Australia: The promise and disappointments of 'indirect' constitutional limits on immigration detention.

I INTRODUCTION

Australian constitutional constraints on immigration detention derive from the separation of judicial power, rather than any express constitutional or statutory rights. The chapter charts the hopes and disappointments of this indirect, institution-oriented, form of rights protection as it has operated in Australia.

The Australian regime of mandatory immigration detention has been characterised by lengthy and harsh detention, significant suffering on the part of the detainees, and a high level of political indifference to their situation.[1] The constitutional parameters within which Australian immigration detention occurs are outlined, and the extent to which they have impinged upon the practice assessed.

The chapter focuses on the length of time spent in immigration detention, a matter in which Australia's statistics are extreme. It looks back at the arc of constitutional immigration detention jurisprudence beginning with *Lim's case* (1992), the first High Court decision on mandatory immigration detention, and ending with its decision in *AJL20* in 2021. *Lim's case* provided for potential limits on the temporal duration of immigration detention. This potential, modest as it was, has been largely unrealised. The jurisprudence's nadir is widely perceived to the High Court's decision in *Al-Kateb* (2004), in which a majority of the Court upheld indefinite immigration detention. Decisions in the 2010s had raised hopes that constitutional limits on immigration detention derived from the separation of powers were being reinvigorated and would do real work in constraining its duration. *AJL20* has done much to disappoint those hopes.

AJL20 was a challenge to the prolonged immigration detention of a person with a well-founded fear of persecution under the Refugee Convention. The High Court held that the statute governing immigration detention had been breached. This was little comfort to the applicant, as the Court further held that the only remedy for the breach was an order compelling his removal from Australia to Syria. It was accepted that such an order would breach Australia's obligations under international law. The chapter analyses how this situation came to pass and its implications for constitutional constraints on Australian immigration detention.

The chapter ends by looking at a 2022 decision that represents the strengths of the separation of powers jurisprudence as an indirect mode of rights protection. But to find those strengths we have to leave immigration detention behind. In *Alexander's case* the High Court invalidated a ministerial power of citizenship deprivation. The reason for analysing a deprivation case in a chapter on immigration detention is that the Court applied and developed separation of powers reasoning drawn from the immigration detention jurisprudence, notably *Lim's case*, to invalidate the deprivation power.

I argue that together *AJL20* (2021) and *Alexander's case* (2022) serve to dramatize the role that citizenship status, and its absence, play in the Australian separation of powers jurisprudence

[1] The allocation of responsibility for this, as apportioned between the legislature, executive and judiciary, is best approached through detailed case studies. For an excellent recent example see Joyce Chia and Savitri Taylor, 'A Masterclass in Evading the Rule of Law: The Saga of Scott Morrison and Temporary Protection Visas' (2021) 44 UNSWLJ 1114.

on immigration detention. These decisions suggest that Australian constitutional doctrine has seen the liberty secured by the separation of powers effectively tied to citizenship status, given the capacious vulnerabilities of unauthorised non-citizens. While unauthorised non-citizens remain 'legal citizens', able to bring actions in the courts,[2] authority to detain remains relatively impervious to legal challenge due to their exclusion from substantive rights protection with respect to personal liberty.

The incidence of immigration detention

This chapter focuses on the duration of immigration detention. This aspect is both a central strand of the Australian constitutional jurisprudence on immigration detention, and a clear point of contrast with other national jurisdictions. The most recent statistics available, to 31 March 2022, show that the average number of days spent in Australian immigration detention is currently 700 (around 23 months) the highest on record according to the Refugee Council of Australia.[3] As at 31 January 2021, over 120 people had been in immigration detention for five or more years. As at 31 March 2022, there were 1512 people in immigration detention (1450 men and 62 women).[4]

The wider legal context

The chapter addresses the way in which Australian constitutional doctrine has responded to mandatory immigration detention, focusing on the central line of that response, reasoning derived from the separation of powers. All the jurisprudence analysed in this chapter concerns challenges to executive detention pursuant to statutory authority. While outside the scope of this chapter, Australian jurisprudence, allowing for some troubling anomalies,[5] has expressed strong antipathy toward the constitutionality of an inherent power of executive detention; that is a power of detention absent statutory authorisation.[6]

Two other, interrelated, aspects of the wider picture are noted at the outset: the extensive and prescriptive statutory regime, and the rich jurisprudence of administrative law challenges to executive action under that regime. The Migration Act 1958 (Cth), the statutory framework governing immigration law in Australia, extends to two volumes of detailed and prescriptive provisions (and attendant sub-statutory regulations, directions and policies). The architecture, extent and prescriptiveness of the Migration Act are largely motivated by a desire to curtail judicial review of executive action in the area. The statute has developed through an ongoing sequence of legislative amendment followed by judicial reaction, giving rise to further legislative amendment….. The executive has at times encountered parliamentary resistance to

[2] Karen Knop, 'Citizenship, Public and Private' (2008) 71 *Law and Contemporary Problems* 309, drawing on JGA Pocock, 'The Ideal of Citizenship since Classical Times' (1992) 99 *Queen's Quarterly* 33 (the latter reprinted in Ronald Beiner, *Theorizing Citizenship* (State University of New York Press, 1995).

[3] See Refugee Council of Australia, 'Statistics on people in detention in Australia': https://www.refugeecouncil.org.au/detention-australia-statistics/5/ , last accessed 25 July 2022. The data presented is taken from statistics published by the Department of Home Affairs, and from Parliamentary questions on notice. The Refugee Council website links to the data relied on.

[4] Refugee Council of Australia, 'Number of people in detention in Australia' https://www.refugeecouncil.org.au/detention-australia-statistics/2/ , last accessed 25 July 2022.

[5] *Ruddock v Vadarlis* [2001] FCA 1329, (2001) 110 FCR 491 (The Tampa).

[6] CPCF #, Plaintiff M68#

its proposed amendments,[7] but legislative responses to judicial decisions in the immigration area are not infrequent.

