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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

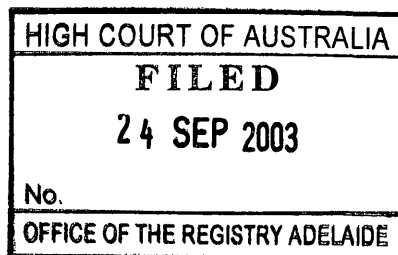
On Appeal from a Single Judge of the Federal Court of Australia

No A253 of 2003

Between:

SHDB

Appellant



And:

**PHILIPPA GODWIN,
DEPUTY SECRETARY
DEPARTMENT OF IMMIGRATION
AND MULTICULTURAL AND
INDIGENOUS AFFAIRS**

First Respondent

And:

**JULIE HELEN KEENAN
ACTING DIRECTOR OF THE
UNAUTHORISED ARRIVALS SECTION
IN THE UNAUTHORISED ARRIVALS
AND DETENTION DIVISION OF THE
DEPARTMENT OF IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS
AFFAIRS**

Second Respondent

And:

**MINISTER FOR IMMIGRATION AND
MULTICULTURAL
AND INDIGENOUS AFFAIRS**

Third Respondent

WRITTEN SUBMISSIONS FOR THE APPELLANT SHDB

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Part I

STATEMENT OF THE ISSUES

1. There are six issues raised in the appeal.
 - 1.1 Does the *Migration Act* 1958 (the Act) authorise the continuing detention of an unlawful non-citizen if there is a finding that the unlawful non-citizen cannot be removed from Australia pursuant to s198 (1) of the Act?
 - 1.2 Is the detention of an unlawful non-citizen authorised by s189 of the Act if the unlawful non-citizen is no longer being held for the purposes set out in s196 of the Act?
 - 1.3 If the answer to 1.1 and 1.2 above is yes, is the Act purporting to detain persons outside the scope of ss 51 (xix) and (xxvii) when read in light of Chapter III of the *Constitution*?
 - 1.4 Is it for the courts to determine what is meant by *as soon as reasonably practicable* in relation to s198 of the Act?
 - 1.5 If it is unlawful to hold a person in detention once the purpose set out in s196 (1) is extinguished, because the answer to 1.1 and/or 1.2 above is no, is *habeas corpus* the appropriate remedy?
 - 1.6 Is the court precluded from ordering the release of a person found to be unlawfully detained because of s196 (3) of the Act?

PART II

SECTION 78B OF THE JUDICIARY ACT (CTH)

2. The issues raised above do involve a matter arising under the *Constitution* and notices have been issued by the Solicitor-General and no further notice is required.

PART III

STATEMENT OF FACTS

3. The appellant is a stateless Palestinian and was born on 29 July 1976 in Kuwait. His parents are Palestinian and he has lived most of his life in Kuwait apart from a brief period when he resided in Jordan.¹
4. The appellant arrived in Australia on 23 December 2000 by vessel. The appellant has no passport. He was placed in immigration detention pursuant to s189 of the Act.²

¹ AB 21 Lines 11 - 14

² AB 21 Lines 16 – 17 AB 9 Lines 25 - 26

5. The appellant lodged an application for a protection visa with the Department for Immigration, Multicultural and Ethnic Affairs (the Department) on 6 January 2001.³
6. On the 22 February 2001, a delegate (the Delegate) of the Minister for the Department (the Minister) refused to grant the appellant a visa. On 28 February 2001, the appellant applied for a review of the decision to the Refugee Review Tribunal (the Tribunal).⁴
7. On the 16 May 2001, the Tribunal confirmed the decision of the Delegate.⁵
8. On the 6 June 2001, the appellant applied for a judicial review of the Tribunal's decision before the Federal Court.⁶
9. On the 23 October 2001, the Federal Court dismissed the application.⁷
10. The Appellant appealed the decision of the Federal Court and on the 21 May 2002, the Full Federal Court dismissed the appeal.⁸
11. On the 19 June 2002 the appellant told the Department that he wished to leave Australia and return to Kuwait or if not there, Gaza.⁹
12. On the 30 August 2002, the appellant signed a form addressed to the Minister asking to be removed from Australia as soon as reasonably practicable.¹⁰
13. The applicant, along with another person in a similar position, then lodged proceedings before the Federal Court for a judicial review of the continuation of his detention, on 6 January 2003. These matters were heard together before Selway J who dismissed both the applications¹¹. These decisions have been appealed.
14. The appellant then lodged a further application before the Federal Court on 12 February 2003 for an order in the nature of a *declaration* that he was being unlawfully detained, an order in the nature of *mandamus* directing the first and second respondents to remove the appellant from Australia, an order in the nature of *mandamus* directing the second respondent to make certain inquiries, an order in the nature of *prohibition* against the third respondent for continuing detention after a certain time, an order in the nature of *habeas corpus* releasing the appellant from immigration detention, and an order for costs, on the ground that the appellant's detention was unlawful.¹²
15. On the 3 April 2003, von Doussa J dismissed the appellants' applications. An officer of the Department gave evidence in the matter and von Doussa J concluded that he was not satisfied that the Department was not taking all reasonable steps to secure the removal of the appellant from Australia, but found that the appellant's removal from Australia is "not reasonably practicable

³ AB 9 Lines 25 - 26

⁴ AB 9 Lines 28 - 30

⁵ AB 9 Lines 30 - 31

⁶ AB 9 Lines 31 - 33

⁷ AB 9 Line 33

⁸ AB 9 Line 34

⁹ AB 9 Lines 35 - 38

¹⁰ AB 9 Lines 38 - 39

¹¹ SHDB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 30; SHFB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] 29;

¹² AB 1 - 3

at the present time as there is no real likelihood or prospect of removal in the reasonably foreseeable future.”¹³

16. Von Doussa J concluded that the appellant was not entitled to any of the reliefs sought including a *declaration* that the appellant was unlawfully detained and an order for *habeas corpus*. Von Doussa J expressly refused to follow the Federal Court Merkel J in the decision of *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 192 ALR 609 (*Al Masri* FCA), a decision of Merkel J.
17. The Full Court of the Federal Court delivered the appeal in *Minister for Immigration and Multicultural Affairs v Al Masri*, [2003] 197 ALR 241, (*Al Masri* FCAFC) on 15 April 2003. This judgement upheld the decision of Merkel J.
18. On 17 April 2003, the appellant applied for an interlocutory order releasing the appellant from immigration detention on certain conditions pending the outcome of his appeal against the judgement of Selway J (see 13 above, the Selway J appeal).
19. The appellant was released from immigration detention by an interlocutory order of Mansfield J on 17 April 2003¹⁴
20. The appellant is living in South Australia and is abiding with the conditions regarding residency and reporting as ordered by Mansfield J.
21. On the 23 April 2003, the appellant lodged an appeal against the decision of von Doussa J., which was to be heard with the Selway J appeal in the Federal Court.¹⁵
22. In July 2003 the appellant was served with a section 40 *Judiciary Act* notice to remove the von Doussa J appeal to the High Court.¹⁶
23. On the 14 August 2003, the High Court granted the Notice.¹⁷

PART IV

RELEVANT CITATIONS

- 24
 - i) SHDB v Goodwin and Ors [2003] FCA 300;
 - ii) SHDB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 30;
 - iii) SHFB v Minister for Immigration, Multicultural, and Indigenous Affairs [2003] FCA 29;
 - iv) SHFB v Goodwin and Ors [2003] FCA 294.

