# Detaining and not removing 'unlawful non-citizens'

Aleksandra Ilic reports on *Commonwealth of Australia v AJL20* [2021] HCA 21

A majority of the High Court held that the Executive can continue to detain persons deemed to be 'unlawful non-citizens' even where they have not been removed from Australia 'as soon as reasonably practicable'.

**Background**

In May 2005, AJL20, a Syrian child, arrived in Australia on a child visa. On 2 October 2014, the Minister for Immigration and Border Protection cancelled AJL20's child visa on character grounds under s 501(2) of the *Migration Act 1958* (Cth) (the 'Act'). As a result AJL20 became an 'unlawful non-citizen' within the meaning of s 14 of the Act and was detained on 8 October 2014 (as required by s 189(1) of the Act).

Following his detention, AJL20 made a number of applications for a protection visa, each of which was refused by the Minister on character grounds (at [6]). On 4 November 2019, AJL20 commenced proceedings seeking damages in respect of his false imprisonment by the Commonwealth and on 12 May 2020 commenced further proceedings seeking an order in the nature of a writ of *habeas corpus* (at [7]).

At first instance, in respect of the *habeas corpus* proceeding, on 11 September 2020, Bromberg J made orders releasing AJL20 from immigration detention into the community (at [9]). His Honour held that because the Executive had not removed AJL20 from Australia 'as soon as reasonably practicable' in accordance with s 198(6) of the Act, ALJ20's detention was not for the purpose of removal from Australia and was therefore unlawful (*AJL20 v The Commonwealth* [2020] FCA 1305 at [75], [123]-[125], [128], [170]-[171]). His Honour found that the Executive's desire to comply with Australia's non-refoulment obligations under s 197C of the Act was no justification for the continuing detention (*AJL20 v The Commonwealth* [2020] FCA 1305 at [95]-[99], [123]).

In respect of the damages proceeding, on 29 September 2020, Bromberg J made a declaration that AJL20's detention was

unlawful and damages were recoverable (although quantum of recoverable damages was to be assessed separately) (at [9]).

The Commonwealth appealed in respect of both sets of proceedings to the Full Court of the Federal Court, and following an application by the Attorney-General of the Commonwealth, each appeal was removed to the High Court pursuant to s 40 of the *Judiciary Act 1903* (Cth) (at [10]).

On appeal to the High Court, the Commonwealth conceded that AJL20 had not been removed from Australia 'as soon as practicable' (at [8]) but contended that AJL20's detention was lawful under s 189(1) of the Act as it was required by s 196(1) of the Act, that is (at [82]) that the Act made detention of an unlawful non-citizen lawful until the person is 'actually removed' (irrespective of whether that is done 'as soon as reasonably practicable' or prolonged for some other reason (at [83])). AJL20 argued that s 196(1)) does not authorise the Executive to detain an unlawful non-citizen where its officers have failed to remove that person from Australia 'as soon as reasonably practicable' (at [8]).