Among other consequences, repeated legislative attempts to stop or reduce the flow of judicial review of executive action have, in the manner of an overtightened faucet, generated leaks of their own. The detailed prescriptive regime generates unintended inconsistencies and issues. This has been a contributing cause of the dense and extensive body of Australian administrative law devoted to immigration, including immigration detention. Indeed, the development and concerns of Australian administrative law as a field have been shaped by immigration more than any other functional area of law.[8] Attempts to oust or curtail judicial review of immigration have provoked a 'constitutionalization' of Australian judicial review of executive action, entrenching it against legislative removal.[9]

II – THE PROMISE OF CONSTITUTIONAL LIMITS ON EXECUTIVE FUNCTIONS: *CHU KHENG LIM* (1992)[10]

Chu Kheng Lim v Minister for Immigration (1992) ('*Lim*') set the parameters of Australian constitutional argument on mandatory immigration detention.[11] A 2020 immigration detention decision simply defines the constitutional principles to emerge from *Lim* as 'the seminal holding' on the topic.[12] *Lim* was the first constitutional challenge to mandatory immigration detention. The plaintiffs were Cambodian nationals who had arrived by boat without legal authorisation in late 1989 and 1990 and subsequently applied for refugee status. Two years later, their claims for refugee status still being processed and still in detention, they brought an application for release in the Federal Court. The amending legislation that introduced mandatory immigration detention into Australia was enacted the day before their application for release was due to be heard (to that point authority to detain had relied on a provision the government anticipated would not withstand challenge).[13] The constitutional challenge was to the amending legislation.

The amending legislation provided that a class of 'designated persons' including the applicants were to remain, or be placed in, custody until either removed from Australia or granted an entry permit. The legislation contained some limits on immigration detention: a fixed temporal limit of 273 days (9 months), and a section which provided that an officer must remove a detainee from Australia as soon as practicable if the detainee asked the Minister, in writing, to be removed.[14]

---

[7] Though even then, there have proved to be a range of sub-statutory means and mechanisms whereby it can often achieve its goals: see eg Taylor and Chia, above n#

[8] Gageler article #; Hooper #

[9] Plaintiff S157 (2003); Matthew Groves #

[10] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* # (1992) 219 CLR 562. This chapter's account of *Lim* and *Al-Kateb* draws on Rayner Thwaites, *The Liberty of Non-Citizens: Indefinite Detention in Commonwealth Countries* (Hart Publishing, 2014), chapters 2 and 3.

[11] This chapter's focus is on the constitutional constraints on Australian immigration detention. The decisions are characterised by intertwined analyses of statutory provisions and constitutional doctrine.

[12] '…the holding in *Lim* (which for convenience I will call "the seminal holding")…': *AJL20 v Commonwealth of Australia* [2020] FCA 1305, [29].

[13] # Div 4B

[14] In addition, the legislation contained requirements that a non-citizen be removed from Australia 'as soon as practicable' if he or she either failed to apply for an entry permit within two months, or had such an application refused and exhausted appeals and review of that decision: #

In *Lim's case*, the High Court held that the amending legislation authorised the plaintiffs' detention.[15] To reach this conclusion, the Court had to find the scheme, in relevant part,[16] constitutional. The Court had to determine whether there were constitutional limitations on the Commonwealth's legislative power to authorise detention by the executive.

The constitutional reasoning centred on separation of powers. The Australian Constitution provides, among other matters, for the national Parliament and legislative power in Chapter I, the executive in Chapter II, and the federal judiciary in Chapter III. Chapter III has been held to make exhaustive provision for the exercise of judicial power in federal matters. While there is a complexity of rules, the principal rule here is that judicial power in federal matters is exclusive to courts.[17] 'Federal matters' in this context refers to matters described in sections 75 and 76 of the Constitution as falling within federal jurisdiction.

The reasoning on constitutional limitations on legislative power started from the proposition that:[18]

> 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.[19]

The rationale for this demarcation of functions is the protection of personal liberty.[20] This protective purpose was indirect, the concern for the effect of the legislation on personal liberty can be found 'subsumed' in the constitutional considerations about judicial power.[21] The exclusive allocation of punitive detention to the courts ensured that liberty could only be 'forfeited for misconduct…in accordance with the safeguards against injustice' that accompanied the exercise of judicial power in federal matters.[22] By way of broad analogy with United States jurisprudence, the central concern was to ensure that deprivation of liberty was attended by due process.[23] Australian constitutional jurisprudence on judicial independence and integrity was given point in its service of personal liberty.

---

[15] The legality of the detention was only secured by the amending legislation. The preceding legislation was held not to authorise the plaintiff's detention. In the absence of the freshly enacted Division 4B, 'the continued detention of each plaintiff in custody…was unlawful.': *Lim*, 22 (Brennan, Deane and Dawson JJ), 64 (McHugh J). The Court did rule one provision constitutionally invalid on separation of powers grounds, s 54R, but this was not fatal to the validity of the regime as a whole.

[16] Section 54R…

[17] This formulation arises from the combined effect of authorities a hundred years apart, notably *Waterside Workers' Federation of Australia v J.W. Alexander Ltd* [1918] HCA 56; (1918) 25 CLR 434 and *Burns v Corbett* (2018) 265 CLR 304.

[18] My account of *Lim* focuses on the joint judgment of Brennan, Deane and Dawson JJ, held to supply the ratio of the decision: see eg *Al-Kateb*, above n # [127]-[133], [139] (Gummow J), [251]-[252] (Hayne J).

[19] *Lim*, 22 (per Brennan et al).

[20] This is made explicit in later cases, notably Alexander's case, discussed in Part V below: *Alexander v Minister for Home Affairs* [2022] HCA 19, [73].

[21] To paraphrase the later decision of *South Australia v Totani* (2010) 242 CLR 1, [424]# (Crennan and Bell JJ).

[22] Alexander's case, above n#, [73]

[23] This comparative analogy was recently made explicit in the majority judgments in Alexander's case, above n #. See for example the lead judgments use of Goldberg J's reasoning in *Kennedy v Mendoza-Martinez* (1963) 372 US 144: *Alexander's case,* [78] (Kiefel CJ, Keane and Gleeson JJ).

The Court in *Lim* ruled that involuntary detention by the executive was prima facie unconstitutional.[24] The assumption that involuntary detention was punitive was underwritten by the harshness of the practice. In terms adopted in a later judgment, 'The harsher the consequence, the more likely it is that the law will be interpreted as a response to proscribed conduct',[25] and thus for the purpose of punishment. The seriousness of detention, and the close historical association between detention and punishment, gave rise to an inference that 'the legislature wishes to punish the person to be detained'.[26] Any departure from this starting point, a constitutional immunity from executive detention, required justification.

Attention then shifted to the exceptions, and in particular, the position of non-citizens. The Court registered a non-citizen's vulnerability to deportation, '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 practical question animating the Australian constitutional jurisprudence on immigration detention is how much? To what extent does a non-citizen's vulnerability to deportation diminish the protection of Ch. III? What is the scope of the relevant exception to the constitutional immunity from executive detention?

