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Migration Amendment (Duration of Detention) Bill 2003

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 182 2002–03

Migration Amendment (Duration of Detention) Bill 2003

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23 June 2003

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Migration Amendment (Duration of Detention) Bill 2003

Date Introduced: 18 June 2003

House: House of Representatives

Portfolio: Immigration and Multicultural and Indigenous Affairs

Commencement: One day after Royal Assent.

Purpose

To amend the *Migration Act 1958* to prevent or limit courts from issuing interim orders for the release of immigration detainees.

Background

The Bill has been introduced to prevent interlocutory or interim orders for the release of detainees whether or not in the context of broader judicial review proceedings. This has been prompted by several cases where such release has been ordered by the Federal Court, for example *Al Masri's Case* and *VFAD's Case* discussed below.

Broadly, interlocutory orders may be made on the balance of convenience where they relate squarely to a decision under review and where there is a serious question to be tried. The cases which raise these issues regarding immigration detention would seem to be rare. Essentially, the basic dispute needs to be the 'downstream' issue of detention rather than an 'upstream' issue, such as the decision not to issue a protection visa. The cases discussed below involve 'downstream' issues: either detention pending deportation or removal or detention following an apparent decision to grant a valid protection visa.

Before discussing the recent cases where release orders have been made, it is worth noting the broader context and parameters of immigration detention, starting with *Lim's Case*. The validity of the existing provisions in the *Migration Act 1958* and proposed provisions in this Bill will be measured against the parameters set down in such cases.

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The Leading Judicial Authority on Detention

On 27 November 1989 and 31 March 1990 two groups of ethnic Chinese and ethnic Vietnamese asylum seekers arrived in Broome in the *Pender Bay* and the *Beagle*. All the asylum seekers had become Cambodian nationals. None held valid visas; all were subsequently detained. Most lodged applications for refugee status but were refused between 3 and 6 April 1992. The decisions were appealed and were ultimately set aside on 15 April 1992. As part of the appeal, applications were made for interim orders to release the detainees, based on the Federal Court decision in *Msilanga* (1991) (see below).

A hearing was set down for 7 May 1992.

Amendment

The *Migration Amendment Act 1992* was introduced and passed on 5 May 1992 and commenced on 6 May,¹ in time to affect hearings in the Federal Court on the release of the applicants on 7 May. It was expressed to be an 'interim measure' intended to target 'a specific class of persons', addressing 'the pressing requirements of the current situation'.²

It applied to 'designated persons' who arrived by boat between about 1989 and 1994.³

The 'interim measure' was later formalised by the *Migration Reform Act 1992* to include all 'unlawful non-citizens' (ie, persons present in Australia who do not have a valid visa).⁴ Using the *Migration Amendment Act 1992* model, the amendments introduced by this Act required mandatory detention of all boat people, illegal entrants and deportees. The relevant provisions, now sections 183, 189 and 196, commenced on 1 September 1994.⁵

Relevant parts of these provisions are extracted in **Appendix 1**.

High Court

In 1992, in *Lim's Case*⁶ the High Court affirmed the constitutionality of 'administrative detention' under the *Migration Act 1958* at least where the detention is reasonably necessary for immigration processing. Brennan, Deane and Dawson JJ held that the provisions introduced by the *Migration Amendment Act 1992* would 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 ...*⁷

The key issue for domestic law is that administrative detention which is not 'reasonably capable of being seen as necessary for the purposes of deportation [etc.]' will be characterised as punitive and will contravene the constitutional requirement for separation

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of powers. In the view of Brennan, Deane and Dawson JJ administrative detention will not be characterised as punitive if it is reasonably necessary for processing or deportation. In McHugh J's words, a law permitting administrative detention 'cannot be so characterised [as punitive] if the purpose of the imprisonment is to achieve some legitimate non-punitive object'.⁸