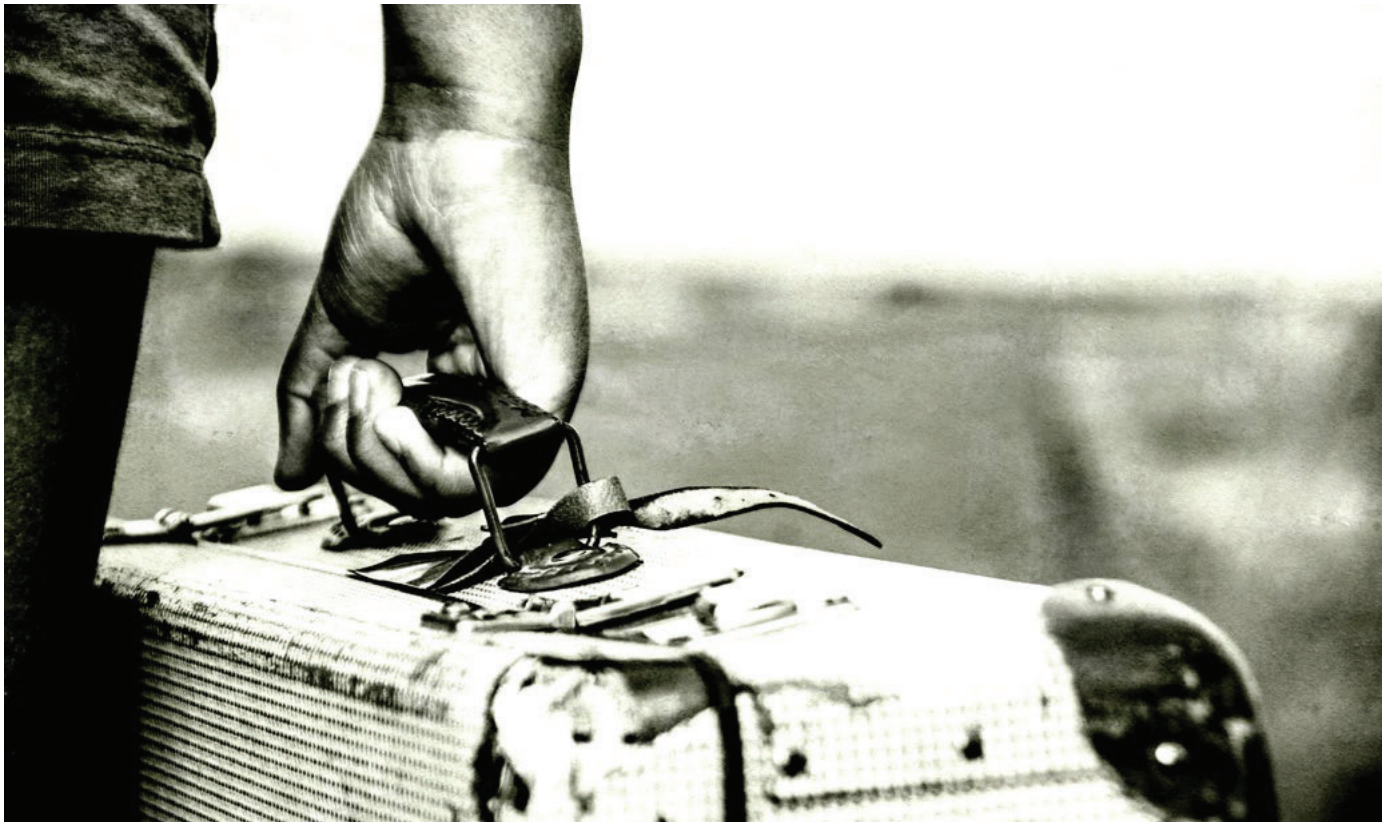
A majority of the High Court (Kiefel CJ, Gageler, Keane and Steward JJ; Gordon, Gleeson and Edelman JJ dissenting) allowed both appeals by the Commonwealth, holding (at [4]-[5]) that the detention of unlawful non-citizens who have not been removed by officers of the Executive 'as soon as reasonably practicable' is lawful, provided that the officers knew or had reasonable suspicion that that person was an unlawful non-citizen.

**Plurality judgment (Kiefel CJ, Gagler, Keane and Steward JJ)**

Their Honours (at [4]-[5]) affirmed the weight of the authorities in *NAES v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1 at [11]-[15], *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625 at [56] and *ASP15 v The Commonwealth* (2016) 248 FCR 372 at [40]-[42], holding that beyond 'any [room for] doubt that the interpretation of ss 196(1) and 198… faithfully reflects the intention of the Act' and that the operation of these sections authorises detention unconstrained by the achievement of removal of the unlawful non-citizen by the Executive 'as soon as reasonably practicable'. Their Honours' judgment went on to say that '[n]o constitutional imperative requires departure from [these principles]. The primary judge erred in thinking otherwise.'