The exceptions to the constitutional immunity were conceptualised and defined with reference to purpose. The Court held that involuntary detention by the executive, in the absence of a legitimate non-punitive purpose, constituted punishment and would accordingly be unconstitutional as contrary to the separation of powers. What constitutes 'a legitimate non-punitive purpose'? With respect to immigration detention, the High Court majority in *Lim* accepted two 'legitimate non-punitive purposes': immigration processing and facilitating removal. Executive detention for those purposes did not contravene the separation of judicial power. McHugh J, at variance with the majority on this point, framed the purpose of removal in wider terms, extending to ensuring that 'the deportee is excluded from the community pending his or her removal from the country'.[28]

What needed to be determined was whether a case fell within the constitutional immunity, or an exception to it.[29] This required assessing the connection between detention and the legitimate immigration purposes noted above; namely processing and removal. The Court in *Lim* held that the purposive link between detention and removal (or detention and processing) was to be assessed through a 'reasonable necessity' test. Were the detention provisions 'reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable the application for an entry permit to be made and considered.' [30] This appeared to provide a loose proportionality test, assessing whether a measure authorising immigration detention overreached as a disproportionate means of securing otherwise legitimate ends.

---

[24] As later expressed by Gleeson CJ in *Behrooz*: 'what is punitive in nature about involuntary detention (subject to a number of exceptions) is the deprivation of liberty involved…For a citizen, that alone would ordinarily constitute punishment': *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 499 [20] – [21]. The conditioning of the statement on citizenship is a central theme of this chapter. It does not blunt the recognition of detention as intrinsically punitive, absent non-punitive justification. See also Alexander's case, [236] (Edelman J).

[25] *Alexander v Minister for Home Affairs* [2022] HCA 19, [244] per Edelman J.

[26] *Falzon v Minister for Immigration and Border Protection* HCA# (2018) 262 CLR 333, [24].

[27] *Lim,* above n,

[28] *Lim*, 71. McHugh J cited *Shaughnessy v United States; Ex rel. Mezei* 345 US 206 (1953) among other authorities for this point.

[29] See *Cunliffe v Commonwealth* [1994] HCA 44, (1994) 182 CLR 272, 323 (Brennan J).

[30] *Lim*, 10 (Mason CJ), 33 (Brennan, Deane and Dawson JJ), 58 (Gaudron J), 65, 66 and 71 (McHugh J).

The above reasoning: the existence of a constitutional immunity to executive detention, with exceptions for legitimate non-punitive purposes, particularised in the case of immigration to (at least) immigration processing and facilitating removal, has remained a constant over the ensuring three decades, though the strength of judicial commitment to it has waxed and waned.[31] At the highest level of abstraction, this structure of a starting assumption of liberty, with departures from it justified with reference to immigration purposes (with respect to unauthorised non-citizens), is replicated across many national jurisdictions, including those with express rights instruments.[32] The comparative differences emerge in how this structure is applied.[33]

How was it applied in *Lim*? In *Lim*, as in every subsequent Australian case on the constitutional dimensions of immigration detention, it was the statutory limits on detention that determined whether it was capable of being seen as necessary for the execution of a legitimate non-punitive immigration purpose. *Lim* did not deliver a clear message on the outer temporal limit of immigration detention as the time limit was treated as part of a package of limitations. The joint judgment's statement on constitutionality took the form of a counterfactual. It held that a limit of 273 days (9 months), following a period of unlawful detention, would not have been sufficient without the request for removal provision. It was not clear whether detention in excess of 273 days would be constitutional when coupled with the request for removal provision. What was clear is that the request for removal provision was critical to constitutionality.

Three decades on, *Lim* remains the 'seminal holding' with respect to the constitutionality of immigration detention in Australia,[34] at the same time as what it requires is fiercely contested. To provide a brief stocktake on what it did and did not do, the High Court's reasoning in *Lim* did not mandate periodic review of the need for detention, nor question the duty on an officer to detain a person where they had a 'reasonable suspicion' that the person fell in the requisite category. What it did appear to offer a detainee by way of constitutional protection was a loose proportionality test to discipline the purposive link between detention and a permissible immigration purpose. Detention had to be 'reasonably capable of being seen as necessary' for the purpose of processing or removal. The principal divide in the subsequent jurisprudence has been whether this means that authority to detain rests on the viability of removal.

A statutory development contemporaneous with *Lim* was the re-organisation of the Migration Act 1958 around a binary, whereby a visa became the condition of lawful authority to remain in Australia.[35] Non-citizens with visas were lawfully in Australia, those without - unlawful. As we'll see, this binary reasoning comes to inform the constitutional jurisprudence in *Al-Kateb*.

[31] Notably, members of the *Al-Kateb* majority expressed the view that the exceptions might be so many and extensive as to weaken the starting assumption of a constitutional immunity, see text accompany n # below.
[32] See eg *R v Governor of Durham Prison, ex parte Singh* [1983] EWHC 1 (QB), [1984] 1 All ER 983 (Hardial Singh) (UK); *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2007] SCC 9, [2007] 1 SCR 350; *Zadvydas v Davis* 533 US 678 (2001).
[33] Thwaites, above n #, with respect to Australia, the United Kingdom and Canada and (with a narrower focus, limited to the *Zadvydas* decision) the United States.
[34] See text accompanying n 12, above.
[35] Introduced in 1992, coming into effect in 1994 #.

Authority to detain conditioned on the viability of removal: Al Masri

A decade after *Lim*, a series of legal challenges sought to challenge authority to detain on the basis of the 'reasonable necessity' test from that decision. As detailed above, the constitutionality of immigration detention had relied on the request for removal provision, on the assumption that by this means a detainee could secure their release. What happened when this assumption was disappointed?