¹³ AB 6; AB 7 - 11

¹⁴ AB 13 - 14

¹⁵ AB 15 - 16

¹⁶ AB 20 - 24

¹⁷ AB 18 - 19

PART V

THE APPELLANT'S ARGUMENT

25 Summary:

The detention of the appellant in immigration detention is unlawful.

The Act does not permit continuing detention.

If it did permit continuing detention, it would be unconstitutional.

The appellant is entitled to seek judicial review of a detention.

The appropriate remedy is *habeas corpus*.

The courts have the power to release the appellant from an unlawful detention and nothing in the Act prohibits the court from so doing.

The appellant is entitled to seek the relief sought although he is an unlawful non-citizen.

The trial judge erred in finding that the detention was lawful and authorised by the Act.

26 Standing. The appellant is an unlawful non-citizen. It is submitted that he is nevertheless entitled to seek the orders sought before the Court.

Every person within a jurisdiction is entitled to equal protection of the law. The rights protected by this principle have been held to not be limited to those who are in a country lawfully or who are citizens of that country. This has been accepted in Australia in *Kiao v West* (1985) 159 CLR 550, Deane J said, [at 631],

*"An alien who is unlawfully within this country is not an outlaw. Neither public officer nor private person can physically detain or deal with this personwithout his consent except under and in accordance with the positive authority of the law...."*¹⁸

The courts have an ongoing supervisory jurisdiction to determine whether detention is lawful. The Court has held that s75 of the Constitution conferring the right of the courts to have jurisdiction to determine the lawfulness of decisions under the Act is not curtailed by any provision of the Act.¹⁹

¹⁸ This decision cited with approval the decision of the House of Lords in *R v Home Secretary; Ex Parte Khawaja* [1984] AC 74 where Lord Scarman speaking of the protection offered by *habeas corpus*, in relation to whether it just applied to British nationals said, "Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been the law at least since Lord Mansfield freed 'the black' in *Sommerset's case* (1773) 20 St. Tr. 1" There is authority of the principle's application in relation to Migration Act matters in *Chu Kheng Lim v Minister for Immigration* [1992] 176 CLR 1 (*Lim's case*), *Al Masri's cases* both in the single judgement and Full Court and the Full Court of the Family Court of Australia in *B and B and the Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FLC 93-142. According to *Lim's case*, these rights do not always mirror the right of a citizen for example, in relation to the vulnerability of an alien to be deported or excluded, and can diminish the protection of a person against imprisonment. See page 29 in the joint judgement of Brennan, Deane and Dawson JJ. The decision of *Coalition of Clergy, Lawyers and Law Professors v Bush* 310 F 3d 1153 (2002) (which challenged the detention without charge of persons at Guantanamo Bay) can be distinguished. In that case, the court limited the protection of rights to persons who were on land that was within the sovereign territory of the United States of America.

¹⁹ See *Plaintiffs 157/2002 v Commonwealth of Australia* (1998) 195 CLR 337

- 27 The appellant is a stateless person who is not able either to obtain residency in any country or to have a right of return to Gaza. Von Doussa J found that the appellant had no real likelihood or prospect of removal in the reasonably foreseeable future. This finding has not been appealed by the respondents. The appellant contends that because of this finding the Act no longer authorises his continued detention. The appellant has therefore a right to pursue relief through the courts for release from an unlawful detention.
- 28 It is submitted that the appellant's detention is unlawful and is not authorised by the Act for three reasons of statutory construction:
- (i) The language of the sections under consideration do not purport to authorise continuing detention; (see paragraphs 34 – 43 below)
 - (ii) Parliament cannot be said to have turned its mind to persons who were stateless and who could not be released pursuant to s198 of the Act. It is submitted that legislation cannot take away fundamental rights by implication, nor impliedly take away common law rights. It is an error to find that Parliament intended indefinite detention; (see paragraphs 44 – 53 below)
 - (iii) That any interpretation of the legislation should be on the assumption that Parliament would have intended that the legislation comply with the common law and Australia's obligations in relation to international covenants. (See paragraphs 54 – 57 below)
- 29 Further, it is submitted that if the appellant is wrong in relation to the interpretation of the Act, then if the Act is purporting to authorise indefinite, and perhaps even lifelong detention, that authorisation would be unconstitutional (see paragraphs 58 – 62)

DO SECTIONS 189, 196 AND 198 OF THE ACT AUTHORISE THE CONTINUING DETENTION OF THE APPELLANT?

- 30 The Act authorises the detention of unlawful non-citizens²⁰ pursuant to s189 of the Act²¹. It is submitted that this section authorises the **act** of detention alone in much the same way that arrest sections in criminal legislation operate. It is submitted that the power exercised under s189 ceases once the act of detention has been exercised. The power to continue detention is then authorised by s196 of the Act.²² The power is authorised until removal from

²⁰ An unlawful non-citizen is defined in s 14 of the Act, which says, (1) "A non-citizen who is in the migration zone who is not a lawful non-citizen is an unlawful non-citizen."

²¹ "189 Detention of unlawful non Citizens.

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person"

²² "196 Period of detention.

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

- (a) removed from Australia under section 198 or 199; or
- (b) deported under section 200; or
- (c) granted a visa."

detention, which occurs through deportation, removal or by the granting of a visa. Once a person has requested their removal from Australia (pursuant to 198(1)), the Act requires their removal as soon as reasonably practicable.²³ It is submitted that the detention provisions in s196 authorise purposive detention only, and contain the provisions that would bring about an end to the detention. The legislation does not refer to persons who have made an application for removal under s198 and whose removal is not possible. It is submitted that this is a gap in the legislation and it is an error to infer, if s198 cannot be complied with, that ss 189 and 196 permits the continuation of detention. It is submitted that the trial judge is wrong in concluding that the Act authorises continued detention of unlawful non-citizens where s198 could not be complied with by the Minister.

