in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party ((74) Constitution, s.75(iii)) or in which mandamus, prohibition or an injunction is sought against an officer of the Commonwealth ((75) s.75(v)). A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid. Moreover, even to the extent that s.54R is concerned with the exercise of jurisdiction other than this Court's directly vested constitutional jurisdiction, it is inconsistent with Ch.III. In terms, s.54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch.III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch.III vests exclusively in the courts which it designates.

39. We have given consideration to whether s.54R can legitimately be read down to bring it within legislative power. In our view, it cannot. Any effective reading down would involve the introduction of some qualification to exclude any interference with the directly vested constitutional jurisdiction of this Court. In so far as this Court is concerned, such a reading down would largely deprive the section of its effective content. More important, in so far as the residual jurisdiction of this Court and the jurisdiction of other courts are concerned, any effective reading down would necessarily involve a complete and impermissible reformulation of the terms of s.54R so as to transform an impermissible directive about the manner in which jurisdiction is to be exercised into a provision withdrawing jurisdiction. On the other hand, s.54R is clearly severable from the other provisions of Div.4B. Its invalidity does not give rise to consequential invalidity of any other provision.

40. No separate argument was addressed to the validity of s.54U. Obviously, it is strongly arguable that the considerations which lead to the conclusion that s.54R is invalid are equally applicable to a section which purports to provide that a Commonwealth officer may pre-empt inquiry by the courts about whether a person who satisfies the first five elements of the definition of "designated person" has been designated - or purportedly designated - by the Executive as being subject to compulsory detention provisions. However, it is not suggested that the defendants place any reliance on s.54U in the present case ((76) Indeed, the Commonwealth Solicitor-General informed the Court that the defendants were "happy to argue this case" on the basis that s.54U was not in Div.4B.) and, in the absence of specific argument on the question, it would seem preferable that we refrain from expressing any concluded view about whether it is invalid by reason of its own content.

Inconsistency arguments

41. It is unnecessary to do more than make brief reference to a number of submissions advanced on behalf of the plaintiffs in relation to alleged inconsistencies between Div.4B on the one hand and the provisions of some international treaties to which Australia is a party and Commonwealth legislation relating to those treaties on the other. First, it was argued that Div.4B is invalid or inapplicable to the extent that its provisions purport to remove, limit or exclude rights of the plaintiffs under the Human Rights and Equal Opportunity Act, the Human Rights Covenant set out in Sched. 2 of that Act and the Refugee Convention and Protocol. The answer to that argument is that s.54T, which expressly provides that the provisions of Div.4B prevail over any other law in force in Australia, unmistakably evinces a legislative intent that, to the extent of any inconsistency, those provisions prevail over those earlier statutes and (to the extent - if at all - that they are operative within the Commonwealth) those international treaties. Next, it was submitted that the provisions of Div.4B were, to the extent of any such inconsistency, beyond the legislative power conferred upon the Parliament by s.51(xxix) of the Constitution with respect to external affairs. The answer to that submission is that, putting to one side the invalid and severable provision of s.54R and the arguably invalid provision of s.54U, the enactment of Div.4B was within the legislative power conferred upon the Parliament by s.51(xix) with respect to "aliens". Finally, it was submitted that the provisions of Div.4B should be read down to the extent necessary to avoid any such inconsistency and that the result of such a reading down would be that they did not make compulsory the detention in custody of the plaintiffs. We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty ((77) See, e.g., Garland v. British Rail Engineering Ltd. [1982] UKHL 2; (1983) 2 AC 751, at p 771; Attorney-General v. Guardian Newspapers Ltd. (No.2) [1988] UKHL 6; (1990) 1 AC 109, per Lord Goff of Chievely at p 283; Derbyshire CC v. Times Newspapers Ltd. (1992) 3 All ER 65, at pp 77-78, 86-87, 92-93.). The provisions of Div.4B which require that, in the circumstances which presently exist, the plaintiffs be detained in custody are, however, quite unambiguous.

Conclusion

42. It follows from what has been said above that Question 1 of the stated case must be answered:

Section 54R is invalid. Sections 54L and 54N are valid.

On the material before the Court, s.54L requires that the plaintiffs, as designated persons, "must be kept in custody" until removal from Australia, grant of an entry permit or the expiry of one of the periods referred to in ss.54P(2) and 54Q. The result of the conclusion that ss.54L and 54N are valid is that Question 2 does not arise.

TOOHEY J. This matter comes before the Court by way of a case stated in which the Court is asked to answer questions which primarily concern the validity of certain provisions of the Migration Act 1958 (Cth) ("the Act").

The background

2. The plaintiffs are all Cambodian nationals who with one exception, a child born in Australia, arrived by boat in Australian territorial waters and who have been detained in custody since their arrival. The first group of plaintiffs, 22 persons in all, arrived on or about 27 November 1989. The

second group of plaintiffs, 13 persons excluding the child, arrived on or about 31 March 1990. Each of the plaintiffs made application to the Minister for Immigration, Local Government and Ethnic Affairs ("the Minister") for refugee status within the meaning of the Convention relating to the Status of Refugees that was signed at Geneva on 28 July 1951 ("the Convention") and the Protocol relating to the Status of Refugees that was made at New York on 31 January 1967 ("the Protocol"). Australia is a party to the Convention and the Protocol and is a Contracting State within the meaning of the Convention. Australia is also a party to the International Covenant on Civil and Political Rights ("the Covenant"). On or about 3 and 4 April 1992 delegates of the Minister rejected the first group of plaintiffs' applications for refugee status. On or about 5 and 6 April 1992 delegates of the Minister rejected the second group of plaintiffs' applications for refugee status.

3. The plaintiffs applied to the Federal Court of Australia under the provisions of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the ADJR Act"), challenging the decisions to refuse them refugee status and seeking orders releasing them from custody and staying their removal from Australia. Between 6 and 14 April 1992 the Federal Court made orders staying the removal of the plaintiffs from Australia; those orders are still in force.

4. On 15 April 1992 O'Loughlin J., in the Federal Court, made certain orders in respect of the plaintiffs' applications. These included orders that:

(a) each of the decisions rejecting each of the plaintiffs' applications for refugee status be set aside pursuant to s.16(1)(a) of the ADJR Act;
(b) the matters to which each of the decisions related be referred for further consideration to a new delegate of the Minister and, if requested by the plaintiffs, also to be reconsidered by the Refugee Status Review Committee; (c) the contested applications for the release from custody of each of the plaintiffs be adjourned for hearing by him in Melbourne commencing on 7 May 1992. Those applications were further adjourned to 25 May 1992 and subsequently were adjourned sine die. Division 4B

5. On 5 May 1992, two days before the date originally set for the hearing by O'Loughlin J., the Parliament passed the Migration Amendment Act 1992 ("the amending legislation"), which inserted Div.4B into the Act. The relevant provisions of the amending legislation received Royal Assent on 6 May 1992 and Div.4B became operative from that date. The division is entitled "Custody of certain non-citizens". The term "non-citizen" was already in the Act, defined by s.4(1) to mean "a person who is not an Australian citizen". The non-citizens with whom Div.4B deals are those who are identified as designated persons. Section 54K defines a "designated person", for the purposes of the Division, to mean:

"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 (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."

6. Section 54J expresses the Division to have been enacted

" because the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in custody until he or she: (a) leaves Australia; or (b) is given an entry permit".

7. Through a combination of sections ((78) ss.54L, 54M, 54N, 54P, 54Q, 54R), Div.4B seeks to ensure that a designated person is kept in custody if already there, and is placed in custody if not, and is only released from custody if the person is removed from Australia under s.54P or is given an entry permit under ss.34 or 115. Section 54Q contains a qualification to the custody requirements, namely, that ss.54L and 54P cease to apply to a designated person in certain circumstances; those circumstances have not arisen so far as the plaintiffs are concerned. It should also be noted that, by virtue of s.54P(1), if a designated person asks the Minister, in writing, to be removed from Australia, an officer must remove that person "as soon as practicable". The person must also be removed in the other circumstances to which s.54P refers.

8. With a view to cementing the custody provisions of the Division, s.54R reads:

" A court is not to order the release from custody of a designated person."

The Minister and the Commonwealth ("the defendants") accepted that s.54R could not oust the jurisdiction conferred on the High Court by Ch.III of the Constitution ((79) In his Second Reading Speech on the Migration Amendment Bill 1992, the Minister said: "The most important aspect of this legislation is that it provides that a court cannot interfere with the period of custody. ... No law other than the Constitution will have any impact on it.": Australian House of Representatives Parliamentary Debates (Hansard), 5 May 1992, p 2372. But, they said, that was not the issue before the Court. The issue was the power of the Federal Court to order the release of the plaintiffs from custody pending the further determination of their applications for refugee status and the consequences of s.54R for that power. Whether in truth that is the issue before the Court remains to be seen.

The questions of law

9. The questions of law asked by the case stated are as follows:

"(1) Are sections 54L, 54N or 54R of the Migration Act 1958, as amended, ('the Act') invalid in respect of the applications for release from custody made by the plaintiffs in the Federal Court of Australia? (2) If yes, are the defendants under a legal duty to decide the plaintiffs' applications for release from custody: (a) having regard to the Convention Relating to the Status of Refugees 1951 ('the Convention') and the Protocol Relating to the Status of Refugees 1967 ('the Protocol'); (b) having regard to the International Covenant on Civil and Political Rights set out in Sched.2 of the Human Rights and Equal Opportunity Commission Act 1986 ('the Covenant')?"

10. In dealing with the first of these questions, senior counsel for the plaintiffs based his argument principally on the contention that the challenged sections constituted a usurpation of Commonwealth judicial power which s.71 of the Constitution vests directly in the High Court and, through legislation, in the Federal Court of Australia. It is necessary to deal with that argument

which was strongly resisted by the defendants. But there is a prior inquiry to be made and that is as to the power to hold the plaintiffs in custody before the amending legislation came into force. The present position of the plaintiffs is best appreciated by considering the situation before 6 May 1992 so far as their custody is concerned. The position of the plaintiffs in terms of their refugee status is not before this Court. Their applications to set aside the decisions refusing them refugee status succeeded to the extent that the Federal Court ordered a reconsideration of those applications. It was the defendants' case that the custody of the plaintiffs before 6 May 1992 was justified by s.88 of the Act. The section has been in force at all relevant times.