One answer was furnished by the 2003 *Al-Masri* decision of the Full Court of the Federal Court.[36] Mr Al-Masri, a Palestinian from the Gaza Strip, arrived in Australia in June 2001 and was placed in immigration detention. His application for refugee status was not granted and he made a written request to be returned to the Gaza Strip in December 2001. The Australian government was unable to secure his removal to Gaza or any third country or territory. He sought an order in the nature of habeas corpus for release from detention. His order was granted at first instance and upheld on appeal. The orders for release did not preclude the Minister taking Mr Al-Masri back into detention if his removal was imminent, and several weeks after his release he was taken back into detention on the grounds that the Minister was now in a position to remove him. He was removed from Australian several days later, taken to the Gaza Strip.[37]

To complicate matters, *Al-Masri* was decided on statutory interpretation grounds, though the statute was interpreted in the shadow of constitutional invalidity. The presumption in favour of constitutionality was held to mandate the interpretation arrived at by the Court. The Full Court of the Federal Court read *Lim* as requiring that the request for removal provision be directed in 'a genuine and realistic sense towards removal' from Australia if it was to serve its constitutional function.[38] It stated that in *Lim* the 'scales were tilted in favour of validity' by the request for removal provision by reason of that provision's 'presumed practical effect'.[39] For the request for removal provision to do the constitutional work assigned to it by the reasoning in *Lim*, it must be true that 'it always lies within the power of a designated person to bring his or her custody to an end'.[40]

In *Al-Masri*, the Australian government argued that an implied temporal limitation would result in the release of those 'who had no right to be…in Australia'. The Court agreed it would be releasing those with no right to remain but did not accept that this involved a contradiction. It rejected the equivalence at the heart of the government's case between the absence of a right to remain and the absence of a right to liberty. An unlawful non-citizen released from detention remained vulnerable to deportation, as demonstrated in Mr Al-Masri's case. In short, the decision held that authority to detain for the purpose of removal was conditioned on the viability of removal. In reaching this conclusion, the joint judgment emphasised that the common law's concern for the liberty of individuals extends to those who are within Australia unlawfully, drawing on Australian and comparative authority to this effect.[41] [#release of Mr Al Kateb following *Al Masri*]

---

[36] *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70, (2003) 126 FCR 54.

[37] #reports killed in the Gaza Strip

[38] *Al Masri,* above n #, [79].

[39] *Al Masri,* [63] and [61] respectively.

[40] *Al Masri*, [61] quoting *Lim*, 34.

[41] The court gave particular attention to the *Hardial Singh* principles in the United Kingdom (*Hardial Singh*, above n #), and the *Zadvydas* decision of the United States Supreme Court (*Zadvydas,* above n #) : see *Al Masri,* [96] – [114]. On the *Hardial Singh* principles and *Zadvydas* in comparative contexts: see Justine Stefanelli,

The decision in *Al-Masri* only constituted the Australian legal position for sixteen months, before it was overturned by a majority of the Australian High Court in *Al-Kateb*.

III – THE PROMISE FOUNDERS: *AL-KATEB* (2004)

If *Lim*'s case seemed to hold out the promise of constitutionally mandated temporal limits on immigration, determined with reference to the viability of removal, these hopes foundered in *Al-Kateb*.

Mr Al-Kateb had been denied an Australian visa and had been in immigration detention since December 2000. It was accepted that he was stateless, a Palestinian who had been born, and resided most of his life, in Kuwait. In mid-2002 he requested removal to Kuwait or, failing that, to Gaza. As with *Al-Masri*, the Immigration Department was unable to secure his removal to either of those locations, or to any third country. He remained in immigration detention. In 2003 he brought an application for habeas corpus in the Australian Federal Court, together with a declaration he'd been unlawfully detained.

The judge at first instance held that, as long as the government was making all reasonable efforts to secure Mr Al-Kateb's removal, his detention met all legislative and constitutional requirements. The actual prospects for his removal were held to be legally irrelevant. Mr *Al-Kateb* appealed to the High Court. A majority of four of seven judges held that s 196 of the Migration Act required his indefinite detention until such time as he was either removed or granted a visa, and that there was no constitutional bar to this outcome. For the purposes of this chapter, I bracket the debates and differences between the majority and minority on statutory interpretation, to focus on the constitutional arguments invoking the separation of judicial power. It should be noted that the differences between the majority and minority tracked through statutory and constitutional interpretation; ie the differences 'went all the way down'. Divergences in constitutional reasoning contributed to divergences in statutory interpretation, in line with the principle that, where possible, a statute should be interpreted to preserve constitutionality.[42]

I approach the separation of powers arguments in *Al-Kateb* through a dissenting judgment, that of Gummow J. The majority's response to his argument efficiently locates why the argument for a temporal limit on immigration detention did not gain traction in their reasoning. Gummow J held that the plaintiff's detention was unconstitutional as contrary to the separation of judicial power. From *Lim*, Gummow J drew the principle that the constitutional validity of immigration detention for the purpose of facilitating removal depends on the 'continued viability of the purpose of deportation or expulsion'. This proposition was conjoined with one about 'constitutional facts'. A constitutional fact is fact on which constitutional validity depends.[43] Gummow J reasoned that:

Judicial Review of Immigration Detention in the UK, US and EU (Hart Publishing, 2020) introduced at 80-85 then discussed at points throughout; Thwaites, above n #, 126-128, 215-218 (Hardial Singh principles), 4-10 (Zadvydas).

[42] This is true with respect of six of seven members of the Court: the four members of the majority, and two of the three dissents. A third dissent, Gleeson CJ relied on the common law principle of legality to interpret the statute as not authorising detention, without express reference to Constitutional doctrine.

[43] Constitutional facts are 'matters of fact upon which…the constitutional validity of some general law may depend': *Mineralogy v Western Australia* [2021] HCA 30, [55] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting *Breen v Sneddon* (1961) 106 CLR 406, 411-412. The most famous Australian decision with

i. Any finding of fact necessary for the constitutional validity of a law or executive act is to be made by a court;
ii. The constitutional validity of detention for the purpose of removal relies on removal remaining a viable option ('the Lim point'); therefore
iii. It is for a court to determine whether removal remains a viable option (where this will determine the constitutionality of detention).[44]

The majority accepted the first step. But they rejected the second step in the argument; that constitutional authority to detain rested on the viability of removal, the *Lim* point. The majority in *Al-Kateb* did not expressly overrule *Lim*, but their statements were sceptical of its holdings.

