Preventing Indefinite Detention: Applying the Principle of Legality to the Migration Act

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Abstract

Within Australia’s immigration detention centres, there are currently more than 30 asylum seekers facing the prospect of spending the rest of their lives detained. Between 2012 and the present, there have been two separate challenges to Al-Kateb v Godwin — the High Court decision that confirmed that the Migration Act 1958 (Cth) granted the power to indefinitely detain asylum seekers. Another challenge appears inevitable after the majority in both cases declined to confirm the correctness of Al-Kateb. This article examines one of the key arguments for a possible future plaintiff: that the Al-Kateb majority failed to correctly interpret the Migration Act in accordance with the principle of legality, a presumption used in statutory interpretation. It examines how this principle operates, how the Court applied the principle in Al-Kateb and subsequent decisions, and the importance of the principle to the judicial process. Ultimately, this article argues for reconsideration of Al-Kateb if an appropriate case arises.

I Introduction

In an interview almost 10 years after the decision of Al-Kateb v Godwin (‘Al-Kateb’),¹ former High Court Justice Dyson Heydon described his majority judgment from that case as ‘what you may call the inhumane approach’.² In the same comment, he also highlighted the principle of legality — a presumption that legislation is not intended to infringe fundamental rights unless Parliament clearly demonstrates that intention — as a means to avoid unjust statutory results. Yet Heydon J and the three other members of the Al-Kateb majority declined to use the principle to avoid what was acknowledged to be a ‘tragic’ result.³ Instead, their Honours interpreted the Migration Act 1958 (Cth) (‘Migration Act’) as permitting the detention of asylum seekers even where there was no foreseeable prospect of release. In doing so, the majority gave judicial approval to a system that left asylum seekers vulnerable to the possibility of life-long detention.

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This system continues to operate, with more than 30 asylum seekers currently indefinitely detained.4 The individuals that this article will focus on have been found to be refugees, but not granted protection visas due to adverse security assessments issued by the Australian Security and Intelligence Organisation (‘ASIO’). They are left in limbo, unable to be released without a visa, but unable to be returned to their country of nationality due to the persecution they would face.

More than a decade has passed since *Al-Kateb*, but the decision remains contentious. In two years, the High Court heard two separate challenges to indefinite detention: Plaintiff M47/2012 v Director-General of Security (‘M47’),5 and Plaintiff M76/2013 v Minister of Immigration, Multicultural Affairs and Citizenship (‘M76’).6 In both cases, the plaintiffs raised the principle of legality in challenging *Al-Kateb*. This argument relied on the leading dissent from *Al-Kateb* of Gleeson CJ, who construed the *Migration Act* in line with the principle of legality to suspend detention when it became indefinite. In deciding M47 and M76 on grounds unrelated to indefinite detention, the majority in both cases declined to confirm the correctness of *Al-Kateb*, thereby leaving the door open for future challenges.

While much has been written about the constitutional issues raised in *Al-Kateb*,7 there has not been a detailed discussion of the principle of legality in the context of indefinite detention. The High Court’s own discussion of the principle has been contradictory, with two justices in M47 following Gleeson CJ’s use of the principle and three justices in M76 rejecting that approach. Accordingly, this article examines the principle of legality, its application to the *Migration Act* in relation to indefinite detention and whether there is sufficient justification for the High Court to revisit *Al-Kateb*.

Part II of this article explores the principle of legality. The nature of parliamentary intention, the rationale of the principle and its importance as an interpretive presumption are discussed. A three-step process for the principle’s application is outlined, which forms the basis of the article’s practical application. Part III examines the relevant sections of the *Migration Act* and how the High Court interpreted these sections in *Al-Kateb*, M47 and M76, as well as the Court’s recent comments about immigration detention in Plaintiff S4/2014 v Minister for Immigration and Border Protection (‘S4’).8 It is suggested that the *Al-Kateb* majority and a number of subsequent justices of the High Court did not properly apply the principle of legality. Part IV applies the principle’s three-step process to the relevant sections of the *Migration Act* to contend that properly applying the

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6 (2013) 251 CLR 322.
8 (2014) 312 ALR 537.
principle leads to a finding that the Act does not permit indefinite detention for the majority of indefinite detainees. Finally, Part V discusses why the High Court must revisit \textit{Al-Kateb} and strictly apply the principle. As a known principle of interpretation, the principle of legality must be applied to fulfil the Court’s constitutional obligation to give effect to the will of Parliament. More broadly, overturning \textit{Al-Kateb} would reinforce the strength of the principle as a rights-protective tool. Ultimately, it is submitted that the misapplication of the principle of legality by the \textit{Al-Kateb} majority justifies overturning their decision.

\section*{II \quad The Principle of Legality}

The term ‘principle of legality’ has been given a variety of meanings, which generally relate to the need for clarity in the law. This article uses it in the specific sense of a presumption used by courts in construing statutes. Before examining this presumption, it is necessary to discuss parliamentary intention and the judicial role in statutory interpretation.