Detention under s.88

11. Section 88(1) provides that a person who is on board a vessel at the time of the arrival of the vessel in port, "being a stowaway or a person whom an authorized officer reasonably believes to be seeking to enter Australia in circumstances in which the person would become an illegal entrant", may be kept in custody, at the direction of an authorized officer or if the master of the vessel so requests and an authorized officer approves, "until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs".

12. With a qualification that is, in any event, inapplicable to the plaintiffs, s.88(2) provides that where a person who has travelled to a port in Australia on board a vessel has sought and been refused an entry permit, the person may, if an authorized officer so directs, be kept in custody "until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs".

13. With the same inapplicable qualification as operates within sub-s.(2), s.88(3) provides that where a person who has travelled or has been brought to Australia has not entered Australia and an authorized officer reasonably believes that the person was on board a vessel when the vessel was used in connection with the commission of an offence against a law of the Commonwealth or of a State or Territory, and the person is not the holder of a valid entry permit and would, if he or she entered Australia, become an illegal entrant, the person may, if an authorized officer so directs, be kept in custody. The period of custody is such period, not exceeding 14 days, as is required for the making of a decision whether to prosecute the person in connection with the offence and the institution of a prosecution and, if a prosecution is instituted within 14 days, for such further period as is required for the purposes of that prosecution.

14. Section 88 contains other provisions of a machinery nature to which it is unnecessary to refer except to note that, by sub-s.(6), where the period of custody under sub-s.(3) comes to an end the person shall "be expeditiously removed from Australia" unless he or she is the holder of a valid entry permit. Reference should also be made to sub-s.(8) whereby a person taken ashore pursuant to sub-ss.(1), (2) or (3) is to be deemed not to enter Australia "unless and until the person is granted a valid entry permit". The significance of sub-s.(8) lies in the fact that a person is not a designated person within the definition in s.54K unless that person "is in Australia", as required by par.(c) of the definition. If sub-s.(8) were applicable to the plaintiffs, there might be an argument that they did not meet the requirements of par.(c) of the definition of a designated person.

15. There are in s.92 of the Act provisions for the arrest and detention in custody of an illegal entrant. But the defendants' counsel expressly eschewed any reliance upon s.92, saying:

" So it is the defendants' case that all of the plaintiffs here are persons detained in custody under

section 88, not section 92".

It is necessary therefore to return to s.88 with a view to determining whether any of the components of that section provided authority for the detention of the plaintiffs in the period preceding the coming into operation of the amending legislation. In my opinion, none of the sub-sections of s.88 so authorised the detention of the plaintiffs. My reasons for coming to that conclusion are as follows.

16. Sub-sections (1) and (2) of s.88 both speak of the arrival of a vessel at a port in Australia and the departure of the vessel from its last port of call in Australia. "Port" is given a technical meaning by s.4(1) to mean "a proclaimed port, a proclaimed airport, an Australian resources installation or an Australian sea installation". Although sub-s.(1) of s.88 refers expressly to a stowaway, its operation is not in terms at any rate confined to such a person. Nevertheless, both sub-sections contemplate the existence of a vessel that arrives at a port in Australia and leaves from a port in Australia. The case stated does not assert that any of the plaintiffs arrived at a port in Australia. Certainly neither vessel on which the plaintiffs arrived departed from Australia, not from any port or at all; both were confiscated and burned.

17. And so far as sub-s.(3) is concerned, while it may be argued that the vessels on which the plaintiffs travelled were used in connection with their illegal entry into Australia, the sub-section treats as different components the commission of an offence and illegal entry, thereby indicating that "offence" in par.(c) is something other than illegal entry. In any event, no prosecution was instituted against the plaintiffs for an offence and it is apparent that no reliance can be placed by the defendants on that sub-section.

18. The situation then is that although the plaintiffs were in custody immediately before the coming into operation of the amending legislation, there was no lawful justification for their detention under the section on which the defendants relied, namely, s.88. An incidental result of the conclusion that s.88 did not apply to the plaintiffs is that sub-s.(8) could not have operated to deem the plaintiffs not to have entered Australia; therefore it does not stand in the way of each of the plaintiffs answering the description of a "designated person". In any event, the case stated asserts that the "plaintiffs fall within the definition of 'designated person'" in Div.4B and the plaintiffs acknowledge in the statement of claim that each of them "falls within the definition of a 'designated person' within the custody legislation".

Detention under Div.4B

19. In the defendants' submission, what was lawful custody under s.88 continued as lawful custody under Div.4B once that part of the Act was introduced. But, as I have just said, there was no lawful custody under s.88. That conclusion does not dispose of the argument under Div.4B. But it does provide the background against which the attack on the present custody of the plaintiffs must be considered. The defendants put their argument this way:

"(A)ll that Division 4B has done is to amend, in a relevant way, section 16(1)(d) (of the ADJR Act) and section 23 (of the Federal Court of Australia Act 1976 (Cth) ('the Federal Court Act')), to say that in the case of proceedings concerning designated persons in custody - or perhaps if the proceedings do not concern their custody - that the court should not have power to order release".

Of course the plaintiffs challenge the validity of ss.54L, 54N and 54R of the Act. The questions asked of the Court concerning the Convention, the Protocol and the Covenant do not arise unless those sections are invalid.

20. Division 4B must be considered against the background of the plenary power conferred on the Parliament by par.(xix) of s.51 of the Constitution to make laws with respect to "Naturalization and aliens" and, if it be necessary, by reference to the power conferred by par.(xxvii) of s.51 to make laws with respect to "Immigration and emigration". In Pochi v. Macphee ((80) [1982] HCA 60; (1982) 151 CLR 101, at p 106), speaking of par.(xix), Gibbs C.J. said:

"There is in my opinion no room to doubt that under this power the Parliament can validly enact a law for the deportation of aliens ... for whatever reason it thinks fit".

Division 4B certainly deals with aliens ((81) A non-citizen within the Migration Act is an alien for the purposes of par.(xxvii) of s.51 of the Constitution: Nolan v. Minister for Immigration and Ethnic Affairs [1988] HCA 45; (1988) 165 CLR 178.), albeit aliens who answer a particular description, and it does so according to prescribed criteria, even if one criterion is expressed in terms of a designation given to a person by the Department of Immigration, Local Government and Ethnic Affairs ("the Department").

21. The specification of particular dates in par.(a) of the definition of a designated person, coupled with the timing of the amending legislation, leaves no doubt that the plaintiffs are among those at whom Div.4B was aimed. With the exception of par.(e), the components of the definition of a designated person are objective facts which are not dependent on the actions of the Department save to the extent that the refusal of an entry permit would satisfy the requirement of par.(d). Paragraph (e) includes as an element of the definition the fact that the person is one to whom the Department has given a designation in the manner specified. Paragraph (e) requires no more than the act of designation; the act is one that is not controlled, although of course a person must also meet the elements of the definition in pars (a) to (d) before he or she can become a designated person. Within the general framework of the definition, the Department is not guided in the act of designation by any criteria; presumably it could act arbitrarily in singling out one person who otherwise answered the description of a designated person and in disregarding another such person. Since the act of designation is an essential requirement of the definition, it is apparent that the operation of Div.4B may, in the end, depend upon a decision to designate or not to designate a particular person.

22. The Parliament may confer upon the Executive an administrative discretion, the exercise of which depends on a particular event or matter, provided that there is a relevant head of constitutional power and that the exercise of the discretion "affects rights and liabilities which must lie within the subject of the power" ((82) Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951) 83 C LR 1, per Dixon J. at p 189; see also Ex parte Walsh and Johnson; In re Yates [1925] HCA 53; (1925) 37 CLR 36, per Starke J. at pp 132-133.). Relevantly, the Parliament has power to make laws with respect to aliens and, in making such a law, to confer upon an officer of the Department a discretion to designate, for an appropriate purpose, persons who answer the description of aliens. No-one may be designated or detained in custody pursuant to any of the provisions of Div.4B unless he or she is a non-citizen, that is, an alien.

23. The defendants claimed that the discretion reposed in the Department by par.(e) of the definition of a designated person was no more than part of the mechanism of identification. Certainly it is part

of that process but, in terms of the definition, the Department is apparently free to give to one person who otherwise answers the definition an identifier that has the effect of completing the definition and to refrain from giving to another person an identifier, with the result that the person is not a designated person. But, even so, it cannot be said that the discretion thereby vested in the Department exceeds that which the Parliament may lawfully entrust to the Department as part of a law with respect to aliens. Any discretion to give a designation is exercisable only in the case of an alien and for the purpose of the definition of a designated person; it is part of a regime dealing with aliens, although not all aliens. And the object of the amending legislation is to hold aliens who are designated persons in custody, not for punitive purposes, but to ensure that they leave Australia if they are not given an entry permit. The plaintiffs did not contend that, in identifying them as designated persons, the Department acted with any improper purpose ((83) See O'Reilly v. State Bank of Victoria Commissioners (1983) 153 CLR 1, at p 48.). In that regard, the Court was told that every known "boat person" who has arrived in Australia since November 1989, whether before or after the amendments came into force, has been given an identifier. The connection between Div.4B and the subject matter of aliens, as to which the Parliament is empowered to legislate, is apparent; the discretionary element in par.(e) of the definition of designated person does not destroy that connection.

