Al-Kateb and Behrooz

Arthur Glass

As is well known Australia has adopted a system of mandatory immigration detention for unlawful non-citizens. *Al-Kateb* and *Behrooz* deal with aspects of these laws.[1] Did the *Migration Act* authorise indefinite detention in circumstances where Mr Al-Kateb requested removal from Australia but had no real prospect of this happening? If it did authorise detention in these circumstances, did the Constitution permit this? For his part, could Mr Behrooz argue that the conditions of his detention had become so intolerable that it lost the character of authorised immigration detention? Did the *Migration Act* extend to make even intolerable detention lawful? Constitutionally, could it so extend?

Our system of mandatory detention of unlawful asylum seekers has been much criticised. It has been the subject of numerous local and international reports. A basic criticism of these laws is that as mandatory they cannot make the appropriate discriminations. They fall on all, including children, the elderly and the sick. They make no provision for administrative or judicial review in particular cases of either the justification for detention or the duration of the detention. But as Kirby J noted in an earlier case, the Parliament knows well this criticism and the inference can only be that it intends to maintain a system of universal mandatory detention for unlawful non citizen arrivals.[2]

It is not difficult to see the basic interests at play in these cases. On the one hand the Constitution grants the Commonwealth power over aliens and immigration and the Government demands plenary power to decide who to admit, how to process these persons and if need be to detain "non-citizens" for these purposes. These are matters for the Parliament and the electors, not for the Courts. On the other hand, non-citizens are subject to our law and entitled to its protection. Identifying these obligations and rights is a matter solely for the Courts.

Our review court will start with the idea that our law and our Constitution acknowledge a basic distinction between the rights of citizens and those of non-citizens. Non-citizens can be subject to exclusion from our community, detention during processing and removal. But laws that have these legitimate ends may overreach themselves. What is the appropriate judicial response to this problem?

I

Mr Al-Kateb a failed asylum seeker had been in immigration detention since December 2000. In August 2002 he asked to be removed from Australia. Since he was a stateless Palestinian born in Kuwait removal to Kuwait or Gaza (his chosen

* I thank my colleague Keven Booker for his remarks on an earlier draft of this draft. The mistakes of course are mine.

[1] *Al-Kateb v Godwin* (*Al-Kateb*) 78 ALJR 1099, *Behrooz v Secretary of the Department of Immigration* (*Behrooz*) 78 ALJR 1057

[2] *Minister of Immigration v B* 78 ALJR 737, 768. See also *Re Woolley and Another; Ex parte Applicants M276/2003* (*Woolley*) 210 ALR 369, 419.

destinations) required the co-operation of other States – Kuwait, Israel, Jordan or Egypt. Could Mr Al-Kateb, an unlawful non citizen be indefinitely detained in circumstances where there was no real prospect of removing him? For the impossibility of removal at present was the finding of the lower Court.

Mr Behrooz was charged with escaping from Woomera Immigration Centre in late 2001. At that time he had been in detention for about 12 months. He argued that the conditions of his detention had become intolerable and as a consequence of this his detention lost the character of authorised immigration detention. And if his detention was not legally authorised his escape was not a breach of the *Migration Act* (s197A). The immediate question before the Court was whether the appellant could obtain witness summonses that would assist him to make out his case that his conditions of detention were intolerable. The Magistrate accepted this request but the Supreme Court of South Australia did not. Was the nature of the conditions of immigration detention legally relevant to the charge that he faced? Was Behrooz's defence known to law?

These were not the first occasions that the High Court had considered aspects of our system of administrative detention for non-citizens. An earlier version of the present scheme was tested in *Chu Kheng Lim*.[3] Here it was decided that, in principle, the system of mandatory immigration detention was constitutional – it came within the aliens power and did not contravene Ch III of the constitution, as it did not involve the infliction of punishment by a non-court. It was not argued in the present cases that *Chu Kheng Lim* was wrongly decided. What it decided was in dispute.

The Full Federal Court had dealt with the Al-Kateb issue in the earlier case of *Al Masri*.[4] That Court had ruled that where there was no reasonable possibility of Mr Al-Masri's removal taking place he was entitled to be released from detention, subject to conditions. Similar issues had arisen in the United Kingdom, United States and Hong Kong with the Courts reaching a solution in line with the Al-Masri solution. But as was pointed out in *Al-Kateb* – what is critical in the resolution of these cases is the particular constitutional and statutory context, and this differs from country to country.[5]

---

[3] (1992) 176 CLR 1

[4] (2003) 126 FCR 54

[5] Gleeson CJ 1102. For example, in the overseas cases the detention under review was discretionary rather than mandatory. Discretionary powers raise questions of reasonableness not obviously relevant to a system of mandatory detention.