Lim had provided that the legitimate non-punitive purposes of immigration detention were processing and removal. The suggestion, acted upon in *Al Masri*, was that where processing was no longer pursued or removal no longer viable, authority to detain came to an end. The majority in *Al-Kateb* conclusively rejected this proposition. Hayne J, authoring what has come to be regarded as the lead judgment, wrote that he 'would not identify the relevant power in quite so confined a manner as is implicit in the joint reasons in *Chu Kheng Lim'*. He continued:

> The [head of legislative] power…extends to preventing aliens from entering or remaining in Australia except by executive permission. But if the heads of power extend so far, they extend to permitting exclusion from the Australian community – by prevention of entry, by removal from Australia, *and* by segregation from the community by detention in the meantime.[45] [emphasis in original]

The effect of this slippage, from detention for the purpose of processing and removal, to detention for the purpose of segregation from the community, have been profound and lasting. This further purpose was held to follow from the fact that unauthorised non-citizens 'had no right to be here'. As put by Hayne J, a member of the majority:

> The questions which arise about mandatory detention do not arise as a choice between detention and freedom. The detention to be examined is not the detention of someone who, but for the fact of detention, would have been, and been entitled to be, free in the Australian community.[46]

The absence of a right to remain, under either statute or constitution, was seen to extinguish any right to liberty on the part of unauthorised non-citizens.[47]

---

which they are associated is the *Australian Communist Party v Commonwealth* [1951] HCA 5, (1951) 83 CLR 1, and it is the Communist Party case on which Gummow J primarily relied for this point in *Al-Kateb.*

[44] *Al-Kateb,* above n#, [140] (Gummow J)

[45] *Al-Kateb*, above n #, [255] (Hayne J). For a direct rejection of this extension of immigration purposes to 'segregration' from the community see ibid, Gummow J in dissent [94] and [140]. In a decision later in 2004 Gummow J wrote that reference to 'exclusion' in the phrase 'exclusion from the community', 'may also be an Orwellian euphemism': *Re Woolley, ex parte applicants M276* [2004] HCA 49 #, [146].

[46] *Al-Kateb* [219] (Hayne J), see also [299].

[47] On indications that the minority judgments in the US Supreme Court decision of *Zadvydas*, above n#, served as a 'background influence' in the reasoning of the majority of the Australian High Court in *Al-Kateb*, in particular with respect to the derivation of an immigration purpose of 'segregation from the community': see Thwaites, above n #, 77-78.

This extension of immigration purposes transforms an exception premised on the need to perform certain regulatory activities: immigration processing and removal, into a status-based distinction with respect to personal liberty. The segregation rationale applies to any unauthorised non-citizen in Australian territory. A lack of membership, designated by the double absence of citizenship status and immigration authorisation, is equated with the absence of a right to liberty. There is simply removal, and segregation from the community until that purpose is realised.

Hayne J's reasoning in *Al-Kateb* went so far as to doubt on the very existence of a constitutional immunity from executive detention. He was sceptical of the assumption that there was 'only a limited class of cases in which executive detention can be justified'.[48] On his view, there was little left of the constitutional immunity when one factored in the exceptions.

What of the request for removal provision? In *Lim* the request for removal provision had 'saved' the legislation from invalidity, ensuring that it always lay within the detainee's power to bring their detention to an end (ignoring that they might have nowhere to go).[49] On the facts of *Al-Kateb*, the request for removal provision had no practical effect. The challenge in *Al-Kateb* was predicated on the inability to remove Mr Al-Kateb having legal consequences, suspending the purpose of detention and so authority to detain. The fact that it did not do so recast the nature of the purpose at issue. The viability of removal at a particular point in time did not matter. The purpose existed at an abstract level at which it could seemingly be 'set and forget'. The need to test the link between detention and immigration purpose was replaced by a categorical scheme.

In *Al-Kateb* the majority held that, even in the absence of any explicit provision to that effect, the Migration Act 1958 authorised the indefinite detention of a non-citizen for the purpose of removal in circumstances where, through no fault of their own, they could not removed. The decision was widely greeted as a spectacular failure of rights protection. Immediately following the decision, the Federal President of the Labor Party,[50] the Australian Democrats and the Greens called for a bill of rights to override the Migration Act.[51] There was disquiet in the then governing Liberal-National coalition, leading to the creation of a new 'removal pending' bridging visa allowing persons to be released from detention when it was not practicable to remove them.[52] The decision became a prominent reference point in debates on the adequacy of rights protection in Australia.[53] As discussed below, the decision has not been overruled.

IV THE RESURGENCE OF *LIM*? – HOPES RAISED AND DISAPPOINTED

The rehabilitation of Lim*:* Plaintiff S4/2014[54]

---

[48] *Al-Kateb* [258] per Hayne J

[49] The fullest explanation of the important role played by the request for removal provision in the separation of powers analysis was given by McHugh J: *Lim*, above n #, 72.

[50] One of the two, alternating, parties of government in Australian politics.

[51] See Meaghan Shaw, 'Ban Indefinite Detention: Lawrence', The Age (Melbourne, 12 August 2004) #url. The Greens' media release stated that the legislative provisions 'make every immigration detention centre in Australia another Guantanamo Bay': 'Bill of Rights: One Way to Defeat Indefinite Detention' (6 August 2004).

[52] See Migration Regulations 1994 (Cth), Sch 2 [Visa] Subclass 070. #

[53] See the prominence and frequency of references to *Al-Kateb* in the National Human Rights Consultation: National Human Rights Consultation Committee, *Report on the Consultation into Human Rights in Australia* (September 2009), https://apo.org.au/node/19288 .

[54] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34 #.

If *Al-Kateb*, in its endorsement of indefinite immigration detention, was the nadir of a rights protective role for Australian constitutional jurisprudence, *Plaintiff S4/2014* was perceived as a clear marker of an upward climb, a reassertion of the modest promise contained in *Lim*.[55] With an obliqueness characteristic of Australian immigration law jurisprudence, the case did not actually involve a challenge to the lawfulness of detention. The context for the decision was ministerial attempts to avoid the grant of permanent protection visas.[56] The plaintiff had been held in immigration detention for the purpose of immigration processing for a permanent protection visa.[57] Using his powers to grant visas to those in detention, the minister then granted him another visa, a temporary protection visa. The effect of this was both to release him from detention and to end his application for permanent protection. The Court held, as a matter of statutory interpretation, that the Minister's decision to issue a new visa while the plaintiff's application for a permanent protection visa continued, was invalid. Among other considerations, the minister's purported decision would deprive the plaintiff's prolonged detention of its purpose.[58]

Its significance for us is that the decision, a unanimous decision of five members of the High Court, strongly endorsed the separation of powers principles from *Lim*,[59] resuscitating its authority after the doubts expressed by the majority in *Al-Kateb*. *Plaintiff S4/2014* affirmed that immigration detention is for limited purposes, the purposes of immigration processing and removal,[60] making no mention of the purpose of 'segregation from the community in the meantime'. It affirmed that immigration detention laws would only be valid 'if the detention which those laws required and authorised was limited to what was reasonably capable of being seen as necessary for the purposes of deportation' or processing.[61] This seemed to reinstate a loose proportionality requirement which, if not met, would render the detention punitive and so unconstitutional. There was language in the judgment which suggested the ability of purposive limits to discipline both the duration and lawfulness of immigration detention.[62]

The discussion of the constitutionality of immigration detention in *Plaintiff S4/2014*, notwithstanding that it was obiter, featured prominently in the litigation in *AJL20*. It grounded an order for release in the first instance hearings before the Federal Court. And it was drawn on to diametrically opposite effect, to deny the order for release, by a narrow majority of the High Court on appeal.