24. If the definition of a designated person does not itself attract a constitutional or other challenge, on what basis are ss.54L and 54N open to attack? The sections operate so as to require the detention of a designated person in custody pending that person's removal from Australia. Detention is required to ensure the removal of a designated person from Australia. (I put to one side the grant of an entry permit.) Section 54P requires removal "as soon as practicable", thereby ensuring that detention is not for any lengthy period although a designated person may, as the plaintiffs have done, seek an order of the Federal Court staying removal from Australia pending the determination of any challenge made by that person to his or her status under the Act. The requirement of detention in custody pending removal which is to be found in ss.54L and 54N is consistent with the scheme of Div.4B and accords with judicial recognition of the power of the Parliament to authorise the Executive to hold an alien in custody in order to ensure his or her deportation ((84) See Koon Wing Lau v. Calwell [1949] HCA 65; (1949) 80 CLR 533).

The power to release from custody

25. Questions then arise as to the power of the Federal Court to release a designated person from custody, the impact on that power of the mandatory provisions of ss.54L and 54N and the effect of s.54R which, in terms, prohibits a court from ordering the release from custody of a designated person. In approaching those questions, there was in argument some uncertainty surrounding the precise nature of the pending applications for release from custody. The applications to the Federal Court challenging the decisions to refuse the plaintiffs refugee status have succeeded, at least to the extent that the applications must be reconsidered. The applications for release from custody cannot be regarded as seeking interim relief in the way that the order staying the removal of the plaintiffs from Australia can be so regarded. That order is clearly intended to operate while the applications for refugee status are being reconsidered and to prevent action which would render that reconsideration pointless. But reconsideration does not require or in any way depend upon the release of the plaintiffs from custody. The applications for review have been dealt with; nothing presently remains to be done with them so far as the Federal Court is concerned. If further decisions are made refusing the plaintiffs refugee status and the plaintiffs wish to challenge those decisions, they will have to do so by making fresh applications under the ADJR Act. It follows that the orders sought by the plaintiffs that they be released from custody are not interim orders; they are

substantive orders, the entitlement to which depends on whether or not the present detention of the plaintiffs is justified.

26. Are such orders within the contemplation of s.16(1)(d) of the ADJR Act or s.23 of the Federal Court Act as the plaintiffs contend? Section 16(1) of the ADJR Act provides:

" On an application for an order of review in respect of a decision, the (Federal) Court may, in its discretion, make all or any of the following orders: (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the Court specifies; (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit; (c) an order declaring the rights of the parties in respect of any matter to which the decision relates; (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties."

Although the power contained in par.(d) is not expressed to be incidental to the power to make an order quashing or setting aside the decision reviewed, that seems to be the way in which it has been treated ((85) See, for instance, Gummow J. in Bond Corporation Holdings Ltd. v. Australian Broadcasting Tribunal [1988] FCA 433; (1988) 84 ALR 669, at p 683. That view of par.(d) is implicit in the decision of this Court in Park Oh Ho v. Minister for Immigration and Ethnic Affairs [1989] HCA 54; (1989) 167 CLR 637, especially at p 644.). O'Loughlin J. did set aside the decisions appealed from; in those circumstances it was open to his Honour (had the amending legislation not come into force) to have ordered the release of the plaintiffs from custody, as an incident of his order setting aside the decisions to refuse the applications for refugee status, if he considered that there was no justification for holding them in custody ((86) Section 15 of the ADJR Act empowers the Federal Court to order a stay of proceedings under the decision sought to be reviewed. But it is apparent that the power is to grant relief pending determination of the substantive application.).

27. It is unnecessary to determine the precise scope of s.23 of the Federal Court Act which reads:

" The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."

The section "confers upon the Federal Court a broad power to make orders of such kinds, including interlocutory orders, as it 'thinks appropriate'. ... It exists only 'in relation to matters' in respect of which jurisdiction has been conferred upon the Federal Court. Even in relation to such matters, the power is restricted to the making of the 'kinds' of order ... which are capable of properly being seen as 'appropriate' to be made by the Federal Court in the exercise of its jurisdiction." ((87) Jackson v. Sterling Industries Ltd. [1987] HCA 23; (1987) 162 CLR 612, per Deane J. at p 622.)

To the extent that the section empowers the Federal Court to grant interim relief, the power is not appropriate in the present case, for the reasons I have given in relation to the ADJR Act. To the extent that the section is concerned with final orders, it would only be appropriate to order the release of the plaintiffs from custody if there was no justification for their detention ((88) In

Minister for Immigration, Local Government and Ethnic Affairs v. Msilanga [1992] FCA 41; (1992) 105 ALR 301, the Full Court of the Federal Court held that, pursuant to the powers conferred by ss.19 and 23 of the Federal Court Act, read with s.15 of the ADJR Act, a judge of that Court may order the release of a person detained in custody, pending execution of a deportation order, until determination of an application for review of the deportation order. However, the relief sought was interim relief, namely, release of the applicant from custody until his application for review had been determined by the Federal Court.).

28. There being power in the Federal Court to order the release of the plaintiffs in the circumstances mentioned (absent the amending legislation), two questions arise:
1. Is s.54R an attempt to interfere with the judicial power of the

Commonwealth and therefore invalid?

2. If s.54R is invalid, do ss.54L and 54N nevertheless operate to ensure that the plaintiffs remain in custody until one of the events contemplated by s.54L has taken place?

Interference with judicial power?

29. In their written submissions, one ground of the plaintiffs' attack on s.54R of the Act was that the amending legislation, and in particular ss.54L. 54N and 54R, is "designed to thwart the Federal Court from being able to address hearing (sic) and determine the plaintiffs' applications". The plaintiffs also contended that the amending legislation "has all the attributes of a Bill of Pains and Penalty which infringes upon the judicial power of the Commonwealth established by Chapter III of the Constitution." The latter proposition echoes some of the discussion in Polyukhovich v. The Commonwealth ((89) [1991] HCA 32; (1991) 172 CLR 501).

30. In Australian Building Construction Employees' and Builders Labourers' Federation v. The Commonwealth ((90) [1986] HCA 47; (1986) 161 CLR 88, at p 96) the Court said:

" It is well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution."

But the plaintiffs' applications under the ADJR Act have been dealt with in the sense that the decisions of which they complain have been set aside. There is an order staying their removal from Australia and it may be assumed that the order will continue in force, at least until the fate of the reconsideration of their applications for refugee status is known. It is hard to see any other purpose the order is designed to achieve. Any inability on the part of the Federal Court to order the release of the plaintiffs from custody cannot affect the reconsideration of the applications or, if the reconsideration is adverse to the plaintiffs and they wish to launch further applications under the ADJR Act, the hearing and determination of those applications.

31. The plaintiffs have not been charged with any offence; there are no pending proceedings to

which an application for release on bail can be incidental. If there is no power to detain the plaintiffs under Div.4B, they are entitled to be released from custody. If they are required to be kept in custody, they are not entitled to be released.

32. In my view, the provisions of Div.4B cannot be attacked as constituting a Bill of Attainder. No doubt, as was said earlier, the Parliament had the plaintiffs very much in mind in enacting the amending legislation. But Div.4B does not relate only to the plaintiffs. A document prepared on behalf of the defendants, entitled "Unauthorised Boat Arrivals in Australia From November 1989 To June 1992", shows that the status of a designated person applies to a number of others as well. The argument that Div.4B is ad hominem legislation cannot succeed. It is unnecessary to repeat what is said in the various judgments in Polyukovich. It is enough to say that Div.4B does not single out individuals or identifiable persons; it operates upon a class of persons who are non-citizens and it prescribes a scheme whereby those persons are to be detained in custody until they have been removed from Australia or have been given an entry permit. The object of custody under ss.54L and 54N is not to punish those persons but to ensure that they are kept under supervision and control until one or other of the events to which Div.4B refers has taken place.

33. However, there is an aspect of s.54R that must be considered. In so far as the section operates only upon a designated person who is lawfully kept in custody pursuant to Div.4B, it does nothing but confirm what the division requires in any event. But there may be circumstances in which a person with the status of a designated person is unlawfully held in custody by a person purportedly acting pursuant to Div.4B. It may be, for instance, that ss.54L and 54P have ceased to apply by reason of the operation of s.54Q. In those circumstances, s.54R on its face directs a court not to release from custody a person whose detention in custody is unlawful. To that extent s.54R is clearly an interference with judicial power and cannot be sustained. However, for the reasons given by Mason C.J., which I adopt, s.54R should be read down to bring it within legislative power so long as it is directed to the release from custody of a designated person who is lawfully kept in custody under the provisions of Div.4B.

34. In consequence, any relevant power in s.16(1)(d) of the ADJR Act or s.23 of the Federal Court Act must yield to ss.54L and 54N. However, if any of the plaintiffs was not a designated person or, being a designated person, was kept in detention beyond any of the periods allowed in ss.54L and 54N, a writ of habeas corpus would secure the release of that person from custody. I assume, of course, that there is no other statutory warrant for the detention of that person. Habeas corpus would lie because of the unlawful detention of the person. It would not be necessary to invoke the ADJR Act to secure that person's release though a decision to treat a person as a designated person may well be susceptible of challenge under that Act. It should also be said that since s.54R is directed only to the release from custody of a designated person who is lawfully kept in custody under the provisions of Div.4B, the section is not a barrier to the making of an interlocutory order for the release from custody of a designated person who is challenging the lawfulness of his or her custody where the court is satisfied that the lawfulness of the custody is sufficiently arguable to warrant an interlocutory order for release from custody in accordance with accepted principles governing the grant of interlocutory relief ((91) See Msilanga (1992) 105 ALR, per Burchett J. at p 318, although his Honour was not concerned with the issues that have arisen in the present appeal.). The result is that, while s.54R is valid to the extent indicated, in reality it adds nothing to Div.4B.