- 31 If the construction that the trial judge placed upon the Act was correct, then an unlawful non-citizen who has,
 - i) Requested that he or she be removed from Australia pursuant to section 198(1) of the Act, (as the appellant did), **or**
 - ii) Who was removable because he or she is not eligible for a visa **and**
 - iii) who has no real likelihood or prospect of removal in the reasonably foreseeable future, could be detainable indefinitely, even for life. This is contrary to the rule of law.
- 32 The Federal Court in *Al Masri* FCA construed sections 189, 196 and 198 of the Act consistent with the approach that the appellant asks this Court to take. In *Al Masri* FCA, the Court held that a person is no longer detainable pursuant to the Act if that person has requested removal from Australia pursuant to s198 and there is no reasonable prospect of being removed from Australia within the reasonably foreseeable future. In the judgement Merkel J followed the High Court decision of *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (*Lim's case*) which considered the earlier removal section (54P) of the Act which had been replaced by the similarly worded s198 of the Act. Merkel J found that *Lim* supported the release of the applicant Al Masri because the failure to be able to remove as soon as reasonably practicable following a request to remove meant that the detention pursuant to s 196 was no longer lawful. Merkel J also examined a number of cases from other jurisdictions, which supported the same principle. Merkel J's conclusion about the detention provisions of the Act not authorising indeterminate detention was upheld in the Full Court appeal *Al Masri* FCAFC, (except in relation to the failure of the Minister to perform his or her duty to remove).²⁴

²³ Section 198 Removal from Australia of unlawful non-citizens.

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

²⁴ Merkel J found that detention would be unlawful if the Minister was not doing all he or she could to remove a person; the Full Court found this failure would not affect the legality of detention but instead give rise to other administrative reliefs.

- 33 The interpretation of the Act by the trial judge in this appeal before this Court was that the power to detain continues regardless of whether the Minister is able to remove a person or not. The Solicitor-General has argued in this and similar matters, (consistent with judgment of Selway J in the first matter the appellant had before the Federal Court)²⁵ that the only avenue open that an applicant would have, if there was a finding that he or she was not able to be removed from Australia as soon as reasonably practicable, would be to pursue a writ of *mandamus* to ensure compliance with the Act; that the detention continues and could not become unlawful. This is inconsistent with *Lim* and both the *Al Masri* decisions, and, it is submitted, is wrong.²⁶

1) The Language of the Act

- 34 The *Al Masri approach* is supported by ordinary principles of statutory construction. There is nothing in the wording of the relevant sections to support a conclusion that Parliament must have turned its mind to persons who were stateless and then decided that indefinite and perhaps even lifetime detention could follow. The trial judge, it is submitted, erred when he supported the approach taken by, *inter alia*, French J in *WAIS*²⁷ and Beaumont J in *NAES*.^{28 29} The trial judge decided against the *Al Masri* approach for three main reasons,
- i) He shared the views expressed by other Federal Court judges who held that Merkel J was wrong in his interpretation of the intent of Parliament and the construction of the Act;
 - ii) because of the earlier finding, in the appellant's first application for judicial relief before Selway J, that *Al Masri* FCA should not be followed; and
 - iii) He considered that there was no room for an implication that Parliament overlooked the plight of stateless persons who have no country of nationality to which the person can readily be returned.³⁰
- 35 It is submitted this is an error. It is submitted that assistance in determining the intent of Parliament can be gained by examining the historical context of the enactment and the wording of the sections under consideration. Prior to the enactment of this section and its predecessor, there were no applications before the courts for release from immigration detention by stateless persons in Australia. Parliament cannot be thought to have considered the plight of stateless persons, and then excluded the possibility of their release.
- 36 The House of Lords in England had examined similar legislation some nine years earlier and had held that the United Kingdom legislation (which has similar wording to s198), did not authorise indefinite detention of a person.

²⁵ *SHDB v Minister for Immigration, Multicultural and Indigenous Affairs* [2003] FCA 30

²⁶ The judgement of von Doussa J was decided before the Full Court delivered its judgment in *Al Masri*.

²⁷ *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625

²⁸ *NAES v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 2

²⁹ AB 36 line 25 – AB 37 line 35

³⁰ AB 37 line 40 – AB 38 line 22

The purpose of holding a person for removal had passed. *R v Governor of Durham Prison; Ex Parte Hardial Singh* [1984] 1 WLR 704 (*Hardial Singh* case).

- 37 Further the High Court in Australia had applied the *Hardial Singh* principles in *Lim*'s case which purported to find that a saving provision in the Act (under the old section) was that a person could bring about the end to his or her own detention³¹ Parliament must have been aware of the *Hardial Singh* principles and that *Lim* followed these principles. Even if Parliament could not have been aware of *Lim* when drafting the legislation in its present form, *Hardial Singh* was an important case, and could not have been ignored. In any event, Parliament has not amended the legislation since *Lim*, which had confirmed the saving provision is that a person could end his or her detention. Parliament has not attempted to amend the Legislation since *Lim*.
38. It is submitted that if the power to bring about the end of detention is unenforceable the Minister cannot perform the act of removal once it is requested. To be a saving provision it must have an effect. It has no effect if an applicant cannot end his or her detention. It is submitted that Parliament would have been clearer in its intent when these sections had been interpreted if it intended detention would continue regardless. As was held in *M38/2002 v The Minister for Immigration and Multicultural and Indigenous Affairs* [2003] 199 ALR 290 (*M38 Case*) at paragraph 28,

"The Full Court observed in Al Masri, at 250,

'There is no power under the Act to decide against the removal of an unlawful non-citizen and so that where a subsection of s 198 applies to an unlawful non-citizen the removal of that person would occur by force of law.'

Broadly speaking, therefore, the Act contemplates that an unlawful non-citizen must either be granted a visa or removed from Australia."

- 39 The intent of Parliament in sections 189, 196 and 198 Act can also be determined by examining the whole of the Act. Parliament has not included indefinite detention powers in any other section.³²
- 40 The intent of Parliament in the whole of the Act can also be determined by a reading of the Explanatory Memorandum that accompanied the Migration Reform Bill 1992 in the House of Representatives. This was quoted in part in *M38* at [57-58]. Of particular relevance is paragraph 53 and 54 of the Memorandum, which says:
- "This is essentially a change in terminology, to reflect an appropriate distinction between 'deportation', as the ultimate sanction for non-citizens who commit serious crimes or are a threat to national security, and 'removal' of persons who have no legal entitlement to remain in Australia.*

³¹ at 34 of the Judgement

³² AB paragraph 30 of SHFB von Doussa J's Judgement

Removal from Australia will be by force of law rather than as a result of a decision. A person will become subject to removal as soon as he or she becomes unlawful. If there is any available avenue for applying to remain, they will have a limited period to apply for it. Once all available applications and merits review entitlements are exhausted the applicant will be removed as soon as practicable”

And paragraph 233 of the Memorandum, which says:

“[t]he sections...provides that an unlawful non-citizen in detention must be removed from Australia if the non-citizen has applied for a visa which has been finally refused, cannot be approved or cannot be granted and who has not made a further valid application for a visa.”³³

- 41 Parliament’s intent can be inferred by the language used in other provisions of the Act that deal with refugees. Section 36(2) of the Act provides that a criterion for a protection visa is that the applicant is a non-citizen in Australia ‘to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugee Protocol’.

