No Constitutional guarantee of freedom from executive detention

Anthony Hopkins reports on *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2

Introduction

The High Court has upheld the validity of s 501(3A) of the *Migration Act 1958* (Cth) (Act) which requires the minister to cancel a visa if satisfied that the person does not pass the character test. The High Court held that s 501(3A) does not authorise or require the detention of a non-citizen and, accordingly, does not seek to confer upon the minister for immigration and border protection the judicial power of the Commonwealth.

Facts

The plaintiff, John Falzon, was a national of Malta. In 1956, he moved to Australia with his family. He was three years of age at the time. At no time did he obtain Australian citizenship. Until 10 March 2016, he held an Absorbed Person Visa and a Class BF Transitional (Permanent) Visa. His legal status as the holder of these visas was as a lawful non-citizen.

In 2008, Mr Falzon was convicted of trafficking a large commercial quantity of cannabis. He was sentenced to 11 years' imprisonment with a non-parole period of eight years. Four days before the expiration of Mr Falzon's non-parole period, a delegate of the minister cancelled his Absorbed Person Visa pursuant to s 501(3A) of the Act ('cancellation decision'). That had the effect also of cancelling his other visa. Mr Falzon was taken into immigration detention upon being released from custody.

Mr Falzon sought revocation of the cancellation decision. The assistant minister decided not to revoke the cancellation decision on the basis of the character test in s 501, given Mr Falzon's substantial criminal record. In so doing, the assistant minister accepted that that Mr Falzon had strong family ties to Australia (Mr Falzon had two sisters, four brothers, four adult children and 10 grandchildren in Australia as well as nieces, nephews and other family members) and that his removal would cause substantial emotional, psychological and practical hardship to his family.

Mr Falzon commenced proceedings in the High Court's original jurisdiction seeking orders quashing the cancellation decision and the decision not to revoke that decision, an order of mandamus requiring his removal from detention and a declaration that s 501(3A) was invalid.

The Act

Section 501(3A) provides as follows:
The Minister must cancel a visa that has been granted to a person if:

> a) the Minister is satisfied that the person does not pass the character test because of the operation of:
>
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) paragraph (6)(e) (sexually based offences involving a child); and
>
> b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

Section 501(6)(a) of the Act provides that a person does not pass the character test if the person has a substantial criminal record, as defined by s 501(7). Section 501(7)(a), (b) and (c), to which s 501(3A)(a)(i) refers, provide that a person has a substantial criminal record if the person has been sentenced to death, to imprisonment for life, or to a term of imprisonment of 12 months or more.

Arguments

Mr Falzon contended that s 501(3A) purports to confer the judicial power of the Commonwealth on the Minister and thereby infringes Chapter III of the Constitution. Central to Mr Falzon's argument was the proposition that, in its legal operation and practical effect, s 501(3A) further punishes him for the offences he has committed and that that is its purpose.[1]

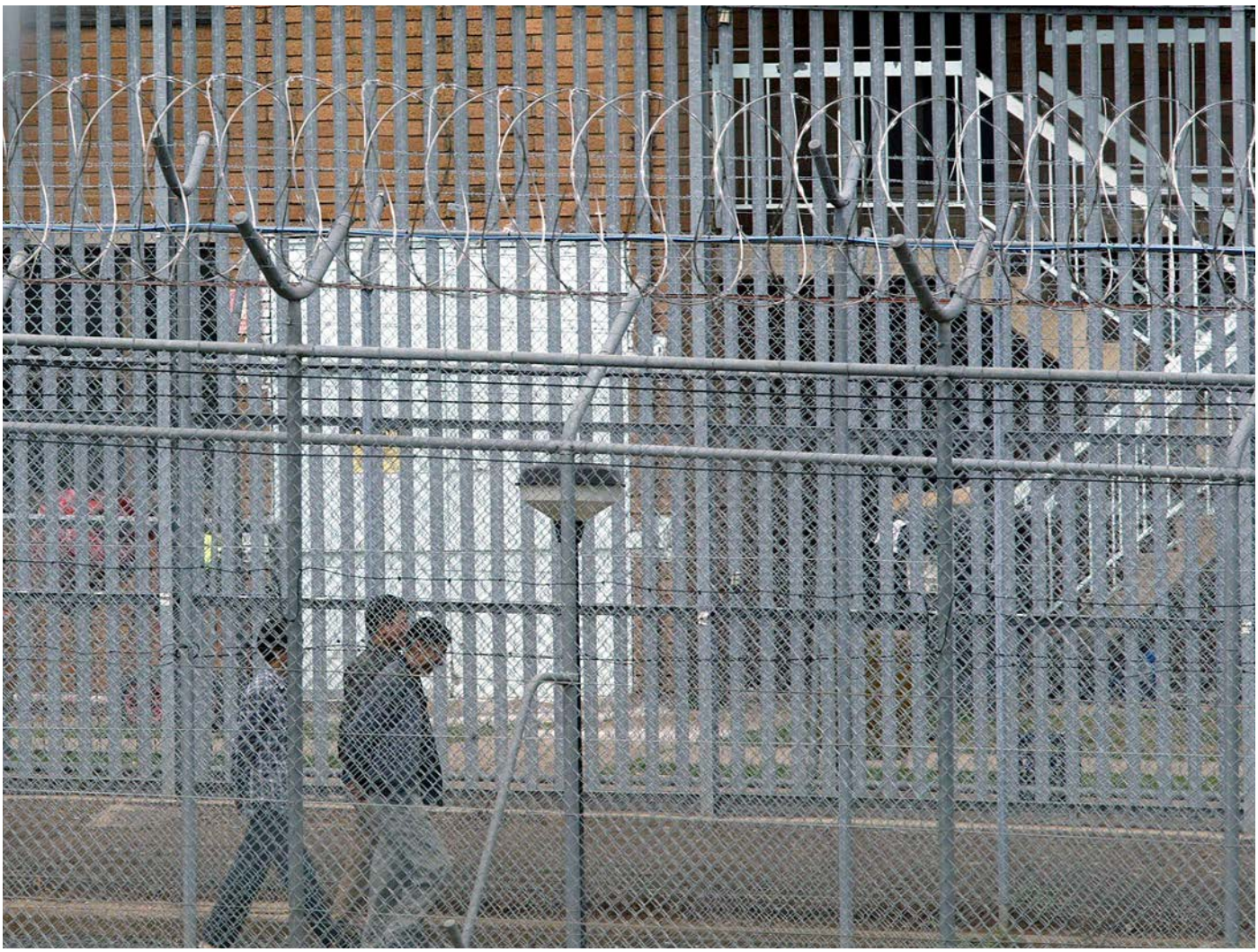
Mr Falzon's principal submission was that the non-judicial detention of a person was punitive and thus involved the exercise of the judicial power of the Commonwealth.[2] He submitted that the only way in which a law by which a person is detained by the Executive may escape characterisation as penal or punitive is to justify it by reference to a non-punitive purpose. That required consideration of whether the law was proportionate to a non-punitive end. Mr Falzon's submission in turn relied upon the argument that there existed a constitutionally guaranteed freedom from executive detention.