\subsection*{A \quad Parliamentary Intention}

The concept of parliamentary intention is central to statutory interpretation. The objective of all statutory interpretation is to give ‘to the words of a statutory provision the meaning which the legislature is taken to have intended them to have’. Finding and giving effect to this intention is the courts’ ‘fundamental responsibility’. While the importance of intention is undoubted, the meaning of the term is highly contested. The approach currently accepted by the High Court — and consequently adopted by this article — is an objective concept based around an attributed intention derived from the words used in the legislation. Courts do not consider the subjective mindset of parliamentarians either individually or collectively. This objective approach is deemed necessary because there is rarely, if ever, a consensus between parliamentarians as to what legislation means. A court must abide by this objective intention even if it differs from what was actually subjectively intended. As the majority in \textit{Re Bolton; Ex Parte Bean} (‘\textit{Re Bolton}’) stated:

\begin{quote}
However unfortunate it may be when [this] happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law.
\end{quote}

\begin{thebibliography}{9}
\bibitem{9} \textit{Lacey v A-G (Qld)} (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (‘\textit{Lacey}’).
\bibitem{10} \textit{Babantiaris v Latony Fashions Pty Ltd} (1987) 163 CLR 1, 13 (Mason J).
\bibitem{12} \textit{Lacey} (2011) 242 CLR 573, 592.
\bibitem{13} Ibid.
\bibitem{14} \textit{Mills v Meeking} (1990) 169 CLR 214, 234.
\end{thebibliography}
The process used by courts to infer this objective intention gives the concept legitimacy in a constitutional system where Parliament is the primary lawmaker. The intention is ascertained through the use of rules of construction, which act (at least notionally) as guides to what Parliament would likely intend. As the majority in Lacey explained, to say that an interpretation is consistent with Parliament’s intention is a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.

When a court applies the rules that are ‘accepted by all arms of government’ it “finds” Parliament’s intention, thereby giving effect to the will of Parliament. Accordingly, intention has been described as an ‘expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws’. The expectation is that Parliament knows the rules of construction to be used and will draft legislation on the basis that these will be applied. Parliament then maintains some control over how legislation will be interpreted. If the subjective intent of the parliamentarians is frustrated, it is due to poor drafting not illegitimate judicial action. Even if this does occur, Parliament can redraft the legislation to better reflect its subjective intent.

B Description of the Principle of Legality

The principle of legality is one of the rules of construction used by the courts. It consists of the presumption that Parliament does not intend to interfere with ‘fundamental rights, freedoms and immunities unless it makes its intention unmistakeably clear’.

The Australian history of this presumption pre-dates federation. The High Court first used it in the 1908 decision of Potter v Minahan (‘Potter’), where O’Connor J stated:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.

21 Ibid.
22 Bropho v Western Australian (1990) 171 CLR 1, 18 (‘Bropho’); Pierson v Secretary of State for the Home Department [1997] 3 All ER 577, 603 (Lord Steyn).
24 Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543, 563 (McHugh J) (‘Daniels Corporation’).
26 (1908) 7 CLR 277, 304.
In the 1980s — following sporadic use of this presumption by the High Court in the early and mid-20th century — the principle of legality (as it is now known) experienced a ‘judicial reassertion’, which has seen the Court rely on it with increasing regularity.27 This modern formulation of the principle of legality is limited in scope to rights and principles that are considered ‘fundamental’.28

Despite the limitation to fundamental rights, the High Court has portrayed the history of the principle of legality as a continuous application of one rule.29 The modern formulation is said by the Court to be founded on the same rationale as the rule in Potter — it exists as a means of ascertaining Parliament’s intention.30

As the current and previous High Court chief justices have described it, the presumption is not a ‘factual prediction’ of what Parliament meant.31 Rather, it is based on the fact that Parliament legislates in a liberal democracy ‘founded on the principles and traditions of the common law’32 and a ‘tradition of respect for individual freedoms’.33 The principle is explained as a ‘common sense guide to what a Parliament in a liberal democratic society is likely to have intended’.34 This is a ‘positive’ justification — to adopt the framework recently suggested by Lim — as it justifies the principle as a guide to likely legislative intent based on ‘political trust’.35

The High Court’s narrative regarding the principle has been increasingly contested by commentators.36 The focus of the Court at times on the rights-protective benefits of the principle (which are discussed in Part II C) has been seen as a shift towards establishing the principle as an ‘independent common law principle’.37 The modern principle is said to differ from the rule in Potter in that it no longer ‘reflect[s] the actual legislative intent’.38 Instead, the principle is said to now be justified as a tool to protect individual liberties.39 This ‘normative’ justification positions the principle as akin to American ‘clear-statement rules’, which require certain express words to be used to infringe rights irrespective of other indications of parliamentary intent.40