---

[55] For a near contemporaneous account of the hopes engendered by *Plaintiff S4/2014* see Joyce Chia, 'Back to the Constitution: The Implications of Plaintiff S4/2014 for Immigration Detention' (2015) 38 UNSWLJ 628.
[56] Chia and Taylor, above n #.
[57] This description papers over the complexity of the 'non-compellable' nature of the minister's power to grant the relevant visa.
[58] *Plaintiff S4/2014* is one of a number of High Court decisions in which the fact that an unauthorised non-citizen being held in detention during immigration processing has had legal consequences for how that processing is conducted and understood, limiting the government's ability to operate outside the statutory framework (see *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41, (2011) 243 CLR 319, or to manipulate it (as in *Plaintiff S4/2014*).
[59] See *Plaintiff S4/2014*, [24] – [26].
[60] *Plaintiff S4/2014*, [26]. It added a third purpose to accommodate the existence of non-compellable powers to grant a visa, 'the purpose of determining whether to permit a valid application for a visa': *Plaintiff S4/2014*, [26]. For the purposes of this chapter, this can be regarded as a refinement of the purpose of immigration processing.
[61] *Plaintiff S4/2014*, [26], quoting from *Lim*, from the joint judgment at p 33 and other judgments in that decision.
[62] *Plaintif S4/2014,* [29].

The promise founders, again: AJL20[63]

The disappointment attending *Al-Kateb* in 2004 was re-experienced in 2021, with reference to *AJL20*. The potential for separation of powers jurisprudence to generate meaningful practical limits on the duration of immigration detention appears to have run aground, again.

The applicant in AJL20 is a Syrian citizen. He came to Australia on a child visa in May 2005, following his mother.[64] Nine years later, his visa was cancelled on 'character' grounds under s 501(2) of the Migration Act 1958, rendering him an 'unlawful non-citizen' subject to mandatory immigration detention. This cancellation occurred notwithstanding the government accepting that it owed the applicant protection obligations, being his non-refoulement to Syria. He was taken into detention on 8 October 2014, and remained there until released on an order in the nature of habeas corpus by the Federal Court on 11 September 2020. The government appealed to the High Court.[65] Between hearing and judgment in the High Court, the executive secured the passage of amending legislation that specified that s 198, the relevant removal provision, did not require or authorise removal if a protection finding had been made, notwithstanding that their visa had been cancelled, unless the non-citizen formally asked to be removed to that country.[66]

His detention was found to have divided into various phases, defined by the purpose ascribed to it in each phase. 25 July 2019 marked the end of the first phase. His four years and ten months in detention to that point were marked by applications for visas to enable him to remain in Australia. During this period his detention was for the purpose of immigration processing. The final episode during this phase was his attempt to have the Minister consider granting him a visa under s 195A of the Act.[67] Section 195A is a key provision in understanding the context, and causes of AJL20's predicament. It enables the Minister to grant a visa to a person in mandatory immigration detention, converting the (former) detainee into a 'lawful non-citizen', leading to their release. 25 July 2019 is the date it became clear that the Minister would not grant the applicant a visa under s 195A. The applicant's legal claim for false imprisonment did not address the four years and ten months he was held for immigration processing.[68]

From 26 July 2019 on, the purported 'legitimate non-punitive purpose' of the applicant's detention was removal. The central legal and operational issue here was that removal of the

---

[63] *Commonwealth of Australia v AJL20* [2021] HCA 21 #.
[64] His mother had immigrated to Australia some nine years earlier, in 1996.
[65] For a detailed account of the course of the litigation and legislative context, and more on the reasoning in the case see: Sangeetha Pillai, 'AJL20 v Commonwealth: Non-refoulement, indefinite detention and the "totally screwed"', Auspublaw (8 August 2021), https://www.auspublaw.org/blog/2021/09/ajl20-v-commonwealth-non-refoulement-indefinite-detention-and-the-totally-screwed .
[66] The Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (Cth). For commentary see Sangeetha Pillai, 'The Migration Amendment (Clarifying International Obligations for Removal) Act 2021: A case study in the importance of proper legislative process', Auspublaw (10 June 2021), https://www.auspublaw.org/blog/2021/06/the-migration-amendment-clarifying-international-obligations-for-removal-act-2021/ .
[67] The convoluted formulation reflects the law. In an example of the 'non-compellable' powers that have come to pepper the Act, a person cannot apply for a visa under s 195A of the Act, and the Minister cannot be compelled to consider the (non-existent) application. There is instead an 'extra-legal' process which generates a recommendation to the Minister as to whether or not they should 'lift the bar' to consider an application.
[68] The lack of challenge to such lengthy detention is indicative of the limited legal grounds available to Australian immigration detainees.

applicant to Syria would breach Australia's non-refoulement obligations to him. The affidavits provided by immigration officials see a bureaucracy trying and failing to square the impossible, a detainee in the 'removal space' (to use the departmental language) who could not be removed due to Australia's protection obligations to him.[69] The legal and operational impasse went even deeper than this suggests. In its efforts to denude the Migration Act of legal rights and obligations that could be enforced against it, in 2017 the government had secured the enactment of s 197C of the Migration Act. Section 197C provides, in part that:

> (2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 [the removal provision] arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

In short, and as stated in s 197C (1), for the purposes of removal 'it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.' Australia's protection obligations were, as a matter of domestic law, no longer a qualification on their statutory duty to remove an 'unlawful non-citizen'.