The Convention, the Protocol and the Covenant

35. Once it is accepted that ss.54L and 54N are a valid exercise of the power to detain aliens

pending their deportation, the plaintiffs' reliance on the Convention, the Protocol and the Covenant in the case stated is somewhat obscure. The defendants argued that the plaintiffs did not allege any particular breach of the Covenant and it should not be assumed that there had been any. But the plaintiffs said that they relied upon Art.9 of the Covenant which is set out in Sched.2 to the Human Rights and Equal Opportunity Commission Act, in particular Art.9(1) and (4). Article 9(1) reads:

" Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Article 9(4) reads:

" Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

36. However, s.54T of the Act gives clear precedence to Div.4B if the Division "is inconsistent with another provision of this Act or with another law in force in Australia". If ss.54L and 54N are valid laws of the Parliament, their contents prevail over the Human Rights and Equal Opportunity Commission Act and any relevant provision of the Schedules thereto. The plaintiffs have not demonstrated that the Convention or the Protocol has any specific bearing on their pending applications for release from custody. Had they done so, questions may have arisen for consideration as to the operation of the Convention and the Protocol in Australian municipal law, but again s.54T of the Act would have prevailed.

37. Once it is accepted that ss.54L and 54N are valid, then subject to what has been said as to the making of orders where the lawfulness of custody is challenged on other grounds, the plaintiffs "must be kept in custody" until the scheme of Div.4B has operated to bring about their removal from Australia, until they have been given an entry permit or until the expiry of one of the periods specified in ss.54P and 54Q. It follows that the matters raised by the second question in the case stated do not arise for consideration by the Court.

Conclusion

38. I would answer the questions in the case stated as follows:
Question 1
Are sections 54L, 54N or 54R of the Migration Act 1958, as amended, ('the Act') invalid in respect of the applications for release from custody made by the plaintiffs in the Federal Court of Australia?
Answer

Sections 54L and 54N are valid.
Section 54R is valid so long as it is directed to the release from custody

of a designated person who is lawfully kept in custody under the provisions of Div.4B of the Act.
Question 2
If yes, are the defendants under a legal duty to decide the plaintiffs' applications for release from custody:

(a) having regard to the Convention Relating to the Status of Refugees 1951 ('the Convention') and the Protocol Relating to the Status of Refugees 1967 ('the Protocol'); (b) having regard to the International Covenant on Civil and Political Rights set out in

Sched.2 of the Human Rights and Equal Opportunity Commission Act 1986 ('the Covenant')?

Answer
Unnecessary to answer.

GAUDRON J. The facts and the relevant legislative provisions are set out in the judgment of Brennan, Deane and Dawson JJ. Subject to two matters with which I shall deal, I am in general agreement with their Honours' reasons for judgment. And, subject to two qualifications, neither of which affects the plaintiffs, I agree that the questions in the case stated should be answered as their Honours propose.

Sections 54L, 54N : aliens and non-citizens

2. Section 54L of the Migration Act 1958 (Cth) ("the Act") requires that a designated person be kept in custody and, if not in custody, s.54N authorizes his or her detention without warrant. "Designated person" is defined in s.54K as a non-citizen who satisfies five requirements therein stated.

3. It is no doubt correct to say that "alien" has become synonymous with "non-citizen" and that that was accepted by this Court in Nolan v. Minister for Immigration and Ethnic Affairs ((92) [1988] HCA 45; (1988) 165 CLR 178). But that conceals a number of questions: when did it become synonymous? with what effect in relation to persons, if any, who were not aliens but did not become citizens? and must it remain so?

4. It may be that the occasion to answer the questions that I have formulated will never arise. However, membership of the community constituting the Australian body politic, for which the criterion is now, but was not always, citizenship ((93) See, ibid., per Gaudron J. at pp 189-190. See, with respect to the change from British subject to Australian citizen, Nolan, ibid., at pp 184-186; Pochi v. Macphee [1982] HCA 60; (1982) 151 CLR 101.), is a matter of such fundamental importance that, in my view, it is necessary that the questions be acknowledged even if they are not answered.

5. Citizenship, so far as this country is concerned, is a concept which is entirely statutory, originating as recently as 1948 with the enactment of what was then styled the Nationality and Citizenship Act 1948 (Cth) ((94) Now the Australian Citizenship Act 1948 (Cth)). It is a concept which is and can be pressed into service for a number of constitutional purposes, including with respect to Commonwealth elections ((95) See, for example, ss.93 and 163 of the Commonwealth Electoral Act 1918 (Cth).) and, as this case shows, for the purpose of legislating with respect to aliens pursuant to s.51(xix) of the Constitution. But it is not a concept which is constitutionally necessary, which is immutable or which has some immutable core element ensuring its lasting relevance for constitutional purposes.

6. Because citizenship is a concept of the kind indicated, it cannot control the meaning of "alien" in s.51(xix) of the Constitution ((96) Nolan (1988) 165 CLR, at pp 186, 191). More particularly, although the power conferred by s.51(xix) to make laws with respect to "(n)aturalization and aliens" authorizes denaturalization laws, it does not, in my view, authorize laws providing for denaturalization in the absence of some failure to observe the requirements associated with naturalization or in the absence of some relevant change in the relationship of the person or persons concerned with the community constituting the body politic ((97) ibid., per Gaudron J. at pp 192-193. And note that in Pochi (1982) 151 CLR, at p 109, Gibbs C.J. observed that "the 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 ordinary understanding of the word". But cf. Meyer v. Poynton [1920] HCA 36; (1920) 27 CLR 436, at pp 439-441 where it was accepted that naturalization might be revoked for any reason, a view which was expressly approved by Isaacs J. in Ex parte Walsh and Johnson; In re Yates [1925] HCA 53; (1925) 37 CLR 36, at p 88.). And it certainly does not authorize the transformation of a non-alien into an alien by statutory redefinition of citizenship or by repeal or amendment of legislative provisions dealing with citizenship. Thus, in my view, ss.54L and 54N of the Act are valid only insofar as "non-citizen" is and remains synonymous with the constitutional meaning of "alien". They can and should be read down to this effect ((98) See R. v. Poole; Ex parte Henry (No.2) ; [1939] HCA 19; (1939) 61 CLR 634, at p 652; Pidoto v. Victoria [1943] HCA 37; (1943) 68 CLR 87, at pp 110-111.).

The legislative power with respect to aliens

7. The legislative power conferred by s.51 of the Constitution is, of course, subject to important prohibitions deriving from Ch.III which vests the judicial power of the Commonwealth exclusively in this Court and the courts specified in s.71 ((99) Reg. v. Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 CLR 254; Harris v. Caladine [1991] HCA 9; (1991) 172 CLR 84.).

8. Usually, people are detained in custody in consequence of an exercise of judicial power resulting in a determination that they have breached some law which requires or authorizes their imprisonment. But, as is well known, there are other situations in which persons may lawfully be held in custody. Detention pursuant to mental health legislation comes readily to mind, as does imprisonment on remand pending trial.

9. Detention in custody in circumstances not involving some breach of the criminal law and not coming within well-accepted categories of the kind to which Brennan, Deane and Dawson JJ. refer is offensive to ordinary notions of what is involved in a just society. But I am not presently persuaded that legislation authorizing detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Ch.III. That does not mean that the power conferred by s.51(xix) permits of laws for the detention of aliens merely because they are aliens.

10. A power to legislate with respect to people falling within a particular class or answering a particular description is different from a power to legislate on a stated topic or for a stated purpose((100) See, for example, Strickland v. Rocla Concrete Pipes Ltd. [1971] HCA 40; (1971) 124 CLR 468, at pp 507-508; Actors and Announcers Equity Association v. Fontana Films Pty. Ltd. [1982] HCA 23; (1982) 150 CLR 169, at p 216.). And the power conferred by s.51(xix), so far as it is a power to legislate with respect to aliens, is a power to legislate with respect to people. It has been said that the power conferred by s.51(xxvi) to legislate with respect to "(t)he people of any race for whom it is deemed necessary to make special laws" authorizes laws which are "very much at large; they may be benevolent or repressive; they may be directed to any aspect of human activity; so long as they are with respect to the people of a race such as is described"((101) Koowarta v. Bjelke-Petersen (1982) 153 CLR 168, per Stephen J. at p 209.). And if that is correct with respect to that power, it would seem, by analogy, that the power with respect to aliens should be similarly construed.

11. There is, however, no decision of this Court that compels the conclusion that a law which

operates on or by reference to aliens or people of a race for whom it is deemed necessary to make special laws is, on that account, a valid law with respect to aliens or with respect to the people of that race, as the case may be. The same is true of the power conferred by s.51(xx) with respect to corporations of the kinds therein specified((102) See, generally, Strickland v. Rocla Concrete Pipes Ltd.; Actors and Announcers Equity Association of Australia v. Fontana Films Pty. Ltd.; see also The Commonwealth v. Tasmania (The Tasmanian Dam Case) [1983] HCA 21; (1983) 158 CLR 1, per Gibbs C.J. at pp 117-118, per Wilson J. at pp 201-202, per Deane J. at pp 271-272 and per Dawson J. at pp 314-315, but cf. per Mason J. at pp 149-150 and per Murphy J. at p 179.), although it may be that the power extends to any activity engaged in by corporations of those kinds. For the purposes of this case, the corporations power can be put to one side for the analogy between people and corporations is less than perfect, particularly when it comes to laws authorizing executive interference with the liberty of the individual.

12. In Koowarta v. Bjelke-Petersen, Murphy J. expressed the view - which in my opinion has much to commend it - that s.51(xxvi) only authorizes laws for the benefit of the race concerned, because, in context, "for" means "for the benefit of" and not "with respect to"((103) Koowarta v. Bjelke-Petersen (1982) 153 CLR, at p 242; see also The Tasmanian Dam Case (1983) 158 CLR, per Brennan J. at p 242.). And in Cunningham v. Tomey Homma, the Privy Council held that s.91(25) of the British North America Act 1867 which vested legislative power with respect to naturalization and aliens exclusively in the Canadian Parliament conferred power "to determine what shall constitute either (alienage) or (naturalization)", but not the "consequences (which should) follow from either"((104) (1903) AC 151, at pp 156-157. But cf. Union Colliery Company of British Columbia v. Bryden (1899) AC 580, at pp 587-588 where it was held that a law precluding "Chinamen", whether naturalized or aliens, from working in underground mines was one "the whole pith and substance" of which was directed to a prohibition affecting aliens or naturalized subjects and, thus, fell within the exclusive authority of the Parliament of Canada.).