The majority judges commented on the practical limits of reasonable necessity. They indicated that the various circumstances surrounding detention *might* impact upon a finding as to whether the detention was reasonably necessary for immigration processing. For example, in the majority judges' view various aspects of the regime, such as the initial time limit on detention, the requirement to deport or remove detainees as soon as practicable and the ability of detainees to unilaterally terminate their detention (by agreeing to deportation or removal) 'suffice 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 ... the making and consideration of an entry application'.⁹ By contrast, McHugh J emphasised the burden on public administration. He noted that '[t]he 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'.¹⁰

The History of Interim Orders for Release

In 1991, in *Msilanga v. Hand*, the Federal Court considered its power to issue interim orders for the release of detainees pending the outcome of judicial review proceedings. The applicant had served a prison sentence for criminal assault and had been released. He was then the subject of a deportation order, on character grounds, and was detained under the *Migration Act 1958* pending his deportation. He appealed the deportation order to the Administrative Appeals Tribunal. He also sought orders from the Court for his release.

Von Doussa J

Von Doussa J ordered his release, partly on the basis that detention was for a non-migration purpose – to protect the victim and the community and to prevent flight – and that this might stretch the detention power under the *Migration Act 1958*:

If the applicant were not a non-citizen under the Migration Act there would be no question of him being detained in custody beyond ... his sentence. It is ... not open to the authorities to implement a victim's desire born out of fear of further attack ...¹¹

Von Doussa J relied on two sections in two Acts:

- section 15 of the *Administrative Decisions (Judicial Review) Act 1977*, and/or.
- section 23 of the *Federal Court of Australia Act 1976*.

Section 15 allows the Court to stay or 'suspend the operation' of a decision that is subject to an application under the *Administrative Decisions (Judicial Review) Act 1977*. Section

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23 allows the Court to make orders 'of such kinds, including interlocutory orders ... as the Court thinks appropriate' provided they relate to 'matters' that are within its jurisdiction.

Orders must relate to decision under review

Von Doussa J was conscious of reservations expressed by Gummow J in *Elmi v. MIEA*. Gummow J said that while sections 15 and 23 might support interim orders for release, they could not be used to attack a decision regarding detention where the judicial review application related to another decision, for example a decision not to grant a visa:

[G]ranted the scope of the power in s 15 ... there remains the difficulty in linking the decision, whose operation is sought to be suspended, or proceedings under which are sought to be stayed with the decision sought to be reviewed under ... the ADJR Act.¹²

He distinguished the facts in *Msilanga v. Hand* from those in *Elmi v. MIEA*:

In [*Elmi*], the decision to which the applicant was held in custody ... was not the subject of the application for review. In the present case, both the decisions pursuant to which the applicant has been, or is being held, are the subject of the proceedings.

Serious Question and Balance of Convenience

Von Doussa J expressed the key questions as follows:

On an application for interlocutory relief the court has to consider 2 questions: first, whether on the substantive issues there is a *serious question to be tried*; and second, if that question is resolved in favour of the applicant, where the *balance of the convenience* lies. If the balance is in favour of the order sought by the applicant it will be made pending further order of the court or the determination of the issues.¹³

Full Court

On appeal, a Full Court upheld Von Doussa's jurisdiction to issue an order for release.

In *MILGEA v. Msilanga's* Beamont J, with whom Black CJ agreed, held that:

[Both section 15 and/or section 23] empowers the court, in an appropriate case ... to restrain, on an interim basis and pending final determination of the substantive claim, administrative action where a serious question arises as to the validity of that action.¹⁴

While the question of what was 'appropriate case' to make an interlocutory order would vary from case to case, a judge need not require a detainee to establish 'exceptional' or 'extraordinary' circumstances. It was sufficient for the judge to ask whether a serious question was raised in relation to the validity of the administrative action and whether the person's release was consistent with the 'balance of convenience' in all the circumstances.

(Mr Msilanga lost his appeal to the Administrative Appeals Tribunal.¹⁵)

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Montero's Case

A similar approach was adopted at first instance and on appeal in *Montero's Case*.¹⁶

The Resulting Amendments

As noted above, the *Migration Amendment Act 1992* and *Migration Reform Act 1992* gave legislative cover to the policy of immigration detention under the *Migration Act 1958*. Significantly, they sought to restrict judicial interference with immigration detention, addressing the concerns in *Msilanga's Case* whilst relying on the judgment in *Lim's Case*.