A distinction can also be drawn between detention of non citizens seeking admission and detention of non citizens who entered lawfully, but have since become unlawful. While mandatory detention applies in Australia to all unlawful non-citizens, it is strictly speaking mandatory *in effect* only for those unlawful at the time of admission. Non-citizens who entered lawfully but have since become unlawful may avoid detention through the grant of a bridging visa. See the many ways in which a bridging visa may be granted, Subclasses 010 – 050 Schedule 2 Migration Regulations 1994. This was a further difference between *Al-Kateb* and the overseas cases noted above. The overseas precedents applied to persons lawfully admitted now attempting to resist expulsion; not to persons seeking admission in the first place. In other words, the overseas litigants could be said to have a stronger connection to their new State. It is not hard to question this distinction in some circumstances. For example, persons who come to Australia holding a tourist or student visa and immediately apply for asylum are not obviously more connected to Australia than asylum seekers who arrive without a visa.

II

Al-Kateb and *Behrooz* illustrate a number of points about legal methods. There is, for instance, an unusually vigorous debate between Justices McHugh and Kirby as to the use of international law in constitutional interpretation. More significantly, the cases, especially *Al-Kateb* illustrate important points about statutory interpretation and how the process known as characterisation works in constitutional analysis. I discuss these three matters in turn.

International law and constitutional interpretation

Should the Constitution be read so that, as far as possible, it conforms to the rules of international law? This is an approach that Justice Kirby has been advocating for some time. In *Al-Kateb* McHugh J vigorously opposed this view. Many points are made but the basic point is as follows. If we do not read the Constitution so that it accords with rules made by our lawmaker, why should we read it to accord with rules made by others, or to accord with rules agreed to by our Executive? The rules of international law are either in the Constitution in which case as independent rules they are irrelevant, or they are not, in which case their use will amend constitutional meaning. An argument not dissimilar to that used, it is said, by the Caliph of Baghdad who in 642 ordered the burning of the library at Alexandria. Either the library books confirmed what was in the Koran in which case they were not needed. Alternatively, they contradicted the Koran, in which case they were wrong and deserved to be burnt.

Justice Kirby in reply argued that his approach was that international law did not bind the Court in the way that conventional rules might. Rather the principles expressed in international law can influence the Court's legal understanding.[6] Resort to these principles for this purpose is no different from the interpretive context that McHugh J allows, namely, changing political, economic and social circumstances that generate new ways of understanding the Constitution; ways that were not available to earlier generations.[7] And if reliance upon international law principles in this way leads to new readings of the Constitution then this is no more amendment than it is in other cases where interpretation produces a significant change from earlier understandings.

The claim that principles expressed in international law can influence the legal understanding of the Constitution is unexceptional. How, for example, could the Court be unaware of the post-war development of international rights law; and why would we want our review Court to ignore this knowledge. But how this knowledge is put to work is the sticking point.

At present we make the following three distinctions among our legal sources; there are sources that are *relevant*, sources that have *force* and sources that are *binding*.[8] International materials have potential relevance; for they may well be the

[6] 1132
[7] 1114
[8] For some discussion of the distinction of force and bindingness see G. Neuman "Agora: The United States Constitution and International Law" 98 *The American Journal of International Law* (2004) 82

manifestation of important legal ideas that can usefully inform the interpretive task.[9] As international materials are not binding in the sense that they contain legal norms that *must* be made to speak to the question at hand; the debate is about their *force*. Here we find that Justice Kirby claims more than he initially says. His is not just a comment about relevance - that the principles expressed in international law can influence the legal understanding of the Constitution. It is a claim about the weight or force of these ideas, namely - interpreters have a duty, as far as possible to harmonise our constitutional provisions with basic principles of international law.[10] As attractive as this sounds, for who can be against checking our ideas against the ideas of a "wider civilisation", as Kirby J puts it.[11] There is always the countervailing point. The task of the judiciary is to interpret *our* Constitution for what it is and not to make it conform to the legal spirit of the times.