28 Bropho (1990) 171 CLR 1, 17.
32 Pierson v Secretary of State for the Home Department [1997] 3 All ER 577, 603 (Lord Steyn) quoted by French CJ in Momcilovic v The Queen (2011) 245 CLR 1, 46 [42] (‘Momcilovic’).
34 Electrolux Home Products Pty Ltd v AWU (2004) 221 CLR 309, 329 [21] (Gleeson CJ) (‘Electrolux’).
36 Ibid.
40 See Meagher, above n 37.
While the debate around the principle’s rationale is important to recognise, it does not impact on this article’s practical discussion. At the heart of the debate is the question of why the courts presume Parliament does not intend to infringe fundamental rights and whether this accurately reflects what parliamentarians would intend. However, this article proceeds off the premise — advocated by the High Court — that intention is an objective construct. Under this objective construct, the principle’s legitimacy depends on whether it is known to parliamentary drafters and courts as an interpretive presumption that will be applied. The principle of legality is undoubtedly a known rule of construction. While it has been used with varying frequency since Potter, the principle has nonetheless been applied for over a century without any legislative intervention, indicating its acceptance by Parliament. The principle was recognised in the 2010 Australian Government report Australia’s Human Rights Framework as one of the ‘well established common law’ rules of interpretation. Before the legislative provisions relevant to this article were passed, High Court justices described the principle as a ‘settled rule of construction’ and a ‘canon of statutory interpretation’. Since the principle is a known rule of construction, the Court meets its constitutional responsibility to follow Parliament’s will by applying it, regardless of the underlying rationale. This is why both the normative and positive justifications have been seen to be consistent with the duty to give effect to Parliament’s objective intention.

C  The Importance of the Principle of Legality

Even for those who advocate a positive justification, the principle of legality’s importance can be seen to go beyond ensuring courts abide by Parliament’s intention. Applying the principle acts as a key rights-protective tool for the judiciary. The principle has been described by numerous High Court justices as possessing a constitutional element, and amounting to an aspect of the rule of law. These descriptions reflect how the principle allows the Court to regulate the relationship between the executive, legislature and the people in relation to fundamental rights. By applying the principle to prevent legislation from infringing fundamental rights, the Court is able to play a guardianship role that is ‘auxiliary to Parliament and defensive of basic rights’.  

42 Migration Reform Act 1992 (Cth).
43 Baker v Campbell (1983) 153 CLR 52, 116 (Deane J) (‘Baker’).
44 Sorby v Commonwealth (1983) 152 CLR 281, 316 (Brennan J) (‘Sorby’).
45 See Lim, above n 35, 375.
49 Yuill v Corporate Affairs Commission of NSW (1990) 20 NSWLR 386, 403 (Kirby P).
In three ways, the principle of legality protects individual rights by strengthening the democratic aspect of the relationship between the arms of government. First, strictly applying the principle ensures the executive’s power to infringe fundamental rights comes only from the people. Cases involving the principle of legality come down to whether the power the executive claims to have been granted by Parliament was actually granted by the legislation. In requiring the executive to demonstrate clear words in the legislation to support its claim, the courts guarantee that any infringement of fundamental rights is explicitly approved by the parliamentarians that represent the people.

Second, the principle strengthens the accountability of Parliament to its constituency if Parliament does decide to grant the executive power to infringe fundamental rights. The requirement that Parliament clearly states that it intends to permit the infringement of a fundamental right ensures that the public — who can (theoretically) act to prevent the infringement through electoral pressure — fully appreciate the consequences of the legislation. As Lord Hoffman said in *R v Secretary of State for the Home Department; Ex parte Simms*:

[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.50

Third, the requirement for clear words leads to a greater respect for rights in the parliamentary process. Faced with courts that strictly apply the principle, Parliament has no choice but to consider fundamental rights. The effect, as described in *Coco*, is that the principle of legality ‘enhance[s] the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights’.51 In this way, the principle prevents ‘oversights in the passage of legislation’ leading to a meaning that could never have been intended52 — a problem acknowledged in the creation of a Parliamentary Joint Committee on Human Rights.53

Despite the above benefits, the principle of legality does have limitations as a rights-protective tool. As a rebuttable presumption, the principle cannot prevent infringements where Parliament has shown clear intention (even if unreasonable).54 If applied, it also cannot prevent Parliament re-legislating to clarify its intention.55 These aspects of the principle limit the ability of the courts to prevent unjust results. But they are also a strength of its operation as they protect judicial legitimacy. Because the principle remains subordinate to Parliament’s expressed intention, its application maintains the proper institutional relationship between courts and Parliament. The ability to re-legislate means that Parliament’s legislative power is restricted only by the people and parliamentarians, which is in

54 *Momcilovic* (2011) 245 CLR 1, 47 [45].
line with Parliament’s position as primary lawmaker. The principle ensures that the ultimate decision on whether to infringe the right is made by Parliament, meaning that the ‘balance between the public interest and individual freedom’ is struck by parliamentarians, not the judiciary. The principle consequently protects rights, while operating in a manner that is ‘entirely consistent with the principle of parliamentary supremacy’.

It is necessary at this point to recognise one of the most significant flaws of the principle of legality. The principle’s legitimacy under the objective concept of intention depends on Parliament having prior notice, not just that the principle will be applied, but also of the nature and content of the fundamental rights that are to be protected. Without knowing what rights will be considered fundamental, Parliament could not draft its legislation to appropriately convey its intended meaning. Despite the importance of the designation of a right as fundamental, the courts have not provided clear criteria for defining fundamental rights; in practice, it comes down to judicial choice. Consequently, Parliament cannot always have notice of both the right in question and what that right will require in particular situations (the content of the right). As Meagher has highlighted, this methodological problem is particularly apparent where the right is of an ‘abstract’ or ‘indeterminate’ nature — such as the right to free speech — which makes it difficult for Parliament to predict the right’s content.