Australia acceded to the 1951 Refugees Convention on 22nd January 1954 (with effect on 22 April 1954) and to the 1967 Protocol on 19th December 1973 (with effect on that date). Pursuant to Art 1A (2), for the purposes of the Refugees Convention, a refugee is a person who:

“Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the county of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.

As this definition includes someone who has a fear of persecution and who is unable to return to his or her country it is open to find that Parliament would have thought that a person without a nationality and who is unable to return to his or her former country of habitual residence would have been granted a protection visa pursuant to s36 of the Act. Further, the plight of stateless Palestinians has been the subject of national and international concern since 1947, and to submit that Parliament intended such persons would be neither refugees nor able to be released from our immigration detention without expressly saying so has no merit.³⁴ The United Nations have passed resolutions of concern to Palestinian refugees, in particular *General Assembly Resolution 302 (IV)*, passed on 8 December 1949 establishing the

³³ at [59] of *M38*

³⁴ There is some discussion on the limitations of the *Convention* in relation to Palestinians who are receiving assistance from the United Nations and therefore arguably not refugees within the definition in 1A in *Shatout v Minister for Immigration and Multicultural Affairs* [2002] FCA 114

United Nations Relief and Works Agency for Palestinian Refugees in the Near East, and *Security Council Resolution 242* passed on 22 November 1967 Stating the Principle of a Just and Lasting Peace in the Middle East. These Resolutions predated the sections of the Act under consideration. In M38 the Full Federal Court examined whether it was proper to look behind the claim of a person who was to be removed to decide if the Minister or his officer had to be satisfied that the return of a person was not in breach of the *non-refoulement* principles of the Refugee Convention (which had not been specifically adopted into Australian law). This decision held that s198 of the Act has no saving provisions, as it requires the removal of a person with the use of the word **must**. It has been held that a court can look behind the officer's removal powers however where they breach other rights, for example if the applicant has not had enough time to have an appeal against the refusal to grant a visa determined or lodged.³⁵

- 42 The use of the language of various sections of the Act to determine Parliament's intent in the issue of indeterminate detention was considered by the Court in *Al Masri* FCAFC. The Court held that the word **until**, as it appears in s196 has a temporal meaning. The Court also held that s196 of the Act is headed "**Period of detention**," which supports the submission that it must have been Parliament's intent that detention would end with one of the three things contained in that section occurring. The word "**period**" implies a time period with a limit. From this language, it is submitted Parliament must have intended that s 196 contains the method for detention to end and s198 is one of the methods mentioned. If it is correct that Parliament intended detention to end through removal, release or the granting of a visa then, it is submitted, Parliament cannot have turned its mind to the possibility that a person's detention could be indefinite and not have included legislation to cover that possibility. It is submitted that it is correct to read s198 as being the statutory foundation for one of the three ways contained in s196 to end a detention.
- 43 It is further submitted, the imposing of a duty on the Minister to remove **as soon as reasonably practicable** supports an interpretation that Parliament intended things to happen within a time frame. If it was the case that Parliament meant, as von Doussa J has held, that the duty to detain remains if removal is not possible, then Parliament would have enacted legislation that reflected this intent, for example, as soon as reasonably practicable *if possible*.

2) The Curtailment of Fundamental Rights.

- 44 Statutory construction principles of the necessity for Parliament to expressly curtail fundamental and common law rights supports the submission that Parliament did not intend to authorise continuing detention. The curtailment of a fundamental freedom, in this case to liberty, is always constructed

³⁵ *Heak v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 29 ALD 505

strictly³⁶. Since the *Magna Carta*³⁷ the courts have interpreted the power of the state to detain to be a fundamental curtailment of a right, and therefore have interpreted any attempt to curtail that right strictly. The approach taken by the trial judge in this appeal did not consider this principle. The law is very jealous to protect the personal liberty of persons, and to interpret legislative intent strictly. Some examples include the right to legal professional privilege,³⁸ and arrest rights.³⁹ In deciding whether it was the intention of Parliament to curtail a right or not, it is submitted that the correct approach is to examine not only the nature of the right, here the right to personal freedom, but also the nature of the curtailment. The appellant faces the very real possibility at such a young age of permanent detention. Courts have held that indefinite detention, even as a form of punishing those who have been sentenced by the courts can be oppressive.⁴⁰ This fundamental right to liberty was discussed in *Grassby v R* (1989) 168 CLR 1. The finding of the trial judge meant that the appellant would lose one of the most fundamental rights and have that right curtailed in the most extreme way. It is wrong to say that Parliament intended this curtailment when it did not say so expressly.

- 45 Support for the approach that Parliament cannot have intended to legislate for indeterminate detention is found in overseas jurisdictions that have examined similar provisions of migration and removal legislation.
- 46 In *Hardial Singh*, the House of Lords examined an applicant with a similar principle that the appellant's case considers. Singh was an Indian national who was being held in immigration detention in England pending deportation, following convictions for criminal offences. The legislative authority empowered his detention until he was removed or deported. He had lost his passport and there was a delay by the Indian High Commission to reissue one. Singh sought a writ of *habeas corpus* arguing he was no longer being held for the purpose of removal but instead for the purpose of awaiting the issue of his passport. The Court held that there was an implied limitation on the detention of the applicant for the purpose of removal and could authorise continuing detention for removal purposes only. If it was not possible to remove a person within a reasonable period, for whatever reason, the Court held, then it was wrong for the Secretary of State to continue to exercise the power of detention.

³⁶ A decision that was referred to by both the Full Court and Merkel J in the single judgement in the decision of *Al Masri* on this point is *Zadvydas v Davis* 533 US 678 (2001), a decision of the United States Supreme Court where the Court considered applications for *habeas corpus* from aliens indefinitely detained. The court could not find a clear intention to give the Attorney General the power to hold indefinitely and therefore held that if Congress had intended to hold a person indefinitely in confinement until removal then it would have spoken in clearer terms. The Court said that freedom from imprisonment 'lies at the heart of liberty' (690).