Statutory interpretation

In both cases the relevant provisions of the *Migration Act* were construed. In *Al-Kateb* these provisions required that officers detain unlawful non citizens (s 189) and that this detention continue until one of three events occurred - removal or deportation or the grant of a visa (s 196). A temporal limitation to the detention was introduced by s 198 - an officer must remove as soon as reasonably practicable a non-citizen who asks to be removed. But in this case the problem was the lack of co-operation from other States, not a lack of due diligence on the part of the Department. Because of this lack of co-operation it could not be said when removal would take place, if at all.[12]

In these circumstances were these provisions clear and unambiguous in enforcing mandatory detention? Four judges thought so. Hayne J considered the provisions in detail and for him it was straightforward that s 196 required detention until removal (or the grant of a visa or deportation). The temporal limit of s 198 – "as soon as

---

[9] Justice McHugh is equivocal on this point. We are told that rules of international law are not factors that can be taken into account when interpreting our Constitution (1114). But we are also told that international law may help to elucidate the meaning of a head of power (1115).

[10] 1132. And see also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 418

[11] 1136

12 Section 198 provides:

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

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) ...

(i) the grant of the visa has been refused and the application has been finally determined; ... and

(d) the non-citizen has not made another valid application ...

Section 189 provides that, if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

Section 196, dealing with the period of detention, provides:

(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.

reasonably practicable" – did not limit this obligation. The duty to remove was quite separate from the obligation to detain. McHugh J and Heydon J linked themselves with Hayne J on this point and Callinan J separately found that the language unambiguously required continuing detention.

The minority judges saw it differently. For Gleeson CJ the Act was silent on whether indefinite detention was authorised in these *particular* circumstances; and the fate of Mr Al-Kateb was not to be dealt with by implication. For Justice Gummow it was a matter of seeing whether a construction of the provisions that avoided indefinite detention was "reasonably open". He thought it was. He focused on s 198. If Mr Al-Kateb could not be removed and was unlikely to be removed then, he argued, that section was spent. The consequence of this was that s 196 lost a necessary assumption for its continued operation, namely, that s 198 removal was a possibility. Without the possibility of removal Mr Al-Kateb's continuing detention was no longer authorised. Kirby J agreed with this construction.

As is not uncommon with issues of statutory interpretation, where you start from is critical to where you end up. The minority judges commenced their interpretive work clearly troubled by the consequences of the law – indefinite administrative detention and its abrogation of the basic right to personal liberty.[13] Did the Act specifically call for this? Was another reading of the Act reasonably open? The majority, for their part, commenced with the statutory text; the clear words of s 196 – detention must continue until the happening of one of the three named possibilities (removal or grant of a visa or deportation). For McHugh J - the words of the sections were "too clear to read them as being subject to a purposive interpretation or an intention not to affect fundamental rights". For Hayne J the words were simply "intractable".

But when interpreting the words of statutes, clarity is not a quality of the language alone. What makes s 196 unclear is not some ambiguity in the words used but that the otherwise followable words of the section lead to a significantly unjust consequence – in this case, indefinite administrative detention. It is reflection upon the consequence of the law, not upon the clarity of its language that gives rise to the interest to see whether other interpretations are open. Three judges were motivated to find another interpretation. One of the puzzling aspects of *Al-Kateb* is why, despite the admitted "tragic" consequences, the other four were not.[14]

An issue in *Behrooz* was whether the appellant was in "immigration detention" when he escaped? "Immigration detention" was a term defined by the Act (s 5). One way of being in immigration detention, according to the Act, was to be held at an established detention centre. Behrooz was in such a detention centre, namely, Woomera. For the majority judges the Act did not further limit the meaning of "immigration detention". It did not say, for instance, immigration detention was detention in circumstances no more severe than was reasonably necessary. The lawful power to detain was one

[13] Gleeson CJ, refers to the "principle of legality" at 1105. The is a term used in recent UK case law for the long standing assumption of statutory interpretation that the lawmaker will clearly manifest any intention to abrogate basic rights and freedoms. See *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539; *R v Secretary of State for the Home Department ex parte Simms and Another* [1999] 3 WLR 328.

[14] McHugh J 1107. The majority did not even take up the ideas of the minority, if only ultimately to dismiss them.

thing; the means by which a person is detained another. While poor conditions of detention may attract other remedies (for assault or for negligence, for example) they did not alter the legality of the appellant's "immigration detention".