How did the government seek to reconcile its protection obligations at international law with their statutory irrelevance in domestic law? In the explanatory memorandum accompanying the Bill introducing s 197C into the Migration Act, the Minister stated:

> Australia will continue to meet its non-refoulement obligations through other mechanisms and not through the removal powers in section 198 of the Migration Act. For example, Australia's non-refoulement obligations will be met through…the Minister's personal powers in the Migration Act, including those under section…195A…of the Migration Act.[70]

The government submitted to Parliament that by this mechanism, the grant of a visa under s 195A, it could coherently deny an obligation under domestic law that it maintained at international law. The circumstances of *AJL20* arise from the government's refusal to use this safety valve to deal with the pressures it had created.

The decision in AJL20 was, as in *Al-Kateb*, the product of a majority of four of the seven judges on the High Court. The majority agreed that the Australian executive had held the plaintiff in immigration detention for the purpose of removal without attempting removal, contrary to its statutory duty. It further held that this did not undermine its authority to detain the plaintiff. The judge at first instance had erred in ordering the plaintiff's release on an application for habeas corpus. The only remedy available to the plaintiff was one he had not sought, namely an order to compel the government to perform its statutory duty to remove him. The majority's reasoning to this remedy is outlined below, with a focus on its understanding of 'purpose' and institutional interaction that it discloses.

First, the last paragraph of the majority judgment is addressed, for the light it casts on the majority's reasoning and disposition. It reads, in part:

---

[69] *AJL20 v Commonwealth of Australia* [2020] FCA 1305, FCR # [ ].
[70] Australia, House of Representatives, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, Explanatory Memorandum at 116 [1142].

> It is evident that the Executive found the prospect of the removal of the respondent to Syria in breach of Australia's non-refoulement obligations unpalatable. In that regard, it is equally evident that, if the Minister wished to avoid the realisation of that unpalatable prospect, a visa might be granted to the respondent – precisely as the Explanatory Memorandum to the Bill that introduced s 197C contemplated. [see preceding indented quote].

In other words, there is a way out of this impasse and it lies with the Minister. This is true, as far as it goes. But it is too swift if it seeks to absolve the courts of responsibility. The Court's ruling imposes no costs on the government for continuing, indefinite, detention, no incentive to bring it to an end. It is beyond the scope of this chapter to provide a definitive analysis of what is now a complicated, layered and inaccessible jurisprudence. But it is arguable that the legal resources were there to derive constitutional limits, a rough indicator being the narrow majority and strong dissents (in both in *AJL20* and Al-Kateb).

An arresting feature of the circumstances in *AJL20* is the stark disjunct between statutory purpose and executive action. The statutory purpose of his detention from 26 July 2019 on was removal. It was not simply that the plaintiff's removal was not viable, in the manner of the circumstances of *Al Masri*. There was evidence that his removal was, for a period of time, ruled out by the officials on the basis of Australia's protection obligations at international law, contemporaneously with him being held for the purposes of removal. On the majority's reasoning, this had no consequences for authority to detain.

The required 'legitimate non-punitive purpose' of detention was held to exist at the level of the statute, defined ('hedged') by the duties imposed on the executive to admit those with a visa and remove those without. These duties could be enforced to bring the detention of an unlawful non-citizen to an end. This was all that was needed to ensure that the executive detention authorised and required by the Migration Act 'can be seen to be within the Parliament's power…as limited by the implications of Ch III'.[71] The existence of enforceable statutory duties, 'hedging duties', that (if successfully enforced) would bring detention to an end meant 'that immigration detention under the Act is not punishment within the exclusive province of judicial power'.[72]

This is a highly abstracted purpose, again very much of the 'set and forget' variety. Once set, the statutory purpose supplies authority to detain until its objective is met. The relevant statutory duty to detain an unauthorised non-citizen was 'neither conditional upon, nor co-extensive with, the intents or purposes of officers of the Executive toward the detainee'.[73] Authority to detain rested on the existence of the statutory duty to remove, not on any 'performance of that duty in fact by the Executive'.[74]

This disassociation of the 'intents or purposes of the executive' from both the statutory duty to remove and statutory (and constitutional) authority to detain was held to be necessary to preserve the constitutional, statutory scheme: 'the purposes of the Act, and consequent validity of the Act, cannot be set at nought by the intents and purposes of the officers of the Executive whose duty it is to enforce that Act'.[75] The executive conduct could have no consequences for

[71] *AJL20*, above n #, [51].
[72] *AJL20*, [45].
[73] *AJL20*, [51]
[74] *AJL20*, [39].
[75] *AJL20*, [45].

statutory authority to detain, for 'were it otherwise, the supremacy of Parliament over the Executive would be reversed and the rule of law subverted.'[76] Executive conduct was deprived of legal consequence for authority to detain so as to preserve the statutory scheme. Here the separation of powers protects the statutory purpose, not the detainees.

A deep constant between *Al-Kateb* and *AJL20* is the majority's acceptance that, as a constitutional matter, the absence of a right to remain equates to the absence of a right to liberty. The legitimate non-punitive purposes of immigration detention are held to extend that far. Under statute 'an unlawful non-citizen may not, in any circumstances, be at liberty in the community',[77] and there is held to be no constitutional imperative that cuts across this position. As a result, 'no question of release on habeas can arise.'[78]

The cases between *Al-Kateb* and *AJL20* seemed guided by a concern to ensure that statute did not confer power to detain 'at the unconstrained discretion of the executive'.[79] AJL20 provided that the necessary constraint was the ability to enforce the 'hedging' duties, relevantly the duty to remove. That constraint aside, the executive's discretion remained at large.

Above, I noted that *Al-Kateb* was widely greeted as a spectacular failure of rights protection, one that continued to reverberate.[80] *AJL20* was an analogous moment in the jurisprudence, one at which hopes for constitutional limits on the duration of immigration detention, protective of the rights of detainees, came to an end. How was it greeted? Eighteen years after *Al-Kateb*, the public and political response seems, by contrast, muted. It may be that the Australian public has become inured to indefinite immigration detention

V THE PROMISE REALISED – FOR CITIZENS

On 8 June 2022, in *Alexander v Minister for Home Affairs* ('*Alexander's case'*) the High Court of Australia invalidated a ministerial power of citizenship deprivation, declaring that the applicant, the subject of a determination under the relevant provision under the relevant provision of the Australian Citizenship Act 2007 (Cth), remained an Australian citizen.[81]

The constitutional reasoning grounding invalidation grew out of the separation of powers reasoning outlined above. The Court in *Alexander's case* began with the proposition from *Lim'*s case, quoted above, to the effect that 'the adjudgment and punishment of criminal guilt under a law of the Commonwealth' is an exclusively judicial function.[82]

In *Lim*, the Court had held that involuntary detention by the executive, in the absence of a legitimate non-punitive purpose, constituted punishment, and would be constitutionally invalid on that basis. In *Alexander's case* the Court extended this reasoning to hold that the citizenship deprivation power in question was punishment for misconduct, and thus could not be reposed in the executive. The case was squarely in the tradition of *Lim* in starting from the proposition that certain *functions* were exclusively judicial by reason of being punitive, as opposed to

[76] *AJL20*, [48].
[77] *AJL20*, above n#, [61].
[78] *AJL20*, [61].
[79] 'It is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive.': *Plaintiff M61/2010E*, above n #, [64].
[80] See text to n 50, above, and following.
[81] There was a majority of six for this result, and one dissent.
[82] See text to n 12 above.

engaging in a qualitative analysis of the legal arrangements at issue to determine whether they were or were not judicial.