However, there is arguably a division between rights that are ‘indeterminate’ and those that are ‘reduced by the general law to specific and justiciable principles and remedies’. When Parliament can reasonably be expected to have notice that a right in the latter category is considered fundamental, I would contend that the methodological problems outlined above do not arise because these rights are clearer in what they require. The right relevant to indefinite detention is personal liberty, which in this instance has been refined to the freedom from detention without valid law. As will be discussed, this right is both widely accepted and clear in content; in each situation it requires that detention only occurs if supported by valid law. The legitimate criticisms of the principle are therefore unlikely to impact on its application in the context of indefinite detention.

56 R v Secretary of State for the Home Department; Ex parte Simms [2000] 2 AC 115, 131 (Lord Hoffman).
58 See French, above n 47.
61 Meagher, above n 37, 434.
62 Ibid.
D Operation of the Principle of Legality

A three-step process for the application of the principle of legality can be discerned from the case law. First, a court determines whether it is necessary to apply the principle. If so, the court decides whether Parliament has demonstrated intent for it to be overridden. Finally, the court chooses the interpretation that corresponds best with Parliament’s intention.

1 Determining Whether the Principle of Legality Applies

Unlike some interpretive principles, ambiguity in the natural or literal meaning of a section is not necessary for the principle of legality to apply.64 The sole criterion for determining whether the principle applies is whether the ‘scope or operation’ of a fundamental right is infringed by the ordinary meaning of a section.65 If a right that is considered fundamental has been infringed, the courts will begin from a presumption against that infringement that may then be rebutted.

2 Determining Parliamentary Intent to Infringe the Fundamental Right

The courts require a high threshold to be met to demonstrate parliamentary intent to infringe a fundamental right. The language of the statute must do more than simply permit a fundamental right to be infringed. There must be a ‘clear indication that the Parliament has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment’.66 The case law provides numerous formulations of how clear this indication must be.67 These include ‘clear and unambiguous words’,68 ‘express words of plain intendment’,69 ‘unmistakable and unambiguous’70 language and intent demonstrated ‘with a clearness which admits of no doubt’,71 all of which highlight the high onus to be met. This onus can be discharged by express words or necessary implication.

(a) Express Words

Words that expressly abolish, suspend or infringe a fundamental right will demonstrate that Parliament intended to rebut the principle of legality.72 References to ‘clear words’ in this context can be misleading, because courts

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64 See Baker (1983) 153 CLR 52; Daniels Corporation (2002) 213 CLR 543; R v Lord Chancellor, Ex Parte; Lightfoot [1998] 4 All ER 764, 771; Meagher, above n 27, 459.
68 Brophy (1990) 171 CLR 1, 17 (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ).
actually look for specificity not clarity; the words must specifically address the situation before the court. As the plurality said in *Coco*:

General words will rarely be sufficient [to demonstrate language of parliamentary intent] 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.

To indicate parliamentary intention, a statute’s words must specifically address the *fundamental right* that has been infringed to establish that Parliament has considered that right. Additionally, the words must also address the *situation* in which the fundamental right has been infringed to demonstrate that Parliament has considered that the right could be infringed in that particular context.

(b) **Necessary Implication**

In the absence of express words, the principle can be displaced where there is a ‘necessary implication’ from the legislation that Parliament intended to infringe the fundamental right. The requirements for an implication to be necessary are ‘very stringent’. There must be a ‘high degree of certainty as to legislative intention’.

An implication of intent will be considered necessary when a restricted interpretation that protects the fundamental right would render the section inoperative. The High Court has described this situation as ‘very rare’. The interpretation infringing the right must be the only one that allows the provision to operate in any way. If a court can interpret the section to protect the right while still allowing it to operate in some limited way, the section will not be considered inoperative, even where it is inconvenient to comply with such an interpretation.

An implication has also been considered necessary where the purpose of the legislation is ‘largely frustrated’ by a restricted interpretation. As with references to intention, the purpose is found in the language of the legislation and not external sources. Once the legislation’s purpose has been ascertained, it will only be sufficiently frustrated if a restricted interpretation renders the section ‘relatively valueless’ or ‘practically useless’ in achieving that purpose. A section must be

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73 Coco (1994) 179 CLR 427, 446.
74 Ibid 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).
76 See eg, Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252.
77 Coco (1994) 179 CLR 427, 438; Magrath v Goldsbrough, Mort & Co Ltd (1931) 47 CLR 121, 130.
79 Hamilton v Oades (1989) 166 CLR 486, 495 (Mason CJ).
84 Plenty v Dillon (1991) 171 CLR 635, 654 (Gaudron, McHugh JJ).
86 Momcilovic (2011) 245 CLR 1, 176 [442].
effectively inoperative in the very situation in which it was meant to apply before an intention to infringe a fundamental right will be implied by a court.89

In both of the above circumstances, an implication of intent to infringe the right is necessary because it is not possible to conclude that Parliament intended a restricted interpretation.90 It is assumed that Parliament would not enact inoperative or useless legislation. However, if a section can operate and be of value in achieving its purpose under a restricted interpretation, it is possible that Parliament only intended the section to operate in that restricted form.91 An implication of intent is not then necessary.