13. There are difficulties in relating what was said in Tomey Homma to s.51(xix) of the Australian Constitution, even though s.51(xix) is concerned with precisely the same subject matter dealt with by s.91(25) of the British North America Act ((105) The construction of the express grants of power conferred on the Commonwealth Parliament is an "essentially different" task from that involved in classifying legislation under one of two exclusive heads of power in the process of ascertaining whether they fall within Dominion or Provincial power: see Huddart Parker Ltd. v. The Commonwealth [1931] HCA 1; (1931) 44 CLR 492, at pp 526-527; South Australia v. The Commonwealth [1942] HCA 14; (1942) 65 CLR 373, at pp 425-426; Actors and Announcers Equity Association v. Fontana Films Pty. Ltd. (1982) 150 CLR, at p 191.). And it is difficult to conceive of a power with respect to aliens that does not involve power to legislate with respect to the consequences of alienage, at least so far as that concerns entitlement to enter the country and the circumstances which may or will lead to deportation. Certainly, those matters are within the power conferred by s.51(xix)((106) Robtelmes v. Brenan [1906] HCA 58; (1906) 4 CLR 395, at pp 404, 415; Ah Yin v. Christie [1907] HCA 25; (1907) 4 CLR 1428, at p 1431. See, specifically with respect to deportation, Ferrando v. Pearce [1918] HCA 47; (1918) 25 CLR 241, at p 270; Koon Wing Lau v. Calwell [1949] HCA 65; (1949) 80 CLR 533, at pp 551, 555-556; Ex parte Walsh and Johnson; In re Yates (1925) 37 CLR, at pp 119, 132-133; Pochi (1982) 151 CLR, at p 106.).

14. Aliens, not being members of the community that constitutes the body politic of Australia, have no right to enter or remain in Australia unless such right is expressly granted. Laws regulating their entry to and providing for their departure from Australia (including deportation, if necessary) are directly connected with their alien status. And laws specifying the conditions on and subject to

which they may enter and remain in Australia are also connected with their status as aliens to the extent that they are capable of being seen as appropriate or adapted to regulating entry or facilitating departure if and when departure is required((107) See, with respect to custody pending deportation, Koon Wing Lau v. Calwell (1949) 80 CLR, at pp 555-556, 581, 586-587.).

15. Leaving aside special questions which may arise with respect to enemy aliens and in respect of whom the power conferred by s.51(vi) of the Constitution may authorize different laws((108) As to the use of the defence power in relation to aliens, see Ferrando v. Pearce (1918) 25 CLR, especially at pp 253, 261, 270, 274; Jerger v. Pearce [1920] HCA 42; (1920) 28 CLR 588, at pp 592, 594.), a law imposing special obligations or special disabilities on aliens, whether generally or otherwise, which are unconnected with their entitlement to remain in Australia and which are not appropriate and adapted to regulating entry or facilitating departure as and when required, is not, in my view, a valid law under s.51(xix) of the Constitution. A law of that kind does not operate by reference to any matter which distinguishes aliens from persons who are members of the community constituting the body politic, nor by reference to the consequences which flow from non-membership of the community and thus, in my view, is not a law with respect to aliens.

16. If ss.54L and 54N are considered in relation to persons who have entered Australia illegally or whose entry would have been illegal but for executive intervention resulting in their being on Australian soil in circumstances in which s.88(8)((109) Before the Migration Legislation Amendment Act 1989 (Cth), s.36(4) of the Act was to the same general effect as s.88(8).) of the Act deems them not to have entered the country and in relation to children born to such persons((110) Note that s.10(2) of the Australian Citizenship Act 1948 (Cth) provides that a person born in Australia after the commencement of the Australian Citizenship Amendment Act 1986 (Cth) is a citizen by birth only if one of his or her parents was a citizen or permanent resident at the time of birth or if he or she has been ordinarily resident in Australia for 10 years from the time of birth.), they are capable of being seen as appropriate and adapted to regulating entry into Australia and facilitating departure as and when required. In this regard I adopt what is said in the judgment of Brennan, Deane and Dawson JJ. in support of their conclusion that the power of detention conferred by ss.54L and 54N does not exceed what is reasonably necessary for the purposes of deportation or for the making and consideration of an entry application. But as their Honours point out, the definition of "designated person" in s.54K permits of other persons being brought within its terms - persons whose entry and presence in Australia may be entirely lawful - and it is impossible to view ss.54L and 54N as in any way relevantly connected with their alien status or as appropriate and adapted to regulating their entry or facilitating their departure.

17. The definition of "designated person" in s.54K shows signs of drafting difficulties. Similar difficulties are involved in reading down ss.54L and 54N so as to give them valid operation. However, it is possible to read them as applying only to persons who entered Australia unlawfully or whose entry would have been unlawful but for executive intervention resulting in their presence on Australian soil in circumstances in which s.88(8) of the Act deems them not to have entered the country and to children born of such persons without altering the operation of these sections in relation to them. They should be read down accordingly.

Conclusion

18. Question 1 should be answered:

Section 54R is invalid. Sections 54L and 54N are valid insofar as they apply to persons who entered Australia unlawfully or whose entry would have been unlawful but for executive intervention

resulting in their presence on Australian soil in circumstances in which s.88(8) of the Act deems them not to have entered the country and to children born of such persons, but only to the extent that "non-citizen" in s.54K of the Act is and remains synonymous with the constitutional meaning of alien.

19. Question 2 does not arise.

McHUGH J. This is a case stated pursuant to s.18 of the Judiciary Act 1903 (Cth). The questions in the case are whether ss.54L, 54N and 54R of the Migration Act 1958 (Cth), as amended, ("the Act") are invalid and, if so, whether the defendants are under a legal duty to decide the plaintiffs' applications for release from custody pending the determination of their claims that they are refugees within the meaning of the 1951 Convention relating to the Status of Refugees ("the Convention") and the 1967 Protocol of the United Nations relating to the Status of Refugees ("the Protocol").

2. Each of the plaintiffs is a "designated person" which is a term defined for the purposes of the Act. It is defined to mean a non-citizen who has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992, is in Australia, has no entry permit, has not presented a visa and has been given a designation by the Department. Section 54L enacts that a designated person must be kept in custody and is only to be released if, pursuant to the provisions of the Act, he or she is removed from Australia or is given an entry permit. Section 54N provides for the apprehension and detention of a designated person. Section 54R enacts that a court is not to order the release from custody of a designated person.

The plaintiffs' contentions

3. The plaintiffs contend that ss.54L, 54N and 54R are invalid for two reasons. The first is that the sections constitute a usurpation of the Commonwealth's judicial power which is vested by Ch.III of the Constitution in the federal judicature. The second is that the sections amend the Human Rights and Equal Opportunity Commission Act 1986 (Cth) ("the H.R.C. Act") in a manner which prevents that Act from conforming with the International Covenant on Civil and Political Rights ("the Covenant"), upon which that Act's validity depends. The plaintiffs contend that because there has been no express or implied repeal of the H.R.C. Act, ss.54L, 54N and 54R have not been validly enacted.

The stated facts

4. Each of the plaintiffs is a Cambodian national. Each of them, except William Lim, arrived in Australian territorial waters by boat. William Lim is the son of one of the second-named plaintiffs, Phau Heang, born after her arrival in Australia. The first-named plaintiffs arrived in Australia on or about 27 November 1989, and the second-named plaintiffs arrived on or about 31 March 1990. None of the plaintiffs entered Australia holding a valid entry permit. The plaintiffs have been detained in custody since their arrival.

5. Each of the plaintiffs has made application to the first defendant for refugee status within the meaning of the Convention and the Protocol. The first-named plaintiffs made their application on or about 8 December 1989; the second-named plaintiffs made their application on or about 9 and 10 May 1990. On or about 3 and 4 April 1992, delegates of the first defendant rejected the first-named plaintiffs' applications for refugee status. On or about 5 and 6 April 1992, delegates of the first

defendant rejected the applications of the second-named plaintiffs.

6. Pursuant to the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("the A.D.J.R. Act"), the plaintiffs applied to the Federal Court of Australia for a review of these decisions. Between 6 and 14 April 1992, the Federal Court made orders preventing the removal of the plaintiffs from Australia pending the determination of the applications for review. On 15 April 1992, each of the decisions rejecting the plaintiffs' applications for refugee status was set aside by the Federal Court which ordered that the applications for refugee status be referred back to a delegate of the first defendant for determination. Applications made by the plaintiffs for orders that they be released from custody were adjourned for further hearing commencing on 7 May 1992. However, before these applications could be heard, the Migration Amendment Act 1992 (Cth) ("the Amendment Act"), which amended the Act by inserting Div.4B, came into force. The Amendment Act was passed on 5 May 1992 and received the Royal Assent on 6 May 1992. Division 4B became operative from the date of assent. Subsequently, as a result of the passing of the Amendment Act, the plaintiffs' applications for orders for release from custody were adjourned sine die.

The Amendment Act

7. The scheme of Div.4B is that a non-citizen who meets the criteria (a) to (d) in the definition of "designated person" and who is given a designation by the Department pursuant to par.(e) of that definition is to be detained in custody until his or her application for either refugee status or an entry permit is determined. If such an application is successful then the person is released into Australia, but if it is unsuccessful the person is removed from Australia. During the period that the application is being determined, the person is not to be released from custody.

8. Section 54J declares that Div.4B was enacted because:

"the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in custody until he or she: (a) leaves Australia; or (b) is given an entry permit".

The Division only applies to a person who is a "designated person". That term is defined by s.54K:

"'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 (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".

9. Section 54L provides:

"(1) Subject to subsection (2), after commencement, a designated person must be kept in custody. (2) A designated person is to be released from custody if, and only if, he or she is: (a) removed from Australia under section 54P; or (b) given an entry permit under section 34 or 115. (3) This section is subject to section 54Q."

