

## Casenote

### CHU KHENG LIM AND OTHERS v MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS (1992) 176 CLR 1

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This case note provides an overview of the key facts and findings of the High Court of Australia in *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1. The case concerned the Commonwealth's ability to detain in custody non-citizens who arrived in Australia by boat without a visa or valid entry permit until they were either removed from Australia or granted an entry permit. The Court held that the Commonwealth's power to compulsorily detain non-citizens in such circumstances was valid, but in so doing established a broader principle that the involuntary detention of a citizen is punitive and therefore can only be implemented as a result of a finding of criminal guilt by the judicial branch and not by the executive.

### Facts

The plaintiffs were Cambodian nationals who arrived in Australian waters by boat. The group of plaintiffs arrived on separate boats, in 1989 and 1990, respectively. They arrived without valid entry permits and their applications for refugee status were rejected in April 1992.<sup>1</sup> They were detained in custody from the time of their arrival.<sup>2</sup>

The plaintiffs sought judicial review of their adverse refugee status determinations and were successful. In April 1992, the Federal Court set aside the decision of the Minister and ordered him to reconsider.<sup>3</sup> However, immediately before the decision was reconsidered, a new Division 4B was inserted into the *Migration Act 1958* (Cth) ('the Act'), the effect of which was to ensure that the plaintiffs remained in detention and were unable to be released by a court.<sup>4</sup>

The new Division 4B, which became operative in May 1992, provided that non-citizens who arrived in Australian waters by boat without a visa or entry permit – a class of persons classified by the Act as “designated persons” – must be compulsorily detained until they are removed from Australia or granted an entry permit.<sup>5</sup> The Division further prohibited a court from ordering the release from custody of a designated person.<sup>6</sup> This meant that the plaintiffs remained in detention and that their avenues for judicial review had been closed.

The plaintiffs brought proceedings in the High Court to challenge their detention.<sup>7</sup>

## Key issue

The key issue in this case were whether the detention regime established by Division 4B violated the constitutional separation of powers by conferring a judicial function on the executive.

## Summary of the relevant law

The plaintiffs' detention was purportedly authorised by the following provisions of the Act, which were in force at the time:

- Section 54K, which defined a “designated person” as, in summary, a non-citizen who: arrived in Australian territorial waters by boat between 19 November 1989 and 1 December 1992, arrived without a visa and who had not been granted an entry permit.<sup>8</sup>
- Section 54L, which provided that a designated person must be kept in custody and can be released from custody “if, and only if” the person is removed from Australia or granted an entry permit.<sup>9</sup>
- Section 54R, which provided that “a court is not to order the release from custody of a designated person”.<sup>10</sup>
- Prior to the coming into force of the new Division 4B, the plaintiffs' detention was authorised by section 88 of the Act, which provided that any person who arrived in Australia by boat, “being a stowaway or a person whom an authorized officer reasonably believes to be seeking to enter Australia in circumstances in which the person would become an illegal entrant” may be kept in custody.<sup>11</sup>

## Plaintiffs' case

The plaintiffs argued that the provisions governing their detention were invalid and therefore that the detention itself was unlawful. They did not dispute the fact that the provisions could be characterised as a law with respect to aliens, and therefore that the power to enact such provisions is validly conferred on the Commonwealth by s 51(xix) of the *Constitution*. However, they argued that the provisions were nonetheless invalid as they usurped the judicial power of the Commonwealth and therefore violated the strict separation of executive and judicial power established by the *Constitution*.<sup>12</sup>

The plaintiffs submitted that the provisions authorising their detention amounted to the Commonwealth conferring on the executive a judicial function that the *Constitution* vests exclusively in Chapter III courts. In support of this separation of powers argument, the plaintiffs submitted that their detention, rather than being for the purposes of deportation or exclusion, was punitive and therefore only valid if exercised by the judicial power of the Commonwealth. The fact that their detention was for the purposes of punishment, they argued, meant that it went beyond what was reasonably necessary to effect deportation.<sup>13</sup>

## Judgment

The High Court found, unanimously, that sections 54K and 54L were constitutionally valid and therefore that the plaintiffs' detention was lawful.<sup>14</sup> In reaching this conclusion, the majority – made up of the joint judgment of Brennan, Deane and Dawson JJ, with Mason CJ agreeing on this point – formulated the following principle regarding the power of the executive to detain: “the involuntary detention of a citizen in custody by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.”<sup>15</sup> Importantly, the court went on to state that there exists, at least in times of peace, a constitutional immunity from involuntary detention at the hands of the executive.<sup>16</sup> The joint judgment of Brennan, Deane and Dawson JJ has subsequently been taken as the leading judgment in this case, and their formulation of the constitutional limits on executive detention is now considered to be the main principle for which this case stands (the ‘*Lim* principle’).