In dissent Kirby J read the *Migration Act* differently. It was for the Court to determine the meaning of "immigration detention". It was a reasonable interpretation of the relevant statutory provisions that the meaning of "immigration detention" did not extend to detention in intolerable conditions. Such a reading would be consistent with available constitutional power, as the aliens power did not support immigration detention under *any* conditions. And such a reading would be in accordance with our international obligations. For in the absence of contrary and clear statutory words Parliament can be assumed to have provided for a form of immigration detention that complies with our treaty obligations.[15]

In my view the majority have the better of this argument. Of course it is for the Court to determine the meaning of "immigration detention" but here the *Migration Act* in a number of ways defines this notion independently from the manner of detention.[16] In addition, such a reading, as we shall see, is consistent with Constitutional power and the *Migration Act* clearly manifests an intention to depart from the ICCPR provisions relevant to the detention of "unlawful non-citizens". It is appropriate to start the interpretation, as Justice Kirby does, by acknowledging an interest; the interest, as he puts it, of protecting persons before the law who are "voteless, politically unpopular and socially threatening".[17] For interest, acknowledged or not, drives all interpretation. However, convincing interpretation needs more than a reason to decide one way rather than another. It needs to be plausibly connected to the relevant material.

Characterisation as a means of judicial scrutiny

Could it be said that the specific laws indefinitely detaining Mr Al-Kateb were appropriate and adapted to the legislative goals of the admission and removal of aliens? Probably not. But *Al-Kateb* is an example of how the present approach to characterisation does not permit the Court to respond to such a question.

Characterisation, if I may remind you, is the process of determining whether a federal law is a law "with respect to" a head of Commonwealth power. Analytically this involves two separate ideas.[18] First, attention has to be given to the law whose validity is in question. The rights and liabilities it creates are examined. Its significant features picked out and then described in general terms. Second, as Commonwealth power is given "with respect to" a list of topics, the strength of the laws connection to the head of power has to be evaluated.[19] Here, it is said, the practical as well as the legal operation of the law is taken into account. While considerations of description

[15] The ICCPR contains provisions relevant to the detention of "unlawful non-citizens", Kirby J 1080

[16] For the detail of this discussion see McHugh, Gummow and Heydon, 1064ff; Hayne J 1085ff

[17] 1067

[18] See McHugh J in *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 368. And for recent endorsement of these remarks, *Re Maritime Union of Australia; Ex parte CSL* [2003] HCA 43 (7 August 2003) at paragraph 35.

[19] As Gummow J notes in *Al-Kateb* (1124), there may be situations in which a law authorising the detention of aliens is so "insubstantial, tenuous or distant" in its connection to aliens that it ought not to be regarded as falling within the aliens power. In other words, the connection with the head of power must not be too remote or too indirect.

(the first process) and of connection (the second) are distinct activities, clearly they are linked. For no one describes the law in this process without bearing in mind the possible ways in which the described law might be significant for the head of power in question.

As we shall see, the first part of the characterisation process - what are the significant features of the law? – is relevant not just to issues of s 51 power but also to questions of prohibitions on power; Ch III limits, for example. Parliament has the power to make certain laws, or possibly lacks the power to make certain laws. Characterisation asks, is this such a law? This question concerns not bare facts, but the legal description of facts. This is an evaluative activity for particular features of an Act are chosen as significant over others.

It was put in *Al-Kateb* that the mandatory detention scheme was an example of incidental power rather than core power. In *Lim* the joint judgment of Brennan Deane and Dawson JJ appeared to give some encouragement to this idea:

> authority to detain an alien in custody when conferred upon the Executive in the context and for the purposes of an executive power of deportation or expulsion, constitutes an incident of that executive power.[20]

If the incidental power was relied upon then the proportionality of the specific measures detaining Mr Al-Kateb would have been a constitutional issue. An exercise of incidental power is only justified if it is a reasonable means to a legitimate end. There is no doubt that justifying the mandatory detention laws at issue in *Al-Kateb* in this way would have proved difficult, bearing in mind the Court's present approach to the incidental power.[21]

However, the judges in *Al-Kateb* who discussed the constitutional point made it clear that this was a misreading of *Lim*. Immigration detention of aliens for the purposes of expulsion or deportation is a matter of core power, not incidental power.[22]

As a matter of core power, what is the significant connecting link to the aliens power? Is it, for example, sufficient for validity that the mandatory detention scheme only applies to aliens? In other words, is it enough that aliens are the subject matter of the provisions for the law to come within 51 (xix)? Putting the characterisation question this way brings to mind the discussion in earlier cases about what was termed the "persons powers" (the corporations power, the race power and the aliens power). The problem with the "persons powers", it was said, was that they seemed to provide for unlimited Commonwealth power over the specified persons. All that was needed was that the law had them as its subject.