In introducing the Migration Amendment Bill 1992 the then Immigration Minister said:

The most important aspect of this legislation is that it provides that a court cannot interfere with the period of custody. I repeat: 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.¹⁷

So, the period of custody was to depend on the *Migration Act 1958* and the Constitution. For present purposes, the key limitations were the requirements that detention:

- (a) continue only until a person is removed, deported or granted a visa¹⁸ and
- (b) be reasonably capable of being seen as necessary for the purposes of deportation.

The latter requirement was explored in *Al Masri's Case* and the former in *VFAD's Case*.

Release where Deportation is Not Reasonably Practicable

In 2002, in *Al Masri v. MIMIA*¹⁹ the Federal Court considered whether it could issue orders for the release of immigration detainees notwithstanding the requirement that unlawful non-citizens must be detained, pending deportation or removal (section 196).

Merkel J

Broadly, the key issue was whether the continued lawful detention of the applicant under the *Migration Act 1958* could become unlawful as a result of circumstances which had frustrated his removal or deportation. Merkel J held that detention could only be lawful for so long as removal was 'reasonably practicable' 'in the sense that there must be a *real likelihood or prospect of removal in the foreseeable future*'.²⁰ Specifically, he found that certain purposive and temporal limitations acted as a restraint on the power to detain. *That is, detention could only be for purposes associated with the processing and removal of aliens. Moreover, it could only last for as long as was reasonably necessary to give effect to those purposes.*

The purposive limitation was drawn from the terms of the Act and the decision of the High Court in *Lim's Case*.²¹ The temporal limitation was drawn from the terms of the Act and from decisions of the United Kingdom Privy Council and the United States Supreme Court, 'subject, however, to appropriate modification'.²² The Act required that unlawful

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non-citizens who request to be removed from Australia be removed 'as soon as reasonably practicable'.²³ In Merkel J's view, this requirement was 'one of the factors that supported the statutory validity [of immigration detention]' in *Lim's Case*. The foreign cases held that, as the power to detain was given 'to enable the machinery of deportation to be carried out', it was 'impliedly limited to a period which is reasonably necessary for that purpose'.²⁴ So, if it was clear that detention was not going to be possible within a reasonable time, the conclusion, *rebuttable by clear statutory language*, was that the detention was unlawful.²⁵

Full Court

In April 2003, a Full Court unanimously upheld the approach taken by Merkel J. They took the same view of the significance of the 'temporal limitation' in *Lim's Case*:

the reasoning of the majority of the High Court in *Lim* ... leads us to conclude that unless the power and duty of detention conferred by s 196 were subject to an implied temporal limitation broadly of the nature of the second limitation found by the trial judge, a serious question of invalidity would arise. Without such a limitation it may well be that the power to detain would go beyond what the High Court ... considered to be reasonably capable of being seen as necessary for the purposes of deportation.²⁶

One aspect of the 'temporal limitation' in *Lim's Case* was that a detainee had the 'practical capacity' to bring about his or her release from detention by electing to be removed. Another aspect of the 'temporal limitation' was a statutory time limit on detention. The detention regime for 'designated persons' contained a 273 day time limit on detention.²⁷ They considered that this was missing in the regime for detention pending removal.²⁸

One of the implied limitations discussed by the trial judge was that detention would be permissible until DIMIA stopped making efforts to deport as soon as was 'reasonable practicable'. This was based on the scenario that a detainee had requested to be deported.

As it relied on these provisions, it ran the risk that the limitation only applied where a detainee had requested deportation. So, *Al Masri* might not have any broader application. But the Court *seemed* to reject this approach in favour of a more general limitation:

The first of the two limitations found by the trial judge was that s 196 was limited in operation to such time as the Minister was taking all reasonable steps to remove a detained person from Australia as soon as reasonably practicable. This limitation emerged from a reading of the power to detain in s 196(1) as subject to the duty imposed upon the Minister by s 198(1) to remove as soon as reasonably practicable. Although the two provisions are part of the same scheme, we would not read them together in this way. If the Minister were not fulfilling his duty under s 198(1) to remove as soon as reasonably practicable the detention would, in our view, still be lawful and the appropriate remedy would be an order in the nature of mandamus to compel the Minister to take the steps required for the performance of his duty.