10. Section 54M provides:

"(1) If, immediately after commencement, a designated person is in a place described in paragraph 11(a) or a processing area, he or she then begins to be in custody for the purposes of section 54L. (2) If, immediately after commencement, a designated person is in the company of, and restrained by, a person described in paragraph 11(b), the designated person then begins to be in custody for the purposes of section 54L."

11. The places described in par.11(a) of the Act are detention centres, prison or remand centres, police stations, watch houses and certain other places approved by the Minister. The persons described in par.11(b) are officers within the meaning of the Act and other persons "directed by the Secretary (to the Department) to accompany and restrain the person".

12. Section 54N provides:

"(1) If a designated person is not in custody immediately after commencement, an officer may, without warrant: (a) detain the person; and (b) take reasonable action to ensure that the person is kept in custody for the purposes of section 54L. (2) Without limiting the generality of subsection (1), that subsection even applies to a designated person who was held in a place described in paragraph 11(a) or a processing area before commencement and whose release was ordered by a court. (3) If a designated person escapes from custody after commencement, an officer may, without warrant: (a) detain the person; and (b) take reasonable action to ensure that the person is kept in custody for the purposes of section 54L."

13. Section 54P provides for the removal of designated persons from Australia. In so far as relevant it provides:

"(1) 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. (2) An officer must remove a designated person from Australia as soon as practicable if: (a) the person has been in Australia for at least 2 months or, if a longer period is prescribed, at least that prescribed period; and (b) there has not been an entry application for the person. (3) An officer must remove a designated person from Australia as soon as practicable if: (a) there has been an entry application for the person; and (b) the application has been refused; and (c) all appeals against, or reviews of, the refusal (if any) have been finalised."

"Entry application" is defined by s.54K to mean, in relation to a person, an application for:

"(a) a determination by the Minister that the person is a refugee; or (b) an entry permit for the person".

14. Sections 54L and 54P are expressed to be subject to s.54Q which provides that ss.54L and 54P cease to apply to designated persons detained in "application custody" for a period of 273 days. "Application custody" refers to the custody of a person while his or her application for refugee status, or for an entry permit, is being dealt with by the Department (but not where continued dealing with the application is beyond the control of the Department).

15. Finally, s.54R provides:

"A court is not to order the release from custody of a designated person."

The detention of the plaintiffs

16. Before dealing with the validity of Div.4B, it is convenient to refer to the detention of the plaintiffs before the Amendment Act was passed.

17. The source of the power to detain the plaintiffs in custody before the Amendment Act was passed is unclear. Absent a statutory power of detention, no public official has any power to detain an alien who has entered the country whether or not that person's entry constituted an illegal entry((111) Ex parte Leong Kum (1888) 9 NSWLR 250, at p 264; Ex parte Lo Pak (1888) 9 NSWLR 221, at pp 243-244; Kioa v. West [1985] HCA 81; (1985) 159 CLR 550, at p 631; Re Bolton; Ex parte Beane [1987] HCA 12; (1987) 162 CLR 514, at p 528.). In a United States immigration case((112) Shaughnessy v. United States ex rel. Mezei [1953] USSC 38; (1953) 345 US 206, at p 218.), Jackson J. reminded us that:

"Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land."

18. In Re Bolton; Ex parte Beane((113) [1987] HCA 12; (1987) 162 CLR 514, at p 528), Deane J. echoed these sentiments when he said:

"The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate."

19. One suggested source of power to detain the plaintiffs is s.88 ((114) At the time of the first-named plaintiffs' arrival, the relevant provisions of the Act were ss.36(1) and (1A). At the time of the second-named plaintiffs' arrival, s.88(1) and (2) which substantially re-enacted s.36(1) and (1A) were the relevant provisions. It is convenient to refer to the relevant section in both cases as s.88. Since the arrival of the second plaintiffs, s.88 has been amended by the Migration Amendment Act 1991 (Cth), s.18.) of the Act. However, the provisions of s.88 are only activated by the arrival of the vessel at "a port" which by s.4(1) of the Act means "a proclaimed port". While the case stated does not make clear where the plaintiffs' boats were intercepted, it is unlikely that the interception occurred upon the arrival of the boats "at a port". Furthermore at the time of the plaintiffs' arrival in Australia, a person could only be detained under s.88 "until the departure of the vessel from its last port of call in Australia or until such earlier time as an authorized officer directs"((115) s.88(1) and (2)). The Court was informed during argument that the boats on which the plaintiffs came to Australia had been burned. It is difficult to see how s.88 could justify the detention of the plaintiffs when the boats upon which they arrived had been destroyed. The period of detention authorised by s.88 was clearly intended to be no longer than the period of the temporary stay of the vessel in Australia.

20. Another possible source of power to detain is provided by s.92 which, prior to the Amendment Act, authorised the arrest of a person "whom (an) officer reasonably supposes to be an illegal entrant"((116) s.92(1)). The officer must take "the arrested person before a prescribed authority within 48 hours after the arrest" or, if it is not practicable to do so, "as soon as practicable after that period"((117) s.92(3)). The defendants do not rely on s.92.

21. Consequently, the plaintiffs may have been detained unlawfully before Div.4B was enacted. But

that circumstance, if it is true, does not mean that Div.4B is invalid in its application to the plaintiffs. That Division does not seek to make lawful what was previously unlawful. It operates prospectively. Any rights that the plaintiffs may have in relation to their earlier detention are unaffected by Div.4B.

Section 51(xix) of the Constitution

22. Subject to the argument that the provisions of Div.4B are invalid because they usurp the judicial power of the Commonwealth, the scheme embodied in that Division is within the power granted to the Parliament by s.51(xix) of the Constitution to make laws with respect to "aliens". Subject to the Constitution, that power is limited only by the description of the subject-matter. If a law of the Parliament can be characterised as a law with respect to aliens, it is valid whatever its terms, provided that the law does not infringe any express or implied prohibition in the Constitution((118) Australian Communist Party v. The Commonwealth (1951) 83 CLR 1, per Williams J. at p 222.). Subject to any relevant constitutional prohibitions, Parliament can make laws imposing burdens, obligations and disqualifications on aliens which could not be imposed on members of the community who are not aliens. In Polites v. The Commonwealth((119) [1945] HCA 3; (1945) 70 CLR 60, at p 69), Latham C.J., after referring to the aliens power, said: "The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications." In Pochi v. Macphee((120) [1982] HCA 60; (1982) 151 C LR 101, at p 106), Gibbs C.J. said that under s.51(xix) "Parliament has power to make laws providing for the deportation of aliens for whatever reasons it thinks fit".

23. Division 4B is a law with respect to the subject of aliens because, notwithstanding the vesting of a discretion in the Department to determine who should be a "designated person", only a "non-citizen"((121) See the definition of "designated person" in s.54K; see also the definition of "non-citizen" in s.4(1).) (i.e. an alien((122) See Nolan v. Minister for Immigration and Ethnic Affairs [1988] HCA 45; (1988) 165 CLR 178, at pp 183-184.)) can become a designated person((123) See Australian Communist Party v. The Commonwealth (1951) 83 CLR, per Dixon J. at pp 188-189.). The effect of a Departmental designation is to confine the operation of Div.4B to some only of the non-citizens who are in Australia. If the Department gives a person a designation and that person is a non-citizen who falls within the terms of pars (a)-(d) of s.54K, he or she becomes a member of a special class of aliens whose members are detained in custody until they are given an entry permit or leave the country. Designation by the Department has legal consequences for the purposes of Div.4B, therefore, only if the person so designated is an alien. Moreover, although classification as a designated person results from the exercise of a Departmental discretion, that circumstance does not prevent the law being a law with respect to aliens. In Ex parte Walsh and Johnson; In re Yates((124) [1925] HCA 53; (1925) 37 CLR 36), the Court held that a law was a law with respect to "immigration" within the meaning of s.51(xxvii) of the Constitution although it authorised the deportation of a person not born in Australia conditionally upon the Minister being satisfied that that person had been concerned in acts which were detrimental to the welfare of the Commonwealth.

24. Furthermore, Div.4B does not lose its character as a law on the topic of aliens because it requires the detention of this special class of aliens pending the processing of their claims for refugee status. In Koon Wing Lau v. Calwell((125) [1949] HCA 65; (1949) 80 CLR 533), the Court held that a law requiring aliens to be held in such custody as the Minister directs pending deportation was a law with respect to aliens((126) See also Robtelmes v. Brenan [1906] HCA 58; (1906) 4 CLR 395, at p 404.). Courts in the United States have held on a number of occasions that the executive government may detain an alien in custody pending the determination of an application for entry into the United

States((127) See generally Shaughnessy v. United States ex rel. Mezei [1953] USSC 38; (1953) 345 US 206; Palma v. Verdeyen [1982] USCA4 549; [1982] USCA4 549; (1982) 676 F 2d 100; Jean v. Nelson [1984] USCA11 678; (1984) 727 F 2d 957; Fernandez-Roque v. Smith [1984] USCA11 798; (1984) 734 F 2d 576.).

25. If a law authorising the detention of an alien went beyond what was reasonably necessary to effect the deportation of that person, the law might be invalid because it infringed the provisions of Ch.III of the Constitution. Similarly, if a law, authorising the detention of an alien while that person's application for entry was being considered, went beyond what was necessary to effect that purpose, it might be invalid because it infringed Ch.III. But neither "law" would cease to be a "law" with respect to the subject of aliens. Judicial power

26. The plaintiffs do not dispute that Div.4B is a "law" with respect to aliens. However, they contend that ss.54L, 54N and 54R are invalid because they usurp the judicial power of the Commonwealth.

27. Section 71 of the Constitution vests the "judicial power of the Commonwealth" in the High Court, in such other federal courts as the Parliament creates, and in such other courts as are invested with federal jurisdiction. This Court has decided that((128) Reg. v. Kirby; Ex parte Boilermakers' Society of Australia [1956] HCA 10; (1956) 94 CLR 254, at p 270.):

"it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to s.71 and constituted in accordance with s.72 or a court brought into existence by a State".

