

## **Australian Immigration Detention after Plaintiff S4: New Limits, Little Change**

*By Nathan Van Wees*

*Mandatory detention of asylum-seekers has been a constant feature of Australia's immigration policy since 1992. With indefinite detention considered lawful and the average length of detention exceeding one year, a recent case ('Plaintiff S4') in the High Court of Australia was reported to be 'the end of Australian immigration detention as we know it,' potentially limiting the availability of lengthy (and indefinite) detention. This article assesses the likely extent of this change. The court's new temporal limitations on detention are (unfortunately) unlikely to add much to existing purposive limitations, meaning that reality will be unlikely to match the media's expectations.*

### **Introduction**

Mandatory immigration detention of asylum-seekers has been a constant feature of Australian law and practice since 1992. The average length of detention exceeds one year (DIBP 2014) and indefinite detention is lawful. In September 2014 however, the High Court of Australia delivered a unanimous judgment (in a case known as '*Plaintiff S4*') which was reported by media to spell 'the end for Australian immigration detention as we know it' (Chia 2014). It was hoped that the Court's decision would require asylum-seekers' claims to be processed in a more timely fashion, leading to a significant reduction in the average length of detention for asylum-seekers.

This article considers whether *Plaintiff S4* will result in meaningful legal and practical change. Legally, the judgment does incorporate a temporal limitation on detention for the first time: it must end 'as soon as reasonably practicable'. Practically, however, this is unlikely to add much to existing purposive limits in curbing lengthy immigration detention.

### **The facts of *Plaintiff S4***

The detainee in *Plaintiff S4* was a stateless person from Myanmar, who arrived in Australia by boat in December 2011 and was detained. Under Australia's *Migration Act* ('the Act'), such a person cannot apply for a permanent protection visa unless the Minister 'lifts the bar'; that is, exercises a power to allow that application to be made. The Minister does not have to consider doing so in any given case; the matter is one of complete discretion (*Migration Act* ss 46A, 189).

The plaintiff remained in detention for over two years, while the Department of Immigration assessed whether he was owed protection under the Refugee Convention or international human rights law. The plaintiff was found to be eligible for a permanent visa (*Plaintiff S4*: [14]-[20]).

Rather than a permanent visa however, the Minister granted two *temporary* visas (with three years' validity), without consulting the detainee. Importantly, these visas include conditions which prevent the holder from making any future application for a permanent visa (*Migration Act* s 91K). In the High Court, the plaintiff sought to invalidate the temporary visas, in an attempt to force the Minister to grant a permanent visa.

In finding the visas invalid, the Court assessed whether the plaintiff's detention had been lawful. The Court found (at [41]) that where a person was detained for the purpose of assessing eligibility for a permanent visa, the Minister could not then grant a different visa which would preclude the permanent visa ever being available – the detention would have been unnecessary.

### **The purposive limitations on immigration detention**

The Court's judgment contains no novel pronouncements on what constitutes a valid purpose for detention. Detention is valid under the Act where exercised for the purpose of:

- 1) removing a person from Australia;
- 2) deporting a person for criminal conduct;
- 3) considering an application for a visa; or
- 4) determining whether to allow a visa application to be made (*Plaintiff S4*: [26]; *Migration Act* ss 189, 196, 198, 200).

These purposive limits on immigration detention are not new. These limits on detention stem from the fundamental principle that any governmental power is conferred for a purpose, and can only be exercised *for that purpose* (*Koon Wing Lau v Calwell* (1949): 556). For example, the government cannot detain someone under the deportation power, simply to ensure that they are available to give evidence in an unrelated criminal trial (*Park Oh Hoh v Minister for Immigration* (1989): 643). In *Chu Kheng Lim* (1992: 21-22, 63), a person could not be detained in order to be put back on their vessel, where that vessel had in fact been destroyed. The purposive limits reiterated in *Plaintiff S4* are therefore not novel restrictions on detention.

### **A new temporal limitation on detention**

The legal novelty of the Court's judgment lies, rather, in the new temporal limit placed upon achieving these purposes. The provision of the Act which outlines the 'purposes' of detention (section 196) does not include any temporal limitation: it states only that a person must be held in immigration detention 'until' one of the purposes is achieved. It does not say how long that may take.