Only one judge in these recent immigration cases discussed validity in such broad terms. Justice McHugh stated in *Al-Kateb* -"any law that has aliens as its subject is a law with respect to aliens." [23] In *Chu Kheng Lim* he said that – "if a law can be characterised as law with respect to aliens, it is valid whatever its terms"[24]

---

[20] *Chu Kheng Lim* 32
[21] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. And see Justice McHugh's remarks in *Woolley* 386
[22] 1108
[23] 1109
[24] *Chu Kheng Lim* 64

The main judgement in *Chu Kheng Lim* (Brennan J, Deane J and Dawson J; with Mason CJ in agreement) did not rule out this approach but found the laws valid on the more restricted ground that they could be described as laws dealing with the detention of aliens for the purposes of processing and possible removal.[25] We see here how the assumed purpose of the laws can be a way of establishing a connection with the subject matter of the power. However the character of the detention laws is described in such general terms that again there is no scope at this stage for questioning the appropriateness of particular provisions. Note these instructive examples offered by Justice Gummow in *Al-Kateb*:

> It could not seriously be doubted that a law providing administrative detention of bankrupts in order to protect the community would be a law with respect to bankruptcy and insolvency (s 51(xvii)), or that a law providing for the involuntary detention of all persons within their homes on census night would be a law with respect to census and statistics (s 51(xi)).[26]

In other words, if mandatory detention laws deal with the admission and exclusion of aliens they are laws with respect to aliens. The basic purposes of admission and exclusion of non-citizens is sufficient connection to 51 (xix). Possibly aspects of these laws are unreasonable, as they involve means disproportionate to what are seen as the legitimate purposes of the power. However, the characterisation process presently in place is not open to arguments about purpose or subject matter at this level of particularity.[27]

In a much quoted passage Justice McHugh remarked in *Chu Kheng Lim*

> If a law authorizing the detention of an alien went beyond what was reasonably necessary to effect the deportation of that person, the law might be invalid because it infringed Ch. III of the Constitution. Similarly, if a law, authorizing the detention of an alien while that person's application for entry was being considered went beyond what was necessary to effect that purpose, it might be invalid because it infringed Ch. III. But neither "law" would cease to be a "law" with respect to the subject of aliens.[28]

What then of the Ch III argument as an avenue for more intense judicial scrutiny? The discussion of Ch III in *Lim* linked two ideas that have apparently come apart in *Al-Kateb*, at least in the majority judgements. As can be seen in the above remarks of McHugh J the test for the validity of the challenged sections was said in *Chu Kheng Lim* to be were these laws reasonably capable of being seen as necessary for the purposes of processing for admission, or removal. In the Brennan, Deane and Dawson

---

[25] *Chu Kheng Lim* 26, 32

[26] *Al-Kateb* 1125

[27] In *Chu Kheng Lim*, and elsewhere, Gaudron J approached the characterisation issue differently from her colleagues (*Lim* 57). In her view a law imposing special disabilities on aliens would not be a valid law under 51 (xix) unless it was "appropriate and adapted" to regulating entry or facilitating departure (see *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Leask v Commonwealth* (1996) 140 ALR 1, *Kruger* (1997) 190 CLR 1 at 109). As can be seen this approach brings issues of purpose and proportionality directly into the characterisation process. The approach of Justice Guadron to characterisation remains unorthodox. Justice Gummow in *Al-Kateb* referred to her approach to reject it.

Without referring to it Justice Kirby in *Behrooz* took a Gaudron-like approach to characterisation. He argued that *Lim* only supports the administrative confinement of persons in immigration detention "implicitly under reasonable and humane conditions" (*Behrooz* 1078). Detention under inhuman and intolerable conditions would not come within the aliens power. Again, this is not the way that characterisation is usually approached at present.