³⁷ Article 39, "No Free-man's body shall be taken, or imprisoned, nor disseised, nor outlawed, nor banished, nor in any ways be damaged, nor shall the King send him to prison by force, excepting by the judgement of his Peers and by the Law of the land."

³⁸ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561

³⁹ *Christie v Lechinsky* [1947] AC 573

⁴⁰ *The State of South Australia v O'Shea* (1987) CLR 378, *Chester v The Queen* (1988) 165 CLR 611,

- 47 The Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* (1997) AC 97 (*Lam's case*) considered the construction of s 13D of the Immigration Ordinance (Laws of Hong Kong, 1981 rev., c. 115) which conferred a power to detain "pending ... removal from Hong Kong". The applicants sought writs of *habeas corpus* on the basis that their detention was no longer for the purpose of removal, as Vietnam was not willing to repatriate the applicants. The Privy Council interpreted an implied limitation in the detention sections, namely that in the absence of contrary indications the purpose of detention was pending removal. Further, the Court held that if it becomes clear that removal is not going to be possible within a reasonable time then further detention is not authorised.⁴¹
- 48 In the recent decision of *R v Secretary of State for the Home Department; ex parte Saadi* [2002] 4 All ER 785, the House of Lords affirmed the decision of *Hardial Singh* and said statutory powers of detention must be, in any event, exercised reasonably by government, in the absence of specific provisions laying down particular time scales for administrative acts to be performed. Indeterminate detention, it is submitted would fail this test.⁴²
- 49 As the Full Court said in *Al Masri* FCAFC the only recourse a detainee has to seek liberty is to request, in writing (as the appellant did), for removal. The legislation would not only have to clearly state that Parliament intended to keep persons in detention indefinitely but did so knowing that the only recourse to liberty that a detainee would be able to exercise could have no effect.⁴³ Clearly, Parliament intended to curtail an alien's right to personal freedom until removal but, it is submitted, it cannot be said that it follows that Parliament intended that that fundamental right be taken away even if removal was not possible. Parliament would have to have said so in clear and unambiguous language.
- 50 The *Al Masri* approach, which held that if a person cannot bring a detention to an end the detention is unlawful, was approved by the Full Court of the Family Court in *B and B*. This case involved an application under the *Family Law Act* 1975 (Cth) to the Family Court to order the release from immigration detention, five children from the one family. At the initial trial, the trial judge had found that the Family Court had no power to make the orders sought. On appeal, the Full Court of the Family Court reversed that decisions and held that if the children were unable to end their detention, their continued detention would be unlawful applying the approach in *Al Masri* and *Lim*. Further, the Court held, because the children would be unable to have the capacity to make a request for removal under s 198(1), they cannot end their own detention. Children are not chattels of their parents and it was held to be irrelevant that the parents could do so on their behalf. Further, the Court found that the interpretation of the legislation raised the very real possibility

⁴¹ At p 111 of the Judgement

⁴² See *Al Masri* Full Court at paragraph 109

⁴³ See *Al Masri* Full Court paragraph 116

that the children might spend their entire childhood in detention and if it were the intent of Parliament to so authorise, the detention would be unconstitutional and therefore unlawful.⁴⁴

- 51 The *Al Masri* decisions say that s 196 of the Act should be construed consistently with curtailment principle discussed in *Coco v The Queen* (1994) 179 CLR 427 by Mason CJ, Brennan, Gaudron, and McHugh JJ, at 437-8:

"The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature had not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities, but has also determined upon abrogation or curtailment of them. The courts should not input to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights. (Chu Kheng Kim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, at 12, per Mason CJ)"

- 52 The courts in decisions that have rejected the *Al Masri* approach in determining the implied intent of Parliament have pointed out reasons why the sections should be read to authorise indeterminate detention. It is submitted none of these reasons rebut the presumption in favour of liberty. Apart from the argument that s 189 of the Act authorises indeterminate detention of all unlawful non-citizens, they include the possible release into the community of persons who may be a threat to national security or the fear that an applicant may abscond. It is submitted that these reasons have no weight. If a person is a real threat to security then there will be some law that could be applied to ensure Australia's ongoing safety, for example as was pointed out in *Al Masri* FCAFC, extradition for known offences⁴⁵. This fear of persons who might come to Australia to seek refuge by boat as opposed to persons who might be living here legitimately or who travel here legitimately, has no merit. The Department has ample opportunity to investigate a person who is in immigration detention and to closely scrutinise the person. If there are real concerns then that is a matter a court can consider when deciding the nature of the orders sought rather than providing a reason for the curtailment of the fundamental right of all persons who might be held, as this appellant is, indefinitely. Further, as was pointed out in *Al Masri* FCAFC, Parliament could enact special provisions for persons who are a real risk to national security without taking away the fundamental right to liberty for persons who pose no threat.

⁴⁴ see Judgement of Nicholson CJ and O'Ryan J at [381 – 384]

⁴⁵ paragraph 132

- 53 Some courts have held that there is a real risk that a person could abscond once released into the community. Clearly, it is in the power of the courts to attach to any orders for release, conditions such as residency and reporting. It is not the case that an application for *habeas corpus* could be released without conditions. If a person was then at large, a court could make orders for detention pending removal if anything of substance concerned the Department, or if the person's removal was now reasonably practicable in the reasonably foreseeable future as occurred in the *Al Masri* case.

3) International Obligations

- 54 It is appropriate for a court to determine the intent of Parliament, where there is no clear language saying otherwise, to imply that Parliament would have intended that legislation would be consistent with our international obligations and would comply in its operation with those obligations.
- 55 The Federal Court has interpreted the intention of Parliament in the relevant sections of the Act in this way in both the judgements of *Al Masri* and the Full Court decision of *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD of 2002* (2003) 196 ALR 111. The principle adopted in these judgements is, it is submitted, the correct approach and is consistent with what the High Court has held in a number of cases including *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 and *Polites v the Commonwealth* (1945) 70 CLR 60.
- 56 As pointed out in *Al Masri* FCAFC Parliament should be assumed to have intended that any detention provisions of the Act comply with our obligations under Article 9 of the International Covenant on Civil and Political Rights - indeterminate detention of individuals would be arbitrary within the meaning of Article 9.⁴⁶
- 57 The Refugee Convention and Protocol (see Appendix C), also has relevance in relation to the submission that the Act should be read consistent with the principle that Parliament would not have intended any inconsistency with the contents of an Act and our obligations. As stated earlier, Australia has ratified both the Convention and the Protocol (in 1954 and 1973 respectively). The Refugee Convention was discussed in *M38*, which says at [34 and 35], that the Convention does not purport to confer a right of asylum on a refugee in a contracting state but rather defines the welfare rights and a refugee's rights. *M38* concerned an application to try to prevent the Minister from removing a person pursuant to s 198 of the Act, as the removal would be in breach of Article 33 of the Convention in relation to the applicant's claim that he had a fear of persecution and a risk to his life. The Full Court held that it is for each contracting state to determine how it would enforce the various provisions of the Convention and Protocol. The Court went on to find

⁴⁶ *Al Masri* Full Court paragraphs 139 - 154

that it is correct to interpret any ambiguity in a statute consistent with the terms of relevant international instruments and obligations. The Court considered as s 198 (6), which like s 198 (1) requires an officer to remove a person with the use of the **must** in the legislation. The Court held because there was no ambiguity and therefore there was no need to look at the Convention and Australia's obligations to determine what Parliament might have intended.