3 Interpreting the Section

The effect of the principle of legality, if not overridden, is that a court will not ascribe the ‘full literal intention’ to the words of the legislation.92 If the language of the statute does not clearly show that Parliament intended to breach the right, the section is read down to avoid the encroachment upon the fundamental right.93 The principle is consequently a ‘powerful’ interpretative tool,94 as it allows a court to interpret legislation contrary to the natural meaning of the words despite no apparent ambiguity.95

Even if parliamentary intent to infringe the fundamental right is established, there may be constructional choices as to the degree of infringement intended.96 The principle of legality requires a court to choose the least intrusive interpretation to ‘avoid or minimise’ the infringement of fundamental rights, while still acting in accordance with Parliament’s intention.97 As recently expressed, the principle is more nuanced than the ‘all or nothing’ operation — whereby the right is either ignored or completely protected — that was described by Meagher in his important discussion of the principle.98 The current approach recognises that Parliament can make an intention clear to infringe a right in some circumstances, but not others. If, however, Parliament makes its intention clear to infringe a fundamental right in all circumstances, the principle cannot prevent the infringement no matter how unjustifiable.99

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91 See, eg, Sorby (1983) 152 CLR 281, 310–11.
92 Ex Parte Walsh and Johnson; Re Yates (1925) 37 CLR 36, 93 (Isaacs J).
93 See, eg, Baker (1983) 153 CLR 52; Ex Parte Walsh and Johnson (1925) 37 CLR 36.
94 Momcilovic (2011) 245 CLR 1, 46 [43] (French CJ).
95 Sales, above n 59, 604.
98 Meagher, above n 27, 463.
99 Momcilovic (2011) 245 CLR 1, 47.
III Indefinite Detention and the Principle of Legality

A Legislation Relating to Indefinite Detention

There have been three major challenges to the indefinite detention of asylum seekers: Al-Kateb in 2004, M47 in 2012 and M76 in 2013. Three sections of the Migration Act are particularly relevant to these cases. Non-citizens are taken into detention under s 189, kept in detention under s 196, and removed under s 198.

Section 189 creates a duty to detain asylum seekers if ‘an officer knows or reasonably suspects’ that a person is an unlawful non-citizen.

The subsections of s 196 most relevant to this discussion are:

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

(a) he or she is removed from Australia under section 198 or 199; or

(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or

(b) he or she is deported under section 200; or

(c) he or she is granted a visa.

(3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than as referred to in paragraph (1)(a), (aa) or (b)) unless the non-citizen has been granted a visa.

Of the sections referenced in s 196(1), only s 198 has been relevant to indefinite detention cases. Under s 198, an officer ‘must remove as soon as reasonably practicable an unlawful non-citizen’ who asks in writing to be removed100 or has been refused the grant of a visa and not made another valid application.101

Detention under these provisions becomes indefinite when an asylum seeker is refused a visa, but it is not ‘reasonably practicable’ to remove them. None of the criteria for release in s 196 can then be met.

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100 Migration Act s 198(1).
101 Ibid s 198(6).
B  Relevant Cases

1  Al-Kateb

The abovementioned sections were first considered by the High Court in *Al-Kateb*, which remains the precedent for their interpretation. Mr Al-Kateb was an asylum seeker whose protection visa application was rejected. He requested removal under s 198, but as a Palestinian national had no right of entry into any recognised country. No third country was willing to accept him. Mr Al-Kateb challenged the validity of his detention arguing that the *Migration Act* did not permit detention when removal was not reasonably practicable. The Federal Court dismissed his application despite recognising that his removal was not reasonably practicable ‘as there [was] no real likelihood or prospect of removal in the reasonably foreseeable future’. On appeal, the High Court held by a 4:3 majority that the *Migration Act* permitted Mr Al-Kateb’s indefinite detention.

The majority (McHugh, Hayne, Heydon and Callinan JJ) adopted the natural meaning of the words in s 196, requiring detention to continue until Mr Al-Kateb received a visa or was removed from Australia. The basis of their Honours’ interpretation was the finding that the wording of ss 196 and 198 was ‘clear and unambiguous’. McHugh J encapsulated the majority’s approach when he said:

> The words of ss 196 and 198 are unambiguous. They require the indefinite detention of Mr Al-Kateb, notwithstanding that it is unlikely that any country in the reasonably foreseeable future will give him entry to that country. The words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights.

Only Hayne J (with whom Heydon J agreed) expressly referred to the principle of legality. His Honour dismissed the principle since the wording was ‘intractable’ in providing that detention ‘is mandatory and must continue until removal, or deportation, or the grant of a visa’. Removal may later become reasonably practicable and detention was to continue until that time. His Honour considered that the interpretation advocated by Mr Al-Kateb would transform s 198 from a duty to remove ‘as soon as reasonably practicable’ to a duty to remove ‘soon’ or ‘for so long as it appears likely to be possible of proximate performance’.