28. An exhaustive definition of judicial power has proved elusive. In Reg. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty. Ltd.((129) [1970] HCA 8; (1970) 123 CLR 361, at p 394), Windeyer J. said:

"The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law."

29. One of the better known descriptions of judicial power is that formulated by Griffith C.J. in Huddart, Parker and Co. Proprietary Ltd. v. Moorehead((130) [1909] HCA 36; (1909) 8 CLR 330, at p 357) where his Honour said:

"I am of opinion that the words 'judicial power' as used in sec.71 of the Constitution mean the power which every sovereign authority must of necessity have to decidecontroversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

An equally well-known description of judicial power is that formulated by Kitto J. in Tasmanian Breweries((131) (1970) 123 CLR, at pp 374-375):

"judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that

question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified."((132) See also Polyukhovich v. The Commonwealth (War Crimes Act Case) [1991] HCA 32; [1991] HCA 32; (1991) 172 CLR 501, at pp 703-704.)

30. The formulations of Griffith C.J. and Kitto J. illustrate the imprecision attaching to the lines between judicial power, executive power and legislative power. The line between judicial power and executive power in particular is very blurred. Prescriptively separating the three powers has proved impossible. The classification of the exercise of a power as legislative, executive or judicial frequently depends upon a value judgment as to whether the particular power, having regard to the circumstances which call for its exercise, falls into one category rather than another. The application of analytical tests and descriptions does not always determine the correct classification. Historical practice plays an important, sometimes decisive, part in determining whether the exercise of a particular power is legislative, executive or judicial in character((133) See, for example, R. v. Bevan; Ex parte Elias and Gordon [1942] HCA 12; (1942) 66 CLR 452 and Reg. v. Davison [1954] HCA 46; (1954) 90 CLR 353.).

31. Notwithstanding the difficulties in determining whether the exercise of a particular power constitutes the exercise of judicial power, Div.4B in its ordinary operation does not constitute an exercise of judicial power. By ordinary operation, I mean the operation of Div.4B in its application to persons who did not have applications for release from custody pending when Div.4B was enacted. While ss.54L, 54N and 54R modify, they do not declare, the pre-existing rights of aliens falling within the description of designated persons. They simply prescribe a new regime of rights for the future. They do not constitute an exercise of judicial power in their ordinary operation.

32. Furthermore, Div.4B does not interfere with the judicial process. It is true that s.54R directs a court "not to order the release from custody of a designated person". Arguably, it prevents a court from ordering the release from custody of a designated person even though other provisions of Div.4B require that person to be released from custody((134) For example, ss.54Q(1) and 54Q(2) and cf. s.54P.). If s.54R was interpreted to have the effect that it directs a court not to give effect to substantive rights while exercising federal judicial power, it would usurp the judicial power of the Commonwealth and be invalid. But, in my opinion, s.54R can and should be construed so as to apply only to persons whose detention in custody is authorised by Div.4B. The chief objection to reading the section in that way is that it would impose no restraint on the right of a court to order the release of a designated person which was not already imposed by other provisions of Div.4B. However, as Dixon J. pointed out in Attorney-General (Vict.) v. The Commonwealth ("the Pharmaceutical Benefits Case")((135) [1945] HCA 30; (1945) 71 CLR 237, at p 267.), an enactment should be interpreted, so far as possible, "so as to bring it within the application" of constitutional power. Consequently, s.54R should be interpreted, so far as possible, to bring it within power.

33. It may be that s.54R was enacted because the draftsperson believed that courts had inherent power to order the release on bail of persons held in custody pending the determination of their applications for entry or pending their deportation. Except for the purpose of granting bail to keep

alive some proceeding otherwise before a court, however, it is difficult to see how, in the absence of a statutory power, a court can order that an alien be granted bail pending the determination of his or her application for entry or pending deportation((136) But see the decision of Stephen J. in Chan v. The Commonwealth of Australia, unreported, High Court of Australia, 12 December 1980, to the effect that s.31 of the Judiciary Act 1901 (Cth) provides this Court with such power.). Courts have no general power to order the release of persons kept in custody pursuant to statutory enactments. In Waterside Workers' Federation of Australia v. J.W. Alexander Ltd.((137) [1918] HCA 56; (1918) 25 CLR 434, at p 464.), Isaacs and Rich JJ. pointed out that "(a) Court of law has no power to give effect to any but rights recognized by law". Furthermore, Canadian courts have concluded that, statute apart, courts of general jurisdiction have no power to grant bail to an alien detained, pursuant to the provisions of legislation, pending his or her deportation((138) R. v. Alamazoff (1919) 47 DLR 533; Re Rojas and The Queen (1978) 88 DLR (3d) 154; Re Chan and The Queen (1985) 18 CRR 193.). In R. v. Alamazoff, Mathers C.J.KB said((139) (1919) 47 DLR, at pp 536-537):

"If a judge of this Court has any power to admit to bail in such a case it must be because such a power has been derived from the common law."

His Honour continued:

"I have been referred to no English or Canadian authority nor have I found any which says that the court has inherent jurisdiction to grant bail on habeas corpus in a non-criminal proceeding such as this is" and concluded:

"in my opinion there is no inherent power in this court to interfere".

34. In Minister v. Msilanga((140) [1992] FCA 41; (1992) 105 ALR 301), however, the Full Court of the Federal Court held that a judge of the Court has jurisdiction to order the release of a person, detained in custody pending the execution of a deportation order, until the person's application for review under the A.D.J.R. Act is determined. By reason of this decision, the draftsperson may have concluded that s.54R was necessary to ensure that designated persons were kept in custody until released or removed in accordance with Div.4B. If so, he or she was mistaken because, having regard to the terms of s.54L(2), no court could order the release of a designated person except in those cases where Div.4B requires that the custody of the designated person should cease. The terms of s.54L(2) make it impossible to exercise the jurisdiction, recognised in Msilanga, in relation to designated persons.

35. However, notwithstanding the form of the section, the evident purpose of s.54R is plain enough. It is to ensure that the effect of the provisions of Div.4B is not frustrated by orders of the courts. Accordingly, s.54R should be construed so as to give effect to that purpose. It should be read as applying only to applications seeking orders of release from custody of those persons who are lawfully detained pursuant to the other provisions of Div.4B. When it is so read, s.54R does not direct a court exercising federal jurisdiction not to give effect to substantive rights.

36. The plaintiffs also contend that Div.4B usurps the judicial power of the Commonwealth because it is a Bill of Pains and Penalties. At common law, special Acts of Parliament under which the legislature inflicted punishment upon persons alleged to be guilty of treason or felony "without any conviction in the ordinary course of judicial proceedings"((141) Story, Commentaries on the Constitution of the United States, 5th ed. (1891), vol.2, p 216.) were known as Bills of Attainder and Bills of Pains and Penalties. The term "Bill of Attainder" was used in respect of Acts imposing

sentences of death, the term "Bill of Pains and Penalties" in respect of Acts imposing lesser penalties((142) ibid.; Calder v. Bull [1798] USSC 3; (1798) 3 US 386, at p 389.). In the sixteenth and seventeenth centuries, the Parliament of the United Kingdom passed many such Bills, particularly "in times of rebellion, or of gross subserviency to the crown, or of violent political excitements"((143) Story, op cit, p 217). During the American Revolution, a number of such Bills were passed in the thirteen States((144) United States v. Brown [1965] USSC 129; [1965] USSC 129; (1965) 381 US 437, at p 442). Subsequently, the Constitution of the United States prohibited the enactment of Bills of Attainder((145) Art.I, s.9, cl.3). The Supreme Court of the United States has construed the term "Bill of Attainder" in that clause to include all "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial"((146) United States v. Lovett [1946] USSC 104; (1946) 328 US 303, at p 315). Thus, a Bill of Attainder or a Bill of Pains and Penalties is a law (1) directed to an individual or a particular group of individuals (2) which punishes that individual or individuals (3) without the procedural safeguards involved in a judicial trial.

37. No express prohibition against the enactment of Bills of Attainder or Bills of Pains and Penalties is to be found in the Constitution. However, it is a necessary implication of the adoption of the doctrine of the separation of powers in the Constitution that the Parliament of the Commonwealth cannot enact such Bills((147) See Calder v. Bull (1798) 3 US, at p 389; Liyanage v. The Queen [1965] UKPC 1; (1967) 1 AC 259, at pp 289-292; War Crimes Act Case (1991) 172 CLR, at pp 536, 617, 646-648, 706, 721.). An Act of the Parliament which sought to punish individuals or a particular group of individuals for their past conduct without the benefit of a judicial trial or the procedural safeguards essential to such a trial would be an exercise of judicial power of the Commonwealth and impliedly prohibited by the doctrine of the separation of powers. Such an Act would infringe the separation of judicial and legislative power by substituting a legislative judgment of guilt for the judgment of the courts exercising federal judicial power.

38. However, Div.4B in its ordinary operation does not constitute a Bill of Pains and Penalties. First, the Division does not specify that an individual or group of ascertainable individuals is or are to be deprived of rights. It operates upon a class of persons in the same way that legislation imposes obligations or disqualifications on other groups such as lawyers, doctors, bankrupts or felons. It is a general enactment which provides objective criteria for determining which aliens are to be detained in custody pending the determination of their status. The persons who would be affected by the enactment of Div.4B could not be identified at the time it became law. While the legislation was intended to ensure that persons such as the plaintiffs would be kept in custody pending the determination of their status, it applies to an unknown number of persons who satisfy the criteria set out in the definition of "designated person" in s.54K.

39. Secondly, no punishment or penalty is imposed by Div.4B in its ordinary operation. Although detention under a law of the Parliament is ordinarily characterised as punitive in character, it cannot be so characterised if the purpose of the imprisonment is to achieve some legitimate non-punitive object. Thus, imprisonment while awaiting trial on a criminal charge is not punitive in nature because the purpose of the imprisonment is to ensure that the accused person will come before the courts to be dealt with according to law. Similarly, imprisonment of a person who is the subject of a deportation order is not ordinarily punitive in nature because the purpose of the imprisonment is to ensure that the deportee is excluded from the community pending his or her removal from the country((148) Ex parte Walsh and Johnson; In re Yates; Shaughnessy v. United States ex rel. Mezei; Jean v. Nelson.). Likewise, the lawful imprisonment of an alien while that person's application for

entry is being determined is not punitive in character because the purpose of the imprisonment is to prevent the alien from entering into the community until the determination is made. But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.