Their Honours held that the purpose for which an officer of the Executive might detain or prolong the detention of a person does not matter, provided that the officer knows or reasonably suspects a person who they detain to be an unlawful non-citizen from the time of detention under s 189 of the Act to the time of removal from Australia (at [61] and [72]). Where officers of the Executive have not discharged their statutory duty to remove an unlawful non-citizen (such as AJL20) from Australia 'as soon as reasonably practicable', the remedy is an order for a writ of mandamus requiring that they do their duty. Such an order gives effect to the scheme of the Act, whereas an order that an unlawful citizen be released into the community because officers of the Executive have not performed their statutory duty would subvert the scheme of the Act (at [72] and [73]).

Finally, the plurality noted that '[i]t is evident that the Executive found the prospect of removal of ALJ20 to Syria in breach of



Australia's non-refoulment obligations unpalatable', and observed that if the Minister wished to avoid that outcome, a visa could have been granted to ALJ20 under s 195A of the Act (at [73]).

**Justices Gordon and Gleeson (dissenting)**

In a joint dissenting judgment, Gordon and Gleeson JJ said (at [81]) that '[t]he central dispute in these appeals is whether detention is lawful even though it continues beyond the time at which it should have come to an end', in this case by a period of 14 months.

Their Honours observed (at [83]) that the consequence of the submission made by the Commonwealth and the interpretation taken by the majority was to 'enable detention of unlawful non-citizens at the unconstrained discretion of the Executive; the terminating event may never occur despite being reasonably practicable, yet detention would remain lawful. That would render the Ch III limits on Executive detention meaningless'.

Their Honours held that '[t]he statutory power to detain an unlawful non-citizen must be understood by reference to two interlocking dimensions – power and duration'. Their Honours concluded (at [87]) that '[t]he tension in the Commonwealth's position can only be resolved by recognising that the prolongation of the detention was not authorised by the Migration Act and was therefore unlawful.' Their Honours regarded this interpretation as consistent with the plurality in Lim (at [90]).

*...the purpose for which an officer of the Executive might detain or prolong the detention of a person does not matter, provided that the officer knows or reasonably suspects a person who they detain to be an unlawful non-citizen from the time of detention under s 189 of the Act...*

In so holding, their Honours emphasised that '[t]he requirement that an officer must maintain their knowledge or reasonable suspicion that a person is an unlawful non-citizen throughout the duration of the person's detention under s 189 of the Migration Act is not – and… could not validly be – the only limit on the duration of lawful detention. The temporal limit expressly fixed by s 198 – the terminating bookend – is removal 'as soon as reasonably practicable'. Therefore the 'lawfulness of detention comes to an end at the time by which removal could have been reasonably practicable' (at [98]).

**Justice Edelman (dissenting)**

In a separate dissenting judgment, Edelman J held that the Court cannot 'uphold a purpose of detention that is beyond the scope and purposes of the statutory authority' (at [165]).

Justice Edelman observed that '[t]he effect of the Commonwealth's submission, if accepted, is that it would be lawful for the Executive, through Commonwealth officers, to continue the detention of an unlawful non-citizen for an objective purpose that is contrary to an express provision concerning the scope of the [Act]' (at [106]-[107] (see also at [126], [130]).

His Honour emphasised the fundamental importance of keeping separate the distinct categories of duty and power contained in Divs 7 and 8 of Part 2 of the Act. His Honour considered the two duties: the duty to keep unlawful non-citizens in detention for proper purposes (versus the power to cease detention by granting a visa), and a duty to remove unlawful non-citizens as soon as reasonably practicable; and emphasised that 'the legal response to a breach of each duty is different'. His Honour distinguished the primary legal response to unlawful detention of *habeas corpus*, namely, release from detention, with the primary legal response to the failure to perform the duty to remove as soon as reasonably practicable, namely *mandamus* to compel removal' (at [110], [142]-[143] and [151]).

Justice Edelman concluded at [114] that '[r]ather than detaining AJL20 unlawfully, in order to remove him consistently with Australia's non-refoulement obligations the Minister could have exercised his power under s 195A of the Migration Act to grant AJL20 a Subclass 070 – Bridging (Removal Pending) visa' (at [114], see also at [135]-[136]). BN