The Minister's purpose in detaining, however, must be the *bona fide* purpose of removal. Otherwise the detention would not be lawful. If the Minister were to hold a

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person in detention without such a purpose, then the detention would be unlawful and the person entitled to relief in the nature of *habeas corpus*.²⁹

So, regardless of whether a detainee had elected to be deported or removed, there *might* be scope to apply the purposive limitation to assess the lawfulness of their detention.

In focusing on purposive and temporal limitations, the Court did not examine the broader issue of whether continued detention could be considered 'punitive' in nature. But, the judges did express the view that the 'punitive detention' issue might arise in a given case:

[I]t seems to us that if the question is asked directly, the short answer may well be that in the absence of any real likelihood or prospect of removal being effected in the reasonably foreseeable future, the connection between the purpose of removing aliens and their detention becomes so tenuous, if indeed it still exists, as to change the character of the detention so that it becomes essentially punitive in nature.³⁰

These comments *might* suggest that, irrespective of any election by the detainee, the lawfulness of detention is tentative where there is no likelihood of removal or deportation.

Future Cases

Ultimately, the judgment raises uncertainty as to continued detention in any given case. It requires an assessment of whether detention is 'reasonably necessary' in the circumstances:

It is true that implied limitations such as were found by the trial judge would give rise to uncertainty as to the legality of detention, dependent upon an assessment of external circumstances rather than upon the presence or absence of indisputable facts. It may be accepted that uncertainty of this nature is undesirable and that it points to an intention not to create it. In practical terms, however, the difficulty is likely to be more apparent than real. The recent endorsement of the *Hardial Singh* principles by the House of Lords and by the Privy Council, many years after their formulation in 1984, suggests that the less stringent and more flexible concept of reasonableness which lies at the centre of those principles has not caused undue difficulty; and this is hardly surprising since reasonableness is a concept that the courts are accustomed to deal with in many situations, and not least in situations where personal liberty is in issue. Moreover, when the demands of certainty and liberty come into conflict, the tradition of the common law is to lean towards liberty.³¹

However, the majority did acknowledge that the application of the purposive and temporal limitations, so as to ground interlocutory orders for release, was 'not likely to have a frequent operation'.³² They cited the view expressed by French J in *WAIS v. MIMIA*:

The term "as soon as reasonably practicable" in s 198 is an evaluative term which is to be assessed by reference to all the circumstances of the case. What is reasonable is to be determined, inter alia, by reference to the practical difficulties that may lie in the way of making arrangements for removal which involve the cooperation of other countries whether in respect of the particular applicant or generally in relation to the class of applicants of which he is a part. Provided arrangements are being sought

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generically or specifically by reference to the applicant with reasonable expedition it is difficult to see how delays beyond the control of the Minister and his officers can be taken into account in determining what period for removal falls outside the scope of the term "as soon as reasonably practicable" in s 198.³³

Hardial Singh

Both Merkel J and the Full Court referred to the 'Hardial Singh' principles. These arose from a judgment of Woolf LJ in *R v Governor of Durham Prison; Ex parte Hardial Singh*:

Although the power which is given to the Secretary of State ... to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act ... it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.

In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.³⁴

Zadvydas

They also referred to a judgment of Breyer J in *Zadvydas v Davis* which pointed to a 'reasonable time' limitation on the power to detain aliens, pending removal or deportation:

Whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority ... In answering that basic question, the habeas court must ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute. In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances.³⁵

Release where there is a Purported Grant of Visa

Recently, there have been a number of cases in which interlocutory orders were made for the interim release of immigration detainees on the fairly narrow, and unusual, basis that a decision regarding their visa application had been finalised, or *purportedly* finalised.³⁶

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For example in *VFAD of 2002 v. MIMIA* a primary decision maker had prepared and dated an unsigned 'Protection Visa Decision Record' that purportedly granted the applicant a visa. The purported decision was in fact made pending an expedited security assessment. The decision maker went on leave. A positive security assessment was received. However, in the meantime, the policy had been changed, resulting in a suspension in processing of visa applications from Afghan persons pending resolution of the situation in Afghanistan.