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102 *Al-Kateb* followed a Full Federal Court decision that ruled against indefinite detention: *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 197 ALR 241 (‘*Al Masri*’).
104 *SHDB v Goodwin* [2003] FCA 300 (3 April 2003), [9].
106 Ibid 581 [33].
107 Ibid 643 [241].
108 Ibid.
109 Ibid.
110 Ibid 641 [237].
In agreeing with Hayne J’s reasoning, McHugh J implicitly referred to the principle of legality by referencing an intention not to affect fundamental rights in the quote above. His Honour dismissed the principle, finding that the ‘unambiguous language of s 196 — particularly s 196(3) — indicates that Parliament intends detention to continue until one of the conditions expressly identified therein ... is satisfied’.

Justice Callinan did not address the principle of legality in his interpretation of the sections, considering only whether a temporal limit could be implied into the natural meaning of the words. He found this impossible due to the clarity of the natural meaning.

The minority justices (Gleeson CJ, Gummow and Kirby JJ) held that there was an alternative interpretation available. They interpreted ‘must be kept in detention’ to exclude situations where removal was not ‘reasonably practicable’.

Chief Justice Gleeson’s judgment expressly applied the principle of legality. His Honour considered that the sections were expressed in terms that assumed the possibility of complying with ‘the unqualified statutory obligation imposed by s 198’. When this was not possible, a constructional choice arose between ‘treating the detention as suspended, or as indefinite’. The provisions did not say anything about indefinite detention and such a thing was ‘not one to be dealt with by implication’. Consequently, the principle of legality required that the former construction be adopted and detention be suspended.

Justice Gummow focused on removal as the purpose of the detention. His Honour considered there to be ‘temporal limits’ in the sections linked to this purpose. Where it was not reasonably practicable to remove a detainee, the purpose of s 198 was spent. As his Honour stated, the ‘temporal imperative imposed by the word “until” in s 196(1)’ then loses a ‘necessary assumption for its continued operation’ (that removal under s 198 is possible) and s 196 no longer permitted the detention.

Justice Kirby agreed with the reasoning of Gummow J, relying on a common law presumption in favour of personal liberty and his own interpretive principle. This principle provided that the Court should interpret legislation and the Constitution in ‘a way that is generally harmonious with the basic principles of international law’.

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111 Ibid 581 [35].
112 Ibid 661 [298].
113 Ibid.
114 See, eg, ibid 578 [22] (Gleeson CJ).
115 Ibid 574–5 [12].
116 Ibid 578 [22].
117 Ibid 578 [21].
118 Ibid 577–8 [21].
119 Ibid 608 [123].
120 Ibid 607 [117].
121 Ibid 608 [122].
122 Ibid.
123 Ibid 616–7 [150]–[151].
124 Ibid 624 [175].
With the exception of Callinan J, each of the majority justices referenced the principle in some way. However, the majority either misapplied or failed to substantively consider the principle. The focus on the literal meaning of the sections meant that the majority did not look for express words of parliamentary intent. The majority found the words ‘too clear’\textsuperscript{125} and ‘unambiguous’\textsuperscript{126} because the starting point of their judgments was whether the natural meaning of the wording permitted the indefinite detention of an individual. Once it was established that it did, they searched for an indication that, despite this natural wording, the sections did not support indefinite detention. As McHugh J stated, the sections were too clear to show an ‘intention not to affect fundamental rights’\textsuperscript{127}

Since the principle is a presumption that must be rebutted, the search should have been for an intention to affect fundamental rights. To determine whether there were express words of parliamentary intent, the majority needed to ask whether the words demonstrated that Parliament had considered and accepted the situation in which the fundamental right had been infringed, rather than simply if the natural meaning of the words permitted the infringement.\textsuperscript{128} Correctly applying the principle of legality would have required the Commonwealth — as the party contending the legislative language had curtailed the fundamental right — to show that the words demonstrated this intention.\textsuperscript{129} Instead, the majority required Mr Al-Kateb to prove that Parliament did not intend to permit indefinite detention. This was particularly apparent in Hayne J’s phrasing of the ‘root question’ as whether the sections would ‘yield the construction asserted’ by the appellant.\textsuperscript{130}

In effect, the majority used the apparent clarity of the natural meaning of the words to justify not considering the principle of legality. The natural meaning of the words could not yield the construction Mr Al-Kateb contended because this meaning was considered unambiguous.\textsuperscript{131} However, ambiguity is not a prerequisite for applying the principle of legality.\textsuperscript{132} While the principle applies only ‘where constructional choices are open’,\textsuperscript{133} these choices do not result from the wording being ambiguous in permitting the infringement of the right. Rather, the choices come from the words not being specific in showing Parliament intended the infringement.\textsuperscript{134} Once it was established that a fundamental right had been infringed, the principle of legality should have been the starting point for interpretation, even in the absence of any doubt about what the natural meaning permitted.\textsuperscript{135}