CONSTITUTIONAL ISSUES

- 58 If it is the case that this Court upholds the trial judge is correct in finding that the Act authorises continued detention even though there is a finding in relation to the appellant not being able to be removed in the reasonably foreseeable future, it is submitted that the sections would be unconstitutional.
- 59 The validity of ss 196 and 198 of the Act depends on the scope of the legislative power contained in s 51 (xix) of the Constitution. Section 51 (xix) empowers the Commonwealth Parliament to make laws with respect to 'naturalisation and aliens'.⁴⁷ The power to legislate in relation to these powers should be given a broad rather than a narrow interpretation⁴⁸. Under this power the Parliament may make laws imposing 'burdens, obligations, and disqualifications on aliens which could not be imposed by Parliament on other persons per Gummow J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 193 ALR 37, 60-1. Section 51 (xxvii) gives the Parliament power to make laws in relation to immigration and emigration but it is submitted that this section would not grant powers significantly different to those granted under s 51 (xix).
- 60 However ss 51 and 52 of the Constitution are to be read 'subject to this Constitution' and this includes restrictions on the legislative power contained in Chapter III of the Constitution. The judicial power of the Commonwealth is exhaustively vested in courts created pursuant to Chapter III of the constitution. (*R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 269 (Dixon CJ, McTiernan, Fullagar and Kitto JJ)). Although an exhaustive and conclusive definition of what is federal 'judicial power' has proven to be elusive,⁴⁹ there are some activities, which can be said to be exclusively judicial such as the adjudication of punishment of crime under a law of the Commonwealth.⁵⁰
- 61 The question whether involuntary detention by the Executive may be presumed to be punitive is a question of substance not form per *Lim's* case. Some forms of involuntary detention do not infringe the separation of powers

⁴⁷ for the definition of an 'alien' see *Nolan v Minister of Immigration and Ethnic Affairs* (1986) 165 CLR 178, 183-4 (Mason CJ, Wilson Brennan, Deane, Dawson and Toohey JJ)

⁴⁸ *Jumbunna Coal Mine NL v Victorian Coal Miners' Associations* (1908) 6 CLR 309, 367 (O'Connor J)

⁴⁹ See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ).

⁵⁰ *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 (Isaacs J)

according to *Lim*. These include arrest and detention in custody pursuant to an Executive warrant or mental illness or infectious disease (*Lim*, 28) or for the presumed general welfare of individuals.⁵¹ Involuntary detention does not offend Chapter III because it would be presumed to be non-punitive in character and as such does not involve an exercise in judicial power and aliens because of their status are vulnerable to involuntary detention. (*Lim* [30 – 31].

It can therefore be said that the legislative power conferred by s 51(xix) of the Constitution encompasses the conferral upon the Executive of authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation. Such 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. By analogy, authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers. Such limited authority to detain an alien in custody can be conferred on the Executive without infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts, which it designates. The reason why that is so is that, to that limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth. When conferred upon the Executive, it takes its character from the executive powers to exclude, admit and deport of which it is an incident. (Lim [32])

The limited authority to detain contained in the decision of *Lim* determines detention lawful if for the determination of the status of detained persons and for their deportation. If the detention cannot be seen to be purposive for these purposes then the detention would be punitive in character and unlawful.

- 62 The critical question is do sections 196 and 198 comply with the limitations noted in *Lim* if given the interpretation that the trial judge gave to the powers contained therein? It is submitted that they would not if the detention authorised went beyond what is necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered (*Lim* [33]). The legislative scheme considered in *Lim* had restraints which the trial judge has said no longer exist with this scheme, either by reference to the actual change in the legislation (the old scheme had a limit of 273 days) or by implication, if the trial judge is correct, in the inability of an applicant in the present scheme to be able to bring about the

⁵¹ *Kruger v Commonwealth* (1996) 190 CLR 1,

end of his or her detention. To detain a stateless person with no prospects of removal does not serve the purpose of their deportation. It is submitted that involuntary deportation is punitive and unconstitutional and thus contrary to Chapter III. For 198(1) to be constitutional it must be read down to only such detention as is reasonably necessary for the purposes of removal within the limits of the legislative powers contained in s 51 (xix) when that power is read subject to Chapter III.

As soon as reasonably practicable

- 63 It is submitted that it would be appropriate for the courts to provide assistance in relation to the obligations set out in s 198 of the Act to remove a person as soon as reasonably practicable. What is reasonably practicable from a temporal point of view differs according to what duty is being discharged and with matters such as the removal of persons to countries whose processes and systems may at best be unreliable is, it is accepted, difficult. Applicants for removal whose situation involves complex negotiations with foreign countries could expect that this process might take longer than a few days. It is submitted that it is permissible for a court to consider the complexity of the task that is required and the likelihood of removal within a reasonable timeframe. Given the situation of a stateless person, the power to detain such a person will be necessarily limited in point of time, i.e. the time reasonably necessary to ascertain whether a third country is willing to admit and receive such a person. The courts have held that it is permissible to look behind the duty that the officer has to perform under this power and to determine the limits on the duty.⁵²
- 64 However, an order for *habeas corpus* does not stop the duty to remove. It orders the release from detention of a person who has no prospect of being removed in the reasonably foreseeable future. When a person should be released after, becoming removable under s 198 of the Act has no authority in the law yet. Some assistance may be derived from the actual time scales of some of the applicants who have sought *habeas corpus* under the Act. This appellant had been removable, it is submitted, when he orally requested removal on the 19th June 2002 and within s 198 (1) clearly, when he requested removal in writing on 30th August 2002. He first applied for the writs sought on 6th January 2003. In the *Al Masri* matter, the applicant signed a request for removal on 5th December 2001 and applied for *habeas corpus* on 21st May 2002. These periods, it is submitted provided the respondents with ample time to effect removal if it was going to be possible. The United States Court considered six months to be adequate time, but in *Hardial Singh*, the Court gave the Minister concerned three days to provide an answer to the Court about the prospects for removal.⁵³ It is submitted that any time longer than 6 months could only be seen as punitive and not purposive. It is further submitted, however, that an officer ought to be able to

⁵² see *Heak v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 29 ALD 505

⁵³ *Zadvydas v Davis* 533 US 678 (2001)

remove a person within 3 months of their being removable under s 198 of the Act.