The power to remove a person from Australia (the first purpose listed above) *is* bounded by a temporal limitation, however. Section 198 of the Act provides that this purpose must be effected 'as soon as reasonably practicable'. The judgment in *Plaintiff S4* is important because it is the first time that this temporal limitation has also been applied to the *other three* purposes of immigration detention.

Removal from Australia is the only one of the purposes which must necessarily occur. The others may or may not happen, depending on the facts of each case. If these others fail however, a person *must* be removed under section 198 (*Plaintiff S4*: [32]). The Court therefore held (at [30], [35]) that all other purposes (which may or may not occur) must fit within that 'outer limit.' The Court thereby extended the application of the limitation from one purpose to all four.

The temporal limitation has only been applied in this way once before, and that was quickly overruled. In 2002, a single Federal Court judge held that the detention provisions 'introduce implicit purposive *and* temporal limitations' (*Al-Masri* (2002): 619 [40]). This decision did not survive an appeal, however. The Full Federal Court held that the provisions should not be

read together in that way (*Al-Masri* (2003): 88 [134]). The only limitations were the well-established purposive criteria.

This rejection of temporal limitations was confirmed in the High Court case of *Al-Kateb* (2004). In that case, two judges (in the majority) held that detention was not limited by the requirement to remove a person 'as soon as reasonably practicable'. Justice Hayne held (at 641 [237]) that the temporal limitation 'is not simply transferred from one section [of the Act] to others.'

*Plaintiff S4* therefore sets a new direction. For the first time, the High Court recognised that there are both purposive *and* temporal limits on immigration detention. The temporal limitation ('as soon as reasonably practicable') was welcomed by those who wish to see an end to lengthy immigration detention in Australia. But will it yield substantial practical change?

### **The practical ineffectiveness of the new limitation**

Unfortunately, the new legal ruling is unlikely to bring real change. The requirement to achieve a purpose 'as soon as reasonably practicable' is inherently difficult to apply. The *Al-Kateb* case (2004) is a perfect example. There, a stateless Palestinian had asked to be removed to Gaza (his birthplace) and the Act explicitly required that this take place 'as soon as reasonably practicable.' Nevertheless, a majority of the Court found that detention could extend *indefinitely*, so long as some attempt was being made to effect *Al-Kateb's* return. Applying the limitation to other detention provisions is therefore also unlikely to yield a useful dividend.

The problem here is that there are many things which can obstruct the achievement of a goal, such that the time it takes for that achievement to become 'practicable' grows longer. In *Al-Kateb*, negotiations with foreign governments for the return of a stateless person could not be swiftly concluded. In an earlier High Court case, Justice McHugh held that the sheer volume of visa applications meant that release could not be promptly realised, as there were limited resources to process those applications (*Chu Kheng Lim* (1992): 71-72). As Justice Hayne stated in *Al-Kateb* (at 638 [225] and 642 [239]), 'as soon as reasonably practicable' does not mean 'soon' and nor does it mean within a 'reasonable time.'

In reality, the only way to show that an aim could have been achieved sooner is to show that nothing was being done in pursuit of it. If the aim was not being actively pursued however, it also means that the detention could not be for the *purpose* of pursuing that aim. Therefore, the *temporal* limitation can only be shown to be breached if the *purposive* limitation is breached.

The facts of *Plaintiff S4* itself demonstrate this well. The plaintiff was detained for two years to assess eligibility for a permanent visa. He was then granted a different (temporary) visa which did not require the two-year assessment (or, therefore, two years of detention). He was therefore not released 'as soon as reasonably practicable,' breaching the temporal limitation. However, the *purpose* of his detention had also fallen away: detention to assess the permanent visa was made irrelevant by the temporary visa. What is ultimately persuasive, therefore, is that the *purpose* of detention shifted. It is only once the purpose of detention falls away that one can see that measures are not being effected 'as soon as reasonably practicable.'

## **Conclusion**

Perhaps the clearest indication that the new temporal limitation on detention will prove ineffective is that the asylum-seeker in *Plaintiff S4* was re-detained as a result of that very judgment (*Plaintiff S4*: [9]). Practically, the temporal limitation in law will only be breached where the existing purposive limitations were *already* breached. The legacy of *Plaintiff S4* is therefore mixed. The judgment does signify an acceptance of legal temporal limitations rejected in previous cases; on the other hand, it is certainly not a practical end to ‘immigration detention as we know it.’

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