



HIGH COURT OF AUSTRALIA

23 June 2021

COMMONWEALTH OF AUSTRALIA V AJL20 [2021] HCA 21

Today the High Court allowed appeals from the Federal Court of Australia, removed to this Court pursuant to s 40 of the *Judiciary Act 1903* (Cth), concerning the construction of ss 189, 196, 197C and 198 of the *Migration Act 1958* (Cth) ("the Act").

Section 189(1) of the Act, read with the s 5(1) definition of "detain", authorises and requires the Executive to take into and keep "unlawful non-citizens" in immigration detention. "Unlawful non-citizens" are non-citizens in the "migration zone" (in broad terms, Australia) who do not hold effective visas. Section 196 governs the period for which an unlawful non-citizen taken into immigration detention is to be kept in immigration detention under s 189(1). Section 196(1) relevantly provides that an unlawful non-citizen must be kept in immigration detention until he or she is removed from Australia under s 198 or until he or she is granted a visa. Section 198(6) imposes an obligation on the Executive to effect the removal of an unlawful non-citizen (without an outstanding visa application) "as soon as reasonably practicable". Section 197C had the effect that it was irrelevant whether the Executive's performance of the s 198 duty would place Australia in breach of its non-refoulement obligations under international law.

The respondent's visa was cancelled on character grounds on 2 October 2014. Having become an unlawful non-citizen, the respondent was detained as required by s 189(1) of the Act. On 11 September 2020, the Federal Court ordered the respondent's release on the footing that his continuing detention was unlawful because, due to its legislatively irrelevant desire to comply with Australia's non-refoulement obligations, the Executive had not removed him from Australia "as soon as reasonably practicable". The Federal Court considered that the period of detention authorised and required by the Act ceases when removal *should* have occurred had the Executive acted with all reasonable despatch. This reading of the Act was thought to be compelled by a need to observe the limitations on the Parliament's power to authorise detention by the Executive flowing from the separation of judicial power effected by Ch III of the *Constitution*.

The High Court, by majority, held that ss 189(1) and 196(1) validly authorise and require the detention of an unlawful non-citizen until the *actual event of*, relevantly, their removal from Australia or grant of a visa. Detention so authorised and required does not involve constitutionally impermissible punishment of the detainee by the Executive because it is reasonably capable of being seen as necessary for the legitimate non-punitive purposes of segregation pending investigation and determination of any visa application or removal. The authority and obligation to detain is hedged about by enforceable duties, including that in s 198(6), that give effect to these legitimate non-punitive purposes and mean that the duration of detention is capable of determination. Upon performance of these hedging duties by the Executive, detention is to be brought to an end. Non-performance by the Executive erases neither these duties nor the legitimate non-punitive statutory purposes which they support. Rather, judicial power compels performance by the Executive of its duties, through the remedy of mandamus, so as to enforce the supremacy of the Parliament over the Executive.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*