- 65 *M38* also discussed the use in the legislation of the term '*reasonably practicable*'. At [65] the Court found that the term limits or qualifies what would otherwise be an almost absolute obligation. The Court held that a removal might be practicable in the sense that it is feasible but not reasonably practicable as required by the Act.

Is the Court precluded from releasing a person found to be unlawfully detained because of s 196(3) of the Act?

- 66 The High Court in *Lim* considered the limitations on the detention of unlawful non-citizens. It examined whether s196 (3) of the Act prohibits an applicant applying for a prerogative relief in the nature of *habeas corpus*.⁵⁴ It is submitted that this section could not prevent a court releasing a person whose detention was invalid and *Lim* is correct.⁵⁵

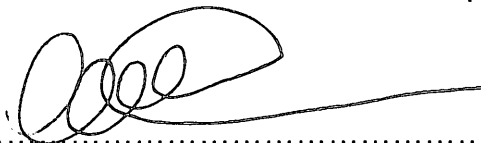
- Annexure A** Chronology
Annexure B Relevant legislative provisions
Annexure C Relevant conventions and protocols.

Orders sought

- 1 That the appeal be allowed in full.
- 2 That the orders made by von Doussa J on 3 April 2003 be set aside and in place thereof, order that:
 - a. The appellant is unlawfully detained.
 - b. An Order in the nature of *habeas corpus* directing the Third Respondent to cause the appellant to be released from immigration detention.
- 3 That the respondents pay the costs of the trial and the Federal Court appeal.

This outline was prepared by Claire O'Connor

Counsel for the appellant



24 September 2003

⁵⁴ "S 196 (3) to avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa."

⁵⁵ See discussion on this point in *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* [200] FCAFC 390 at [159] and *B and B* [338 – 357] and both *Al Masri* decisions, in particular the Full Court at [31 -33].

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

On Appeal from a Single Judge of the Federal Court of Australia

No A253 of 2003

Between: **(SHDB)**

Appellant

And:

**PHILIPPA GODWIN,
DEPUTY SECRETARY
DEPARTMENT OF IMMIGRATION
AND MULTICULTURAL AND
INDIGENOUS AFFAIRS**

First Respondent

And:

**JULIE HELEN KEENAN
ACTING DIRECTOR OF THE
UNAUTHORISED ARRIVALS SECTION
IN THE UNAUTHORISED ARRIVALS
AND DETENTION DIVISION OF THE
DEPARTMENT OF IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS
AFFAIRS**

Second Respondent

And:

**MINISTER FOR IMMIGRATION AND
MULTICULTURAL
AND INDIGENOUS AFFAIRS**

Third Respondent

APPENDIX A FROM OUTLINE OF SUBMISSIONS FOR SHDB

TIMELINE

ANNEXURE A CHRONOLOGY

29 th July	1976	Appellant born in Kuwait
23 rd December	2000	Appellant arrives in Australia and is detained pursuant to the Migration Act 1958
6 th January	2001	Appellant applies for a protection visa with the Department
22 nd February	2001	Delegate of the Minister refuses to grant visa
28 th February	2001	Appellant applies for review of the delegate's decision
16 th May	2001	Refugee Review Tribunal (RRT) upholds decision of the delegate
6 th June	2001	Appellant applies for judicial review of the RRT decision
23 rd October	2001	Federal Court dismisses judicial review application
21 st May	2002	Full Federal Court dismisses appeal of the Federal Court
19 th June	2002	Appellant verbally informs the Department he wishes to be removed from Australia.
30 th August	2002	Appellant signs form requesting removal from Australia
6 th January	2003	Appellant seeks judicial review of his continuing detention
30 th January	2003	Selway J refuses application for <i>habeas corpus</i> , <i>declaration</i> and <i>mandamus</i> .
11 th February	2003	Notice of appeal lodged against Selway J decision.
12 th February	2003	Further application for judicial review lodged in Federal Court
3 rd April	2003	Von Doussa J refuses application for <i>habeas corpus</i> , <i>prohibition</i> , <i>mandamus</i> and a <i>declaration</i> .
17 th April	2003	Appellant applies for and is granted interlocutory relief for <i>habeas corpus</i> before Mansfield J in relation to the appeal against the refusal for relief from Selway J.
23 rd April	2003	Notice of appeal lodged against decision of von Doussa lodged in Federal Court.
14 th August	2003	Motion granted in High Court removing appeal against decision of von Doussa J to High Court.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

On Appeal from a Single Judge of the Federal Court of Australia

No A253 of 2003

Between: (SHDB)

Appellant

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MULTICULTURAL AND INDIGENOUS
AFFAIRS**

Second Respondent

And:

**MINISTER FOR IMMIGRATION AND
MULTICULTURAL
AND INDIGENOUS AFFAIRS**

Third Respondent

**APPENDIX B FROM OUTLINE OF SUBMISSIONS FOR SHDB
LEGISLATION**

1. **Migration Act 1968** , s 5, 14, 36, 189, 196 and 198 in part
2. Acts Interpretation Act 1901 **s 15A**
3. **Constitution of Australia** , s 51, 77, 78

MIGRATION ACT 1958

Section 5 Interpretation

(1) In this Act, unless the contrary intention appears:

.....

authorised officer, when used in a provision of this Act, means an officer authorised in writing by the Minister or the Secretary for the purposes of that provision.

.....

deportation means deportation from Australia.

deportation order means an order for the deportation of a person made under, or continued in force by, this Act.

deportee means a person in respect of whom a deportation order is in force.

detain means:

(a) take into immigration detention; or

(b) keep, or cause to be kept, in immigration detention;

and includes taking such action and using such force as are reasonably necessary to do so.

detainee means a person detained.

.....

enter includes re-enter.

enter Australia, in relation to a person, means enter the migration zone.

entered includes re-entered.

entry includes re-entry.

.....

Federal Court means the Federal Court of Australia.

.....

holder , in relation to a visa, means, subject to section 77 (visas held during visa period) the person to whom it was granted or a person included in it.

.....

immigration detention means:

(a) being in the company of, and restrained by:

(i) an officer; or

(ii) in relation to a particular detainee - another person directed by the Secretary to accompany and restrain the detainee; or

(b) being held by, or on behalf of, an officer:

(i) in a detention centre established under this Act; or

(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or

(iii) in a police station or watch house; or

(iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel - on that vessel; or

(v) in another place approved by the Minister in writing;

but does not include being restrained as described in subsection 245F(8A), or being dealt with under paragraph 245F(9)(b).