[28] *Chu Kheng Lim* 65-6

JJ judgement the same test was proposed and it was said that if the laws failed this test then this would show that the law was punitive in character and offensive to Ch III.[29] Punishment under our separation of powers doctrine is an incident of judicial not administrative power.

The discussion of Ch III in *Al-Kateb* commenced not with the "reasonably capable of being seen as necessary" test but with the distinction between punitive and non-punitive laws. A distinction it was said that turned on a consideration of the purpose of the law, not a consideration of its effect. For McHugh J the general purposes of the law – to make aliens available for removal or to prevent aliens entering the Australian community – were characterised as non-punitive purposes. Hayne J and Callinan J thought along similar lines. For Hayne J neither the bare fact of detention nor the length of time in detention (or presumably the conditions of detention) changed the characterisation from non-punitive laws to punitive laws.[30]

Justice Hayne questioned in passing whether *Chu Kheng Lim* was right to pose the Ch III test for the validity of the detention laws as whether they were "reasonably capable of being seen as necessary for the purposes" of admission and deportation. The other majority judges made no specific reference to this point.[31]

Justice McHugh returned to the question of the proper approach for applying Ch III in the subsequent case of *Woolley*. It had been argued in that case (questioning whether children could be lawfully detained) that where a law authorises executive detention, the Ch III question is - are the measures "reasonably capable of being seen as necessary" for the presumed objectives? This approach was supported by dicta from such cases as *Lim* and *Kruger*. But for McHugh J, the majority judges in *Al-Kateb* had taken a different approach to the application of Ch III. These judges did not apply a "reasonably capable of being seen as necessary" test in order to come to the conclusion that the purposes of the detention were non-punitive. Their immediate inquiry was into the purposes of the law themselves, not into the reasonableness of the law as a means to certain ends. Only if the purpose was to impose punishment would the provision offend the separation of powers doctrine. Putting it the other way around, if it could be shown that detention was for the non-punitive purposes of admission, deportation and the exclusion of aliens then the Ch III limit did not apply. In this approach any argument about disproportionate or unreasonable means is relevant only as an indication of legislative purpose. To offend Ch III the law must be found to have the primary purpose to punish.[32] It is not sufficient that that the

[29] *Chu Kheng Lim* 33
[30] Hayne J 1148. See also Callinan J in *Behrooz* 1097
[31] One of the minority judges touched on these matters. Justice Gummow pointed out that there was no clear distinction between punitive and non-punitive. Imprisonment following a criminal sentence, for example, might serve the punitive purposes of deterrence, retribution and reform but also the protective purpose of removing the offender form the community. The question for him was not are the laws punitive but whether the detention, could be connected to "the entry, investigation, admission or deportation of aliens"? If there is such a connection any deprivation of liberty is beyond the reach of Ch III (*Al-Kateb* 1126).
[32] We are told even if it was established that the detention laws had the purpose of deterring others (other possible asylum seekers) this would only change the purpose of the law from protective to punitive if deterrence was one of the main objects of the law; McHugh J *Woolley* 386. But this would be extremely hard to establish; for the lawmaker would have to explicitly promote a punitive intent which stood out from the other acceptable purposes. Callinan J in *Al-Kateb* speculates that even if the

practical effects of the law go beyond what is needed to achieve the legitimate aims of the law.[33]

If I understand Justice McHugh the crucial step in his argument is as follows.[34] Because of Ch III, detention by a non-court requires justification. However *Chu Kheng Lim* was wrong to start with the assumption that detention by a non-court was punishment, unless it could be seen as a reasonable means to a legitimate end.[35] A Ch III inquiry is not structured by any assumption. Whether punishment is involved or not depends on the character of the law's purpose.[36]

If this analysis is taken up in subsequent cases then *Al-Kateb* has altered the legacy of *Chu Kheng Lim*. Clearly if the purpose approach replaces the "reasonably capable of being seen as necessary" test there is far less scope for the Court to question the specifics of the law. A particular feature of the law which applies to an identifiable class of persons - the removal laws at issue in *Al-Kateb*, for instance - cannot be picked out and the Commonwealth challenged to justify the appropriateness of the measures in the light of the ends of the law.