40. Certainly, Div.4B deprives designated persons of the right to seek their release from custody. But they have been deprived of that right not because the Parliament wishes to punish them but because it wishes to achieve the non-punitive object of ensuring that aliens who have no entry permit or visa are kept under supervision and control until their claims for refugee status or entry are determined.

41. It is true that a designated person can be detained in custody for a period of nine months together with such additional periods as result from the delays in dealing with the application occasioned by persons or events beyond the control of the Department. In other words, the designated person can be detained for at least nine months for the sole purpose of enabling the Department to consider the application for entry and make its own examination and investigation. Inordinately long as the potential period of detention may seem to be, it has to be evaluated in the context of the allegation in the plaintiffs' statement of claim, which the defendants admit, that, in addition to the plaintiffs, there are approximately twenty-three thousand applicants for refugee status in Australia at the present time. The appropriateness of the period of detention for the individual cannot be isolated from the administrative burden cast on the Department in investigating and determining the vast number of applications by persons claiming refugee status.

42. Furthermore, even if the provisions of ss.54L, 54N and 54R, standing alone, could be characterised as a punishment, the effect of s.54P(1) is that a designated person may release himself or herself from the custody imposed or enforced by those sections. Section 54P(1) requires an officer to remove a designated person from Australia as soon as practicable "if the designated person asks the Minister, in writing, to be removed". That provision makes it impossible to regard Div.4B in its ordinary operation as a punishment. It is true that a designated person, having regard to his or her claim for refugee status, might regard the choice between detention and leaving the country as not a real choice. But for the purpose of the doctrine of the separation of powers, the difference between involuntary detention and detention with the concurrence or acquiescence of the "detainee" is vital. A person is not being punished if, after entering Australia without permission, he or she chooses to be detained in custody pending the determination of an application for entry rather than to leave the country during the period of determination.

43. Consequently, the period of detention authorised by Div.4B does not constitute a punishment for the purpose of the doctrine concerning Bills of Pains and Penalties.

44. Thirdly, the legislation does not conclusively determine whether a person is a "designated person". That is a matter for the courts. Thus, a person may challenge the right of the Minister to detain him or her on the ground that that person is not a "non-citizen" or on the ground that that person does not fall within one or more of the lettered paragraphs in the definition of "designated person". If the person is found not to be a designated person, the detention of that person under ss.54L and 54N is unlawful.

45. Thus, Div.4B in its ordinary operation is not a Bill of Pains and Penalties. It leaves it to the courts to ascertain the individuals affected in accordance with ordinary judicial procedures and does not impose any punishment on any person or persons.

46. However, the further question arises whether the provisions of Div.4B constitute a Bill of Pains and Penalties or an exercise of judicial power by reason of their effect on the applications of the plaintiffs which were pending before the Federal Court when the Divison became law.

47. At the time when the Amendment Act was passed, the first-named plaintiffs had been detained in custody for two years and five months and the second-named plaintiffs had been detained in custody for two years and one month. Over two years and four months elapsed from the time of application before delegates of the Minister rejected the applications of the first-named plaintiffs; almost two years elapsed before delegates of the Minister rejected the applications of the second-named plaintiffs. Subsequently, those rejections were set aside, and the plaintiffs sought their release from custody. The effect of Div.4B is to prevent the Federal Court from ordering their release.

48. Although the plaintiffs have already spent a very considerable period of time in custody while their applications have been considered, their long period of detention does not convert Div.4B into a usurpation of judicial power in so far as the Division applies to them or their applications before the Federal Court. If it wishes to do so, Parliament may legislate to alter substantive rights that are in issue in pending litigation without usurping the judicial power of the Commonwealth. In Australian Building Construction Employees' and Builders Labourers' Federation v. The Commonwealth((149) [1986] HCA 47; (1986) 161 CLR 88, at p 96), this Court said:

"It is well established that Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution."((150) See also Nelungaloo Pty. Ltd. v. The Commonwealth [1947] HCA 58; [1947] HCA 58; (1948) 75 CLR 495, at pp 503-504, 579-580; Reg. v. Humby; Ex parte Rooney [1973] HCA 63; (1973) 129 CLR 231, at p 250; War Crimes Act Case (1991) 172 CLR, at pp 532-534.) There is no automatic interference with the judicial process even when the motive or purpose of the Parliament in enacting the legislation is to circumvent or forestall the relevant proceedings((151) Australian Building Construction Employees' and Builders Labourers' Federation (1986) 161 CLR, at pp 96-97.).

49. Moreover, the non-punitive character of the Division in its application to the plaintiffs does not change because the plaintiffs had been detained in custody for periods of between two years and one month and two years and five months before the Amending Act became law. Division 4B in its application to the plaintiffs still had, and has, the non-punitive object of ensuring that none of the plaintiffs enters the Australian community unless and until he or she is given an entry permit under ss.34 or 115 of the Act((152) See s.54L(2)). When the application of a plaintiff has been refused and all appeals and reviews finalised, he or she must be removed from Australia((153) s.54P(3)). If the process has not been completed within 273 days of "application custody", the plaintiff must be released((154) s.54Q(1)). Furthermore, as I have pointed out, each of the plaintiffs is entitled to obtain his or her release from custody by asking the Minister in writing to be removed from Australia.

50. Accordingly, Div.4B does not usurp the judicial power of the Commonwealth either in its ordinary operation or in its effect on the applications of the plaintiffs for their release from custody. Division 4B involves no assumption of the essential attributes of judicial power by the legislature. It involves no interference with the judicial process itself. It involves no enactment of a Bill of Attainder or of Pains and Penalties.

Inconsistency with the Human Rights and Equal Opportunity Commission Act

51. The H.R.C. Act was enacted pursuant to s.51(xxix) of the Constitution - the external affairs power. It gives partial effect to the Covenant. The plaintiffs contend that Div.4B, if valid, would constitute a breach of Australia's obligations pursuant to the Covenant and would have the result that the H.R.C. Act would not conform to the Convention because it could no longer apply to designated persons. The plaintiffs then contend that the H.R.C. Act, as impliedly amended by the enactment of Div.4B, would no longer be regarded as appropriate to giving effect to Australia's obligations pursuant to the Convention and would therefore be invalid. It must follow, according to the argument of the plaintiffs, that the Amendment Act was not validly enacted because there was no express or implied intention in the Amendment Act to repeal the H.R.C. Act.

52. To dispose of this argument, it is not necessary to determine whether the enactment of Div.4B constitutes a breach of Australia's obligations under the Convention. The entry into a treaty by Australia does not change the domestic law. The validity of legislation enacted by the Parliament (other than some legislation enacted pursuant to s.51(xxix)) does not depend on it being consistent with a Convention to which Australia is a party. If any inconsistency between the Amendment Act and the provisions of the H.R.C. Act exists, the Amendment Act prevails. There is no principle of statutory interpretation which requires a later Act to be consistent with an earlier enactment. Given that Parliament cannot bind its future legislative power((155) South-Eastern Drainage Board (S.A) v. Savings Bank of South Australia [1939] HCA 40; (1939) 62 CLR 603.), it would be unconstitutional for such a principle of statutory interpretation to be adopted. Moreover, there is no principle of statutory interpretation that an Act is invalid if it has the unforeseen consequence of repealing an earlier Act.

53. Independently of these general considerations, however, Parliament has made it clear that Div.4B is to be operative regardless of its effect on earlier enactments. Section 54T provides:

"If this Division is inconsistent with another provision of this Act or with another law in force in Australia, whether written or unwritten, other than the Constitution: (a) this Division applies; and (b) the other law only applies so far as it is capable of operating concurrently with this Division."

54. In any event, the Amendment Act does not have the effect of rendering the H.R.C. Act invalid. It is not the case that a law which gives effect to Australia's obligations under a treaty can only be supported by s.51(xxix) if it gives effect to all obligations under that treaty((156) The Commonwealth v. Tasmania (The Tasmanian Dam Case) [1983] HCA 21; (1983) 158 CLR 1, at pp 172, 233-234, 268; Richardson v. Forestry Commission [1988] HCA 10; (1988) 164 CLR 261.). As long as the legislation can reasonably be regarded as appropriate for implementing the provisions of the treaty, it will be valid. Regardless of the effect of the Amendment Act, the H.R.C. Act can still reasonably be so regarded.

Division 4B is not invalid

55. For those reasons, Div.4B is a valid law of the Parliament of the Commonwealth. Because Div.4B is valid, question 2 of the case stated does not arise. I would answer the questions of law submitted for the consideration of this Court as follows:

Q.1 Are sections 54L, 54N or 54R of the Migration Act 1958, as amended, invalid in respect of the applications for release from custody made by the plaintiffs in the Federal Court of Australia?

Answer: No.

Q.2 If yes, are the defendants under a legal duty to decide the plaintiffs' applications for release from custody: (a) having regard to the Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967; (b) having regard to the International Covenant on Civil and Political Rights set out in Sched.2 of the Human Rights and Equal Opportunity Commission Act 1986?

Answer: Not necessary to answer.

ORDER

Answer the questions reserved for the consideration of the Full Court as follows:

1. Are ss.54L, 54N or 54R of the Migration Act 1958 (Cth) invalid in respect of the applications for release from custody made by the plaintiffs in the Federal Court of Australia?

Answer: Sections 54L and 54N are valid. Section 54R is invalid.

2. If yes, are the defendants under a legal duty to decide the plaintiffs' applications for release from custody: (a) having regard to the Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967; (b) having regard to the International Covenant on Civil and Political Rights set out in Sched.2 of the Human Rights and Equal Opportunity Commission Act 1986 (Cth)?

Answer: Does not arise.

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