Note: See also section 198A, which provides that being dealt with under that section does not amount to *immigration detention* .

.....

lawful non-citizen has the meaning given by section 13.

.....

leave Australia , in relation to a person, means, subject to section 80 (leaving without going to other country), leave the migration zone.

.....

migration zone means the area consisting of the States, the Territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:

- (a) land that is part of a State or Territory at mean low water; and
 - (b) sea within the limits of both a State or a Territory and a port; and
 - (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;
- but does not include sea within the limits of a State or Territory but not in a port.
-

non-citizen means a person who is not an Australian citizen.

.....

officer means:

- (a) an officer of the Department, other than an officer specified by the Minister in writing for the purposes of this paragraph; or
 - (b) a person who is an officer for the purposes of the *Customs Act 1901*, other than such an officer specified by the Minister in writing for the purposes of this paragraph; or
 - (c) a person who is a protective service officer for the purposes of the *Australian Protective Service Act 1987*, other than such a person specified by the Minister in writing for the purposes of this paragraph; or
 - (d) a member of the Australian Federal Police or of the police force of a State or an internal Territory; or
 - (e) a member of the police force of an external Territory; or
 - (f) a person who is authorised in writing by the Minister to be an officer for the purposes of this Act; or
 - (g) any person who is included in a class of persons authorised in writing by the Minister to be officers for the purposes of this Act, including a person who becomes a member of the class after the authorisation is given.
-

passport includes a document of identity issued from official sources, whether in or outside Australia, and having the characteristics of a passport, but does not include a document, which may be a document called or purporting to be a passport, that the regulations declare is not to be taken to be a passport.

permanent visa has the meaning given by subsection 30(1).

.....

privative clause decision has the meaning given by subsection 474 (2).

.....

Refugee Review Tribunal means the Refugee Review Tribunal established by section 457.

Refugees Convention means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951.

Refugees Protocol means the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

.....

remain in Australia , in relation to a person, means remain in the migration zone.

remove means remove from Australia.

removee means an unlawful non-citizen removed, or to be removed, under Division 8 of Part 2.

.....

unlawful non-citizen has the meaning given by section 14.

vessel includes an aircraft or an installation.

SECTION 14

Unlawful non-citizens

(1)

A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.

(2)

To avoid doubt, a non-citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non-citizen.

SECT 36**Protection visas**

- (1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

- (2) A criterion for a protection visa is that the applicant for the visa is:
- (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
 - (b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa.

Protection obligations

- (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
- (5) Also, if the non-citizen has a well-founded fear that:
- (a) a country will return the non-citizen to another country; and
 - (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

Determining nationality

- (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
- (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

SECTION 189

Detention of unlawful non-citizens

- (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
- (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
 - (a) is seeking to enter the migration zone (other than an excised offshore place); and
 - (b) would, if in the migration zone, be an unlawful non-citizen; the officer must detain the person.
- (3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.
- (4) If an officer reasonably suspects that a person in Australia but outside the migration zone:
 - (a) is seeking to enter an excised offshore place; and
 - (b) would, if in the migration zone, be an unlawful non-citizen; the officer may detain the person.
- (5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, officer means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.

SECTION 196

Period of detention

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

SECTION 198

Division 8 - Removal of unlawful non-citizens

Removal from Australia of unlawful non-citizens

- (1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.
- (1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).
- (2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:
 - (a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and
 - (b) who has not subsequently been immigration cleared; and
 - (c) who either:
 - (i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or
 - (ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

- (2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
 - (a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and
 - (b) since the Minister's decision (the original decision) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and
 - (c) in a case where the non-citizen has been invited, in accordance with section 501G, to make representations to the Minister about revocation of the original decision - either:
 - (i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or
 - (ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E

- (3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or

(2A) to him or her.

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

- (a) is a detainee; and
- (b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

- (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) one of the following applies:
 - (i) the grant of the visa has been refused and the application has been finally determined;
 - (iii) the visa cannot be granted; and
 - (d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is a detainee; and
 - (b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and
 - (c) either:
 - (i) the non-citizen has not been immigration cleared; or
 - (ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
 - (d) either:
 - (i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or
 - (ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is a detainee; and

- (b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and
 - (c) either:
 - (i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or
 - (ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
- (a) the non-citizen is a detainee; and
 - (b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and
 - (c) either:
 - (i) the non-citizen has not been immigration cleared; or
 - (ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
 - (d) either:
 - (i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or
 - (ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.
- (10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

ACTS INTERPRETATION ACT 1901 - SECT 15A

Construction of Acts to be subject to Constitution

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

THE CONSTITUTION OF AUSTRALIA

CHAPTER I SECTION 51

Legislative powers of the Parliament

51. The Parliament shall, subject to this Constitution, have power*11* to make laws for the peace, order, and good government of the Commonwealth with respect to:-

(xix) Naturalization and aliens:

(xxvii) Immigration and emigration:

:

(xxix) External affairs:

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws-

(i) Defining the jurisdiction of any federal court other than the High Court:

(ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:

(iii) Investing any court of a State with federal jurisdiction.

Proceedings against Commonwealth or State

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

On Appeal from a Single Judge of the Federal Court of Australia

No A253 of 2003

Between: **(SHDB)**

Appellant

And:

**PHILIPPA GODWIN,
DEPUTY SECRETARY
DEPARTMENT OF IMMIGRATION
AND MULTICULTURAL AND
INDIGENOUS AFFAIRS**

First Respondent

And:

**JULIE HELEN KEENAN
ACTING DIRECTOR OF THE
UNAUTHORISED ARRIVALS SECTION
IN THE UNAUTHORISED ARRIVALS
AND DETENTION DIVISION OF THE
DEPARTMENT OF IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS
AFFAIRS**

Second Respondent

And:

**MINISTER FOR IMMIGRATION AND
MULTICULTURAL
AND INDIGENOUS AFFAIRS**

Third Respondent

**APPENDIX C FROM OUTLINE OF SUBMISSIONS FOR SHDB
CONVENTIONS AND PROTOCOLS**

International Covenant on Civil and Political Rights 1966; article 9A

Refugees Convention and Protocol Relating to the Status of Refugees 1951 and
1967; Articles 1A, 33.

CHAPTER I: General Provisions

Article 1

DEFINITION OF THE TERM "REFUGEE"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

- (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

- (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring



shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33

PROHIBITION OF EXPULSION OR RETURN ("REFOULEMENT")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 34

NATURALIZATION

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.



5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7 **General comment on its implementation**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9 **General comment on its implementation**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on

such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10 *General comment on its implementation*

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12 *General comment on its implementation*

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those