The decision record was obtained under the *Freedom of Information Act 1982* and an application was made for his release on the basis that the decision record, whether alone or along with the security assessment, constituted a grant of visa. Moreover, it was argued, there was a 'serious issue to be tried' and the balance of convenience favoured release.

Merkel J ordered his release under section 23 of the *Federal Court of Australia Act 1976*.

Following *VFAD*, there were at least three other cases involving similar facts and orders.³⁷

Full Court

On appeal, the Full Court upheld the decision of Merkel J.³⁸ They took the view that the *Migration Act 1958* did not confine the power to issue interlocutory orders for release:³⁹

There is nothing in the language of s196(3) which, expressly or impliedly, prevents this Court from ordering the release, on an interlocutory basis, of a person who establishes that there is a serious question to be tried regarding the lawfulness of that person's detention. Regrettably, although perhaps inevitably, the task of finally resolving that question may involve a lengthy process. The right to be free from arbitrary and unlawful detention is as fundamental a freedom as our system of values recognises. It is of such paramount importance that it would be remarkable if this Court, in which is vested the judicial power of the Commonwealth, could not, in an appropriate case, order the release of the person from detention at least on an interlocutory basis. It would require language of much greater clarity ... to deprive the Court of the general power to grant interlocutory relief which is conferred by s23.

In so doing, the Full Court recognised that it had returned full circle to *Msilanga*:

The respondent in the present case is in a position not dissimilar in certain respects to that of the applicants in *Msilanga*. While we accept that at a formal level that case, and the many other cases which have subsequently followed it, can be distinguished, the principles which underlie those cases are not distinguishable. Those principles, in our opinion, remain correct, and are applicable to this case.⁴⁰

In other words, where the validity of detention is squarely raised as an issue before a court, it has the power to issue interlocutory orders for release pending a final determination. This is so in relation to the Federal Court at least in the absence of a clear statutory intention, express or implied, in the *Migration Act 1958* to prevent such orders.

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Main Provisions

Schedule 1 amends the *Migration Act 1958*.

Item 1 inserts **new subsections 196(4)-(5)**. Detention is to continue until a court finally determines that detention is unlawful or the detainee is not an unlawful non-citizen.⁴¹

Moreover, this rule applies regardless of whether there is:

- a 'real likelihood [of removal or deportation] in the reasonably foreseeable future', or
- a judgment as to the lawfulness of a decision relating to a visa.

Item 2 provides that the new rules are not retrospective.

Concluding Comments

Clearly, since *Lim's Case*, any case involving indefinite detention, or detention beyond the period that is reasonably necessary for processing or deportation, may be unlawful. This is because a question may arise as to whether the detention is reasonably capable of being seen as necessary for the purposes of immigration processing or deportation or removal. It may also raise a question as to whether the detention should be characterised as punitive.

The issues in *Lim's Case*, and explored in *Al Masri's Case*, arguably reflect the broader proposition that Australian law does not support arbitrary detention of asylum seekers. This proposition has also been extensively explored in the context of international law.

International Law

The 'legality' of mandatory detention under international law has been widely canvassed.⁴² It has been argued that mandatory detention is contrary to the prohibition on unnecessarily restricting the movement of and/or penalising bona fide asylum seekers in the *Convention Relating to the Status of Refugees* (Refugee Convention) (Article 31). Also, it has been argued that it is contrary to the prohibitions on cruel, inhuman and degrading punishment in the *International Covenant on Civil and Political Rights* (ICCPR) (Article 7) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (Article 16). It has also been argued that it is contrary to the prohibition on arbitrary detention in the ICCPR (Article 9(1)) and the *Convention on the Rights of the Child* (CROC) (Article 37). A wide range of other prohibitions and requirements are cited as being relevant to the mandatory detention of asylum seekers.⁴³