However, the joint judgment stated that this immunity does not apply to non-citizens due to their vulnerability to deportation.<sup>17</sup> The majority then further clarified the principle by stating that the executive has the power under section 51(xix) of the *Constitution* to detain non-citizens for the purposes of deportation or exclusion but that the detention must be limited to what is “reasonably capable of being seen as necessary” to achieve that purpose”.<sup>18</sup> If a regime of detention could be considered reasonably capable of being seen as necessary to carry out a legitimate purpose related to deportation or exclusion, the law will be characterised as incidental to the aliens power. If it goes beyond what can be seen as necessary to effect such a purpose, it may be considered punitive and therefore amount to an unlawful conferral of judicial power on the executive. On these facts, the court found that sections 54K and 54L created a detention regime that was indeed so limited, and therefore that they do not violate Chapter III of the *Constitution*.<sup>19</sup>

In a separate majority judgment, Gaudron J formulated a similar principle by holding that in order for executive detention to be lawful, the law must be sufficiently connected to the regulation of aliens – i.e. it must be capable of being characterised as falling under the power in section 51(xix) of the *Constitution* – and it must ‘appropriate and adapted’ to regulating the entry and/or departure of aliens.<sup>20</sup> The notion that the purpose of the detention must be ‘appropriate and adapted’ to the regulation of aliens represents a proportionality requirement similar to that of the joint judgment but expressed in slightly different terms.

While the Court found that the major provisions operative on the plaintiffs' detention to be valid, a majority of the justices (Mason CJ, Toohey and McHugh JJ dissenting) found that section 54R was *invalid* as it purported to prevent a court from ordering the release of a designated person even when that person's detention was unlawful.<sup>21</sup> They held that a provision with this effect is unconstitutional as it attempts to interfere with the courts' constitutionally-entrenched power of judicial review. Mason CJ agreed that, read literally, section 54R did restrict a court from acting when designated persons were held unlawfully, however he held that the section could be read down so as to apply only to lawful detention.<sup>22</sup>

## Further reading

Human Rights and Equal Opportunity Commission, *Preliminary report on the detention of boat people* (1997).

Bryanna Workman, 'Protecting Individual Liberty: Recent applications of the Lim principle' (2016) 35 *University of Tasmania Law Review* 136

Joyce Chia, 'Back to the Constitution: The Implications of Plaintiff S4/2014 for Immigration Detention' (2015) 38(2) *University of New South Wales Law Journal* 628

## Endnotes

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<sup>1</sup> *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1 at [39].

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid* at [40] (Brennan, Deane and Dawson JJ).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* at [41] (Brennan, Deane and Dawson JJ).

<sup>7</sup> *Ibid* at [14] (Brennan, Deane and Dawson JJ).

<sup>8</sup> *Ibid* at [40] (Brennan, Deane and Dawson JJ).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid* at [41] (Brennan, Deane and Dawson JJ).

<sup>11</sup> *Ibid* at [42] (Brennan, Deane and Dawson JJ).

<sup>12</sup> *Ibid* at [5] (B. J Shaw QC).

<sup>13</sup> *Ibid* at [28] (Brennan, Deane and Dawson JJ).

<sup>14</sup> *Ibid* at [14], [38] (Brennan, Deane and Dawson JJ).

<sup>15</sup> *Ibid* at [27] (Brennan, Deane and Dawson JJ).

<sup>16</sup> *Ibid* at [28] (Brennan, Deane and Dawson JJ).

<sup>17</sup> *Ibid* at [29] (Brennan, Deane and Dawson JJ)

<sup>18</sup> *Ibid* at [33] (Brennan, Deane and Dawson JJ).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid* at [57] (Gaudron J).

<sup>21</sup> *Ibid* at [35]-[36] (Brennan, Deane and Dawson JJ).

<sup>22</sup> *Ibid* at [13] (Brennan, Deane and Dawson JJ).