III

It is my argument that as exercises in statutory construction *Al-Kateb* and *Behrooz* are a nice contrast. In *Al-Kateb* the interpretive possibilities to achieve a just result were present but the majority did not take these up. In *Behrooz* the majority were right. The appellant's defence was not available on any fair reading of the *Migration Act*. Convincing statutory interpretation needs to draw upon both the statutory text and the reasons for finding one way rather than another. To adapt a well known remark – if statutory interpretation does not concern itself with the detail of the provisions it is without content. But interpretation without regard for the consequences is blind.

As for the constitutional issues, clearly if we had different constitutional arrangements - a "due process" clause or an "equal protection" clause in our Constitution, for instance - then a review court has other legal arguments to work with. But what of the possibilities of judicial scrutiny in these types of cases under our present constitutional arrangements?

The problem in *Al-Kateb*, in short, was that there was no clear way of raising before the Court the potential unreasonableness or lack of proportionality of the specific laws that led in his case to indefinite administrative detention. The mandatory detention laws as a whole dealt with detention for the purposes of processing and removal. This was sufficient for them to be laws "with respect to" 51 (xix). The application of the Ch III limit was also done with a light touch. In fact once the head of power question

---

purpose of detention was *only* to deter future unauthorised entrants this would not be described as punishment (1153). This is difficult to agree with.

[33] Justice McHugh offers the example of detention laws that had the *purpose* of keeping detainees in solitary confinement or the *purpose* of subjecting detainees to cruel treatment. Such laws we are told would offend Ch III (*Woolley* 391). Presumably if these excessive measures were the consequence of otherwise protective laws, the laws would keep their non-punitive character.

[34] *Woolley* 384

[35] i.e. an end in power.

[36] Purpose is not the lawmaker's declared purpose but is to be worked out from the terms of the Act, the surrounding circumstances, the mischief aimed at and possibly parliamentary debates. *Woolley* 385

has been answered there seems nothing more to ask when disposing of the Ch III limit on power. In the reworking of *Al-Kateb* by McHugh J in the subsequent case of *Woolley*, the only relevance of disproportionate aspects of the mandatory detention laws is if they disclose an improper punitive purpose. It is hard to see this test having much bite. Unless, of course, our lawmaker surprises us further.

Although I cannot develop the point here, arguments of proportionality are highly relevant when other Constitutional limits are applied. Examples such as the *Political Advertising case* (applying the implied freedom of political communication) and *Castlemaine Tooheys* (applying s92) show a review court evaluating specific measures and asking whether these are sufficiently tailored to advance otherwise legitimate ends.[37] Clearly it is thought that the Ch III limit is different.[38] But it is not adequately explained why. With respect, Justice McHugh would seem not to the point in the following remark.

> Questions of proportionality cannot arise in the context of Ch III. A law that confers judicial power on a person…that is not authorised by…Ch III cannot be saved by asserting that its operation is proportionate to an object compatible with Ch III.[39]

Of course, once it has been decided that it is judicial power that is at stake there can be no role for proportionality arguments. But the suggestion is that these arguments play their part at an earlier stage of the analysis, namely, with the decision whether the law is punitive and whether judicial power is in fact being exercised. The *Chu Kheng Lim* "reasonably capable of being seen as necessary" test allows the Court to question whether specific measures authorising administrative detention overreach themselves as disproportionate means to otherwise legitimate ends. This approach should not be discarded.

Justice Hayne concludes his judgement in *Al-Kateb* with a reference to Learned Hand's comment – that if "society chooses to flinch when its principles are put to the test, courts are not set up to give it derring-do".[40] This is reminiscent of the more shocking remark of Oliver Wendell Holmes. "If my fellow citizens want to go to hell I will help them. It's my job".[41] We get the point. But the Constitution is there to protect us from our excesses and our High Court should be encouraged to start its constitutional work with this interest in mind.

There must be some things we cannot do to non-citizens in the pursuit of the legitimate goals of regulating their entry, investigation, admission or deportation? Why read out of the Constitution a possible way in which our Court can scrutinise these matters?

---

[37] (1992) 177 CLR 261; (1990) 169 CLR 436, respectively

[38] One difference is that the interests protected by Ch III are more difuse than with the other two limits – protecting political speech, avoiding protectionism. However in its applicability to the detention cases the Ch III interest is well enough defined, namely, the interest in personal liberty.

[39] *Woolley* 392

[40] 1149

[41] Letter to Harold Laski; 4/3/1920; M Howe (ed) Holmes-Laski Letters (1953) vol 1, 249