The key issue appears to be the prohibition in international conventions on unnecessary or arbitrary detention. As in the Australian cases, there is a nexus between arbitrariness and reasonable necessity. Thus, in *Alphen v The Netherlands* (1990), the Human Rights

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Committee (HRC), the treaty body responsible for the ICCPR, noted that detention could be arbitrary notwithstanding that it was lawful as the concept included 'elements of inappropriateness, injustice and lack of predictability'. The HRC stated that detention 'must not only be lawful but *reasonable* in all the circumstances' and, in addition, 'must be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.⁴⁴ In *A v Australia* (1997)⁴⁵ the HRC commented specifically on the *Migration Amendment Act 1992*. As in *Lim's Case*, the HRC clearly articulated a nexus between necessity and arbitrariness.⁴⁶

Application in *Al Masri*

International law issues may have been a factor in the *Al Masri* decision. Having examined some international law jurisprudence on arbitrary detention the Full Court commented:

We are ... therefore fortified in our conclusion that s 196(1)(a) should be read subject to an implied limitation by reference to the principle that, as far as its language permits, a statute should be read in conformity with Australia's treaty obligations. To read s 196 conformably with Australia's obligations under Art 9(1) of the ICCPR, it would be necessary to read it as subject, at the very least, to an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention.⁴⁷

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Appendix 1: Relevant Provisions of the *Migration Act 1958*

183 Courts must not release designated persons

A court is not to order the release from immigration detention of a designated person.

...

189 Detention of unlawful non-citizens

- (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
- (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
 - (a) is seeking to enter the migration zone (other than an excised offshore place); and
 - (b) would, if in the migration zone, be an unlawful non-citizen;
 the officer must detain the person.
- (3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person ...

190 Non-compliance with immigration clearance basis of detention

For the purposes of section 189, an officer suspects on reasonable grounds that a person in Australia is an unlawful non-citizen if, but not only if, the officer knows, or suspects on reasonable grounds, that the person:

- (a) was required to comply with section 166; and
- (b) did one or more of the following:
 - (i) bypassed, attempted to bypass, or appeared to attempt to bypass, immigration clearance;
 - (ii) went to a clearance officer but was not able to show, or otherwise did not show, evidence required by section 166 to be shown;
 - (iii) if a non-citizen, went to a clearance officer but was not able to give, or otherwise did not give, information required by section 166 to be given.

191 End of certain detention

A person detained because of section 190 must be released from immigration detention if:

- (a) the person gives evidence of his or her identity and Australian citizenship; or
- (b) an officer knows or reasonably believes that the person is an Australian citizen; or
- (c) the person complies with section 166 and either:
 - (i) shows an officer evidence of being a lawful non-citizen; or
 - (ii) is granted a visa.

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196 *Period of detention*

- (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
 - (a) removed from Australia under section 198 or 199; or
 - (b) deported under section 200; or
 - (c) granted a visa.
- (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
- (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

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- (1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