The applicant in the case, Delil Alexander, is a dual Australian-Turkish national. He had travelled to Syria in 2013 and was alleged to have joined ISIS. He was apprehended by Kurdish Forces and transferred to the Syrian authorities. His family and friends had last heard from him in July 2021, at which time he was in a Syrian jail. His sister brought the High Court action on his behalf. The challenge was to a determination of the Minister on 2 July 2021, to deprive Mr Alexander of his Australian citizenship, pursuant to a discretion conferred by s 36B of the Australian Citizenship Act. That section empowered the Minister to deprive a dual citizen of their Australian citizenship where she was satisfied that: (a) the person had engaged in the proscribed conduct (loosely and problematically defined with reference to various terrorism offences in the criminal code); (b) the conduct demonstrated that the person had 'repudiated their allegiance to Australia' and (c) 'it would be contrary to the public interest for the person to remain an Australian citizen.' The proscribed conduct in Mr Alexander's case was that he had entered Al-Raqqa province, Syria, at a time when it was a 'declared area'

The characterisation of deprivation as punishment was underwritten, in ways crucial to the reasoning, by the importance attached to citizenship. The value of citizenship status, in no small part, was that it saved one from immigration detention. The lead judgment stated that:

> For an Australian citizen, his or her citizenship is an assurance that, subject only to the operation of the criminal law administered by the courts, *he or she is entitled to be at liberty in this country* and to return to it as a safe haven in need. [emphasis added]'.[83]

In elaborating the consequences of deprivation of Australian citizenship, underpinning its characterisation as punishment, Gordon J stated:

> If the person is overseas, they will be unable to return to Australia, unless they are granted a visa. If the person is in Australia they will immediately become an 'unlawful non-citizen' who must be taken into immigration detention and is liable to be removed from Australia as soon as reasonably practicable.[84]

In other words, a significant reason that citizenship deprivation constitutes punishment is that it is likely to place a (former) citizen in the position of the plaintiff in *AJL20*.

It was the grant of statutory Australian citizenship that attracted the relevant constitutional protections: the constitutional immunity from executive detention and the right to enter and remain.[85] It followed that the loss of citizenship is a loss of rights, grounding a characterization of the relevant citizenship deprivation power as a punishment.[86] To strip an Australian of citizenship is to strip them of 'the right to be at liberty in Australia.'[87]

---

[83] *Alexander,* above n #, [74] (Kiefel CJ, Keane and Gleeson JJ).
[84] *Alexander,* [166] (Gordon J)
[85] The wording of the judgment references an intermediary status: 'it is the grant of Australian citizenship that creates the status which attracts constitutional protections': *Alexander,* [31] (Kiefel CJ, Keane and Gleeson JJ). This is because it is statutory citizenship that ensures that a person is a constitutional non-alien (the relevant constitutional membership category), with non-alienage being tha status that attracts constitutional protection.
[86] *Alexander,* [95] (Kiefel CJ, Keane and Gleeson JJ).
[87] *Alexander,* [95] (Kiefel CJ, Keane and Gleeson JJ).

The reasoning in *Alexander's* case recaptures the constitutional pressure present in *Lim*, that derives from the proposition that certain functions (detention, citizenship deprivation) are prima facie punitive, and that any allocation of these functions to the executive call for justification. The concern for the individual often ascribed to the separation of powers jurisprudence is close to the surface. It is 'the fundamental value accorded to the liberty of the individual' that provides the rationale for insisting that deprivation of liberty for misconduct be attended by the safeguards of judicial due process.[88]

As a development of, and comparator to, the constitutional jurisprudence on immigration detention, *Alexander's case* highlights features of that jurisprudence. First, in the context of registering what is lost when Australian citizenship is lost, the Court clearly registers the position confirmed in *AJL20*, an unauthorised non-citizen in Australia has no right to liberty. In *Alexander's case*, the dire consequences of loss of citizenship are relied on to defend the status. The seriousness of the consequences of deprivation support the argument for it being an exclusively judicial function. From a different aspect, *Alexander's case* highlights the work the separation of powers jurisprudence, and in particular, the proposition that certain functions are exclusively judicial, denied to the executive, can do when not hobbled by a categorical exclusion of unauthorized non-citizens.

VI CONCLUSION

Australian separation of powers jurisprudence is said to 'commonly subsume consideration of the effect of the legislation on personal liberty'.[89] In the absence of an express commitment to a right to personal liberty, this consideration rises and sinks. A concern with personal liberty was close to the surface in *Lim*, animating a rights protective framework which, many years later, proved capable of invalidating sweeping powers of citizenship deprivation in *Alexander*. Alternatively, a rights protective function can drop from view, protecting the statutory purposes of detention, rather than the detainees, as in *AJL20*. In this rising and falling consideration of personal liberty, an expansive conception of the 'legitimate non-punitive purpose' of immigration detention, acts as a heavy stone. It entirely removes unauthorized non-citizens from the protection of the constitutional immunity from executive detention. Until this conception shifts, authority to hold an unauthorised non-citizen in immigration detention seems impervious to constitutional challenge.

AJL20 and *Alexander's case* raise the very real prospect that fundamental Australian constitutional protections, to personal liberty, are attracted by citizenship and the constitutional membership it confers, and conversely repelled by the double absence of citizenship and immigration authorisation.

A rights instrument is no guarantee of protection. Immigration purposes still operate as an exception. But the suggestion is that direct rights protection is less likely to see the right dismissed categorically; and better able to constrain the exception with reference to the right. This is a matter for further comparative investigation.

[88] *Alexander,* [73].
[89] *Totani,* above n #.