The minister submitted that s 501(3A) cannot sensibly be said to authorise detention in its legal and practical operation.[3]

Reasoning of the High Court

The High Court rejected the plaintiff's argument.

In a joint judgment, Kiefel CJ, Bell, Keane and Edelman JJ noted that in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (Lim)*,[4] the High Court had confirmed that under the Constitution the power to adjudge and to punish guilt for an offence against a law of the Commonwealth is exclusive to the



Villawood Detention Centre. Photo: Robert Pearce / Fairfax Photos

Chapter III judiciary. However, there was no constitutionally guaranteed freedom from executive detention.[5] Their Honours held that decisions relied upon by Mr Falzon[6] did not support the notion that any restriction on such a freedom must be justified by showing that the legislative restriction is proportionate.

Kiefel CJ, Bell, Keane and Edelman JJ said that the power to remove or deport aliens from a country is executive in nature and it is non-punitive.[7] However, their Honours also noted that it may be accepted that a legislative power to detain must be justified, in the sense that it must be shown to be directed to a purpose other than to punish.[8] The exercise of a power of cancellation of a visa by reference to the fact of previous criminal offending does not involve the imposition of a punishment for an offence and does not involve an exercise of judicial power.[9]

Their Honours held that s 501(3A) did not authorise or require detention. It operated on the status of Mr Falzon by permitting the cancellation of his visa because of his criminal convictions. That changed his legal status from lawful non-citizen to unlawful non-citizen, and this change meant Mr Falzon was liable to removal from Australia. The detention was associated with facilitating his removal, consistently with s 189 of the Act.[10]

Gageler and Gordon JJ agreed with the joint judgment that the application should be dismissed. Their Honours held[11] that the principle in Lim was concerned with laws that require or authorise detention. However, s 501(3A) neither required nor authorised the detention of non-citizens. Their Honour described the power to cancel a visa under s 501(3A) as one which was administrative in character.[12]

Therefore, the fact that a person whose visa was cancelled under s 501(3A) would become liable to detention was not enough to attract the principle in *Lim*. Gageler and Gordon JJ noted that the provisions of the Act permitting detention were not challenged by Mr Falzon.[13]

Nettle J agreeing with Gageler and Gordon JJ. His Honour drew a distinction between punishment and deportation, concluding that Mr Falzon's detention was not punitive in nature and therefore involved no exercise of judicial power.[14]

END NOTES

1 [2018] HCA 2 at [8].
2 [2018] HCA 2 at [23].
3 [2018] HCA 2 at [22].
4 (1992) 176 CLR 1.
5 [2018] HCA 2 at [25].
6 e.g. *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393; [2014] HCA 13; *McCloy v New South Wales* (2015) 257 CLR 178; [2015] HCA 34.
7 [2018] HCA 2 at [29].
8 [2018] HCA 2 at [33].
9 [2018] HCA 2 at [47].
10 [2018] HCA 2 at [48], [52], [56], [59], [62].
11 [2018] HCA 2 at [69], [83], [84], [86], [87]-[88].
12 [2018] HCA 2 at [88].
13 [2018] HCA 2 at [69], [87].
14 [2018] HCA 2 at [96].