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Endnotes

- 1 The provisions relating to mandatory detention commenced on 6 May 1992. Other provisions commenced 3 June 1992 and 6 November 1992.
- 2 The Hon Gerry Hand, MP, Migration Amendment Bill 1992, [Second Reading Speech](#), House of Representatives, *Debates*, 5 May 1992, p. 2370.
3. Section 183 was inserted as section 54R in [section 3](#) of the *Migration Amendment Act 1992*.
- 4 The delay was intended to allow drafting of subordinate legislation, design and printing of forms, training, development of new information technology systems and programs.
- 5 These provisions were inserted as sections 54W and 54ZD by the *Migration Reform Act 1992*. The *Migration Reform Act 1992* was due to commence on 1 November 1993 but was deferred by the *Migration Laws Amendment Bill 1993* to 1 September 1994.
- 6 *Chu Kheng Lim v. The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
7. *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per Brennan, Deane and Dawson JJ, at p. 33 (emphasis added).
8. *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per McHugh J, at pp. 71–72.
- 9 *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per Brennan, Deane and Dawson JJ, at pp. 33–34.
- 10 *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per McHugh J, at pp. 71–72.
- 11 *Msilanga v. Hand* (1991) 22 ALD 27 at p. 30.
- 12 *Elmi v. Minister for Immigration and Ethnic Affairs* (1988) 17 ALD 471 at p. 472.
- 13 *Msilanga v. Hand* (1991) 22 ALD 27 at p. 28.
14. *Minister for Immigration, Local Government and Ethnic Affairs v. Msilanga* (1992) 105 ALR 301, at p. 313.
- 15 *Re Msilanga and the Minister for Immigration, Local Government & Multicultural Affairs* (1991) 22 ALD 353.
- 16 *Minister for Immigration, Local Government and Ethnic Affairs v. Montero (No 2)* (1992) 26 ALD 158.
- 17 Gerry Hand MP, Migration Amendment Bill 1992, Second Reading Speech, House of Representatives, *Debates*, 5 May 1992, p. 2370.
- 18 Section 196.
- 19 *Al Masri v. Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA [1009](#) (15 August 2002).
20. *Al Masri v. Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA [1009](#) (15 August 2002) at [38] (emphasis added).

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21. *Al Masri v. Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA [1009](#) (15 August 2002) at [19].
22. *Al Masri v. Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA [1009](#) (15 August 2002) at [38].
23. *Migration Act 1958*, section 198.
24. *R v. Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704, per Woolf J at p. 706.
25. *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1997] AC 97.
26. *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Masri* [\[2003\] FCAFC 70](#) (15 April 2003) at [72].
27. *Migration Act 1958*, section 182.
28. *Migration Act 1958*, section 196.
29. *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Masri* [\[2003\] FCAFC 70](#) (15 April 2003) at [135] – [136].
30. *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Masri* [\[2003\] FCAFC 70](#) (15 April 2003) at [75].
31. *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Masri* [\[2003\] FCAFC 70](#) (15 April 2003) at [129].
32. *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Masri* [\[2003\] FCAFC 70](#) (15 April 2003) at [176].
33. *WAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [\[2002\] FCA 1625](#) (23 December 2002) at [58].
34. *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704 at p. 706.
35. *Zadvydas v Davis*, 533 U.S. 678 (2001), per Breyer J at pp. 699-700.
36. *Applicant VFAD of 2002 v. Minister for Immigration & Multicultural Affairs* [\[2002\] FCA 1062](#) ("VFAD"), per Merkel J, *VHAF v. Minister for Immigration and Multicultural and Indigenous Affairs* [\[2002\] FCA 1243](#) ("VHAF"), per Gray J and *VJAB v. Minister for Immigration & Multicultural & Indigenous Affairs* [\[2002\] FCA 1253](#), per Marshall J.
37. *Ibid.*
38. *Minister for Immigration & Multicultural & Indigenous Affairs v. VFAD* [2002] FCAFC 390 (9 December 2002).
39. *Minister for Immigration & Multicultural & Indigenous Affairs v. VFAD* [2002] FCAFC 390 (9 December 2002) at [159].
40. *Minister for Immigration & Multicultural & Indigenous Affairs v. VFAD* [2002] FCAFC 390 (9 December 2002) at [160].
41. **New subsection 196(4).**
42. For example see Chris Sidoti, 'Asylum seekers: human rights obligations', *Migration Action*, Vol 22 No. 2, 2000 pp. 13–16.

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43. See generally Commonwealth Parliament of Australia, Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, February 1994, Chapter 3.
44. Communication No. 305/1988, Human Rights Committee Report 1990, Volume II: UN Doc. A/45/40, paragraph 5.8 (emphasis added).
45. CCPR/C/59/D/560/1993.
46. '[D]etention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State Party has not advanced any grounds particular to the author's case, which would justify his continued detention ... The Committee therefore concludes that the author's detention ... was arbitrary': *ibid*, page 24.
47. *Minister for Immigration & Multicultural & Indigenous Affairs v. Al Masri* [\[2003\] FCAFC 70](#) (15 April 2003) at [156].

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