\textsuperscript{125} Ibid 581 [33] (McHugh J).
\textsuperscript{126} Ibid 661 [298] (Callinan J).
\textsuperscript{127} Ibid 581 [33] (emphasis added).
\textsuperscript{129} \textit{A-G (SA) v City of Adelaide} (2013) 249 CLR 1, 66 [149] (‘City of Adelaide’).
\textsuperscript{130} \textit{Al-Kateb} (2004) 219 CLR 562, 641 [239].
\textsuperscript{131} Ibid 644 [244] (Hayne J) 661 [298] (Callinan J).
\textsuperscript{132} See above n 64 and accompanying text.
\textsuperscript{133} \textit{City of Adelaide} (2013) 249 CLR 1, 30 [42] (French CJ).
\textsuperscript{134} This is the difference between ambiguity in the natural meaning and what James Spigelman has described as ‘inexplicitness’: ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 \textit{Australian Law Journal} 769, 772.
\textsuperscript{135} See above n 64 and accompanying text.
While Mr Al-Kateb was subsequently granted a visa due to political pressure,\(^{136}\) indefinite detention remains a pressing social and political problem. The non-citizens that are the focus of this article have been recognised as refugees by the Department of Immigration, but have not met the other criteria for the grant of a protection visa, which include character\(^{137}\) and security checks.\(^{138}\) These non-citizens have failed their security checks due to adverse security assessments from ASIO,\(^{139}\) and are held in detention under s 196(1)(a) pending removal. Their recognition as refugees prevents the government returning them to their country of nationality against their will and no third country will accept them. They are, in effect, in the same position as the stateless Mr Al-Kateb, without any real likelihood of removal in the reasonably foreseeable future. Some of this group have already been detained for more than five years.\(^{140}\) It is important to note that there are also a small number of non-citizens facing indefinite detention for other reasons, such as due to visa cancellations on character grounds.\(^{141}\) However, because different sections of the Migration Act apply to these individuals, they are unlikely to be able to rely on a principle of legality argument to suspend their detention.\(^{142}\)

The detention of one of the non-citizens who received an adverse ASIO assessment was challenged in 2012 in M47. Pursuant to a clause in the Migration Regulations 1994 (Cth) (‘Migration Regulations’), the Minister was required to refuse the grant of a protection visa to anyone who received an adverse security assessment.\(^{143}\) Plaintiff M47 requested removal under s 198, but no willing third country was found.\(^{144}\) He challenged his detention arguing that the clause in the Migration Regulations was ultra vires or that Al-Kateb should be revisited because indefinite detention was not permitted on the proper construction of the Migration Act.\(^{145}\)

The majority (French CJ, Hayne, Crennan and Kiefel JJ) held that the clause in the Migration Regulations was ultra vires and ordered the plaintiff’s processing to be lawfully redetermined without the Minister considering the clause. Al-Kateb was not considered by the majority since the possibility of a visa subsequently being granted meant that the detention was not indefinite.\(^{145}\)

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137 Migration Act s 501.
138 Ibid s 36.
140 Flitton, above n 4.
141 See, eg, BHFC v Minister for Immigration and Border Protection [2014] FCAFC 25 (24 March 2014) (‘BHFC’).
142 See Part IV B.
143 Migration Regulations sch 2 cl 866.225.
144 M47 (2012) 251 CLR 1, 188 [517].
145 See, eg, ibid 48 [72] (French CJ).
The minority (Gummow, Bell and Heydon JJ) held that the clause was not
ultra vires and consequently considered the issue of indefinite detention. Their
Honours were split on whether *Al-Kateb* should be overturned.

Gummow and Bell JJ both applied the principle of legality in holding that
detention was suspended because the removal of the plaintiff was not reasonably
practicable.\(^\text{146}\) Interestingly, Gummow J’s reasoning differed to his judgment in
*Al-Kateb*. His Honour expressly referred to the principle of legality, describing it
as ‘the doctrine … which provides strongest guidance in resolving the issue of
construction’.\(^\text{147}\) His Honour held the *Migration Act* had ‘not squarely confronted’
the possibility of indefinite detention, since it did not ‘provide in terms that an
unlawful non-citizen is to be kept in immigration detention permanently or
indefinitely’.\(^\text{148}\) His Honour considered that detention should be suspended because
the intention to permit indefinite detention did not ‘appear with the “irresistible
clearness” required [by the principle of legality]’.\(^\text{149}\) Bell J provided an explanation
of the operation of the principle consistent with the operation outlined in Part II D:

> The application of the principle of legality requires that the legislature make
> plain that it has addressed that consequence [indefinite detention] and that it
> is the intended consequence.\(^\text{150}\)

Her Honour found that this had not occurred for the reasons outlined by
Gleeson CJ in *Al-Kateb*.\(^\text{151}\) Both Bell and Gummow JJ stated that the failure of
McHugh and Callinan JJ in *Al-Kateb* to expressly refer to the principle of legality
was one justification for overturning the interpretation.\(^\text{152}\)

On the other hand, Heydon J did not consider that *Al-Kateb* needed to be
revisited on the *M47* facts, as removal of Plaintiff M47 remained reasonably
practicable.\(^\text{153}\) Nonetheless, his Honour restated his agreement with Hayne J from
*Al-Kateb*, despite recognising that the minority reasoning had ‘obvious force’.\(^\text{154}\)

The decisions of Bell and Gummow JJ demonstrated that the interpretation
of the *Migration Act* in relation to indefinite detention was not conclusively
determined by the slim majority in *Al-Kateb*. Both justices considered the *Al-Kateb*
interpretation sufficiently incorrect to justify its overturn. In reaching this
conclusion, both supported the view of the principle of legality outlined in
Part II D of this article — they applied the principle because a fundamental right
had been infringed notwithstanding the clarity of the natural meaning. This was
particularly apparent in Bell J’s statement regarding the *Al-Kateb* majority’s failure
to discuss the principle ‘in the context of a conclusion that the scheme abrogates
fundamental rights’,\(^\text{155}\) which demonstrated her Honour’s belief that the principle
applies any time a fundamental right is infringed.

\(^{146}\) *M47* (2012) 251 CLR 1, 61 [120] (Gummow J), 193 [533] (Bell J).

\(^{147}\) Ibid 60 [119].

\(^{148}\) Ibid 59 [116].

\(^{149}\) Ibid 60 [117].

\(^{150}\) Ibid 192 [529].

\(^{151}\) Ibid 192 [530].

\(^{152}\) Ibid 60 [119] (Gummow J), 193 [532] (Bell J).

\(^{153}\) Ibid 139–40 [354].

\(^{154}\) Ibid 138 [351].

\(^{155}\) Ibid 193 [532].
Less than a year after *M47*, indefinite detention was again challenged in *M76*.156 Like Plaintiff *M47*, Plaintiff *M76* was accepted as a refugee, but issued with an adverse security assessment from ASIO and consequently refused a protection visa. She contended, among other points, that the proper interpretation of the *Migration Act* did not permit detention when removal was not reasonably practicable.

As with *M47*, the Court in *M76* decided the case on grounds unrelated to indefinite detention. The majority held that the Minister improperly exercised his power to permit an application for a visa.157 This led to the Court ordering the reassessment of Plaintiff *M76*'s visa application, with the result that the administrative processes for her removal had not yet been exhausted. Significantly, French CJ, Crennan, Bell and Gageler JJ expressly left open the issue of indefinite detention and *Al-Kateb* for a future case.158

Despite not deciding on *Al-Kateb*, the obiter dicta of Crennan, Bell and Gageler JJ in *M76* was notable in that their Honours were unwilling to find that Plaintiff *M76*'s detention was indefinite. Their Honours were not prepared to draw an inference that there was no realistic prospect of removal in the foreseeable future from Plaintiff *M76*'s circumstance, despite repeated failed attempts to relocate her over three years. Their Honours highlighted that Plaintiff *M76* had relatives in India and another country, had not asked to be removed and that the Department of Immigration would continue trying to find a willing country to accept her.159 Their Honours’ unwillingness to find that Plaintiff *M76*'s detention was indefinite indicates a high evidentiary standard will be required in future cases for the Court to infer that there is no real prospect of removal.

Justices Hayne, Kiefel and Keane did consider the correctness of *Al-Kateb* with all three agreeing with the *Al-Kateb* majority that indefinite detention was permitted. Justice Hayne focused on the ‘overall purpose’ of pt 2 of the Act, which His Honour considered to be to control the arrival and presence of non-citizens in Australia.160 His Honour construed ss 189, 196 and 198 as working towards this purpose by permitting indefinite detention so as to prevent non-citizens remaining in Australia without permission.161 Interestingly, Hayne J did not expressly refer to the principle of legality. Instead, his Honour’s judgment amounted to a rebuttal of the purposive argument raised by Gummow J in *Al-Kateb*, despite Gummow J basing his *M47* decision on the principle.

Justices Kiefel and Keane stated that two questions were raised by Gleeson CJ’s application of the principle of legality in *Al-Kateb*. The first was

156 A similar challenge was brought in *SI38/2012 v Director-General of Security*, but the plaintiff was released before the hearing: [2013] HCATrans 148 (13 June 2013).
157 A protection visa application cannot be made unless the Minister allows it under s 46A of the *Migration Act*.
159 Ibid.
160 Ibid 366.
161 Ibid.
whether the Migration Act was ‘silent’ on the question of indefinite detention.\footnote{Ibid 379 [181].} Their Honours held that this was not the case as an intention to permit indefinite detention was implied from the absence of any time limit in the sections. This absence was considered to be ‘eloquent of an intention that an unlawful non-citizen should not be at large in the Australian community’.\footnote{Ibid 379 [182].}

The second question was whether any fundamental right had been infringed by the indefinite detention of Plaintiff M76. Their Honours held that as a non-citizen the plaintiff did not have a fundamental right to be at liberty within the Australian community.\footnote{Ibid 380 [184].} Instead, the ability for non-citizens to be in the community was ‘to be approached as a statutory entitlement under the Act rather than as a “fundamental right”‘.\footnote{Ibid.} Since no fundamental right was infringed, the principle of legality did not apply.\footnote{Ibid 379–80.} This aspect of their Honours’ decision is considered in more detail in Part IV A.

As with the Al-Kateb majority, Kiefel and Keane JJ’s judgment was adversely influenced by where they began their analysis. Their Honour’s framing of the question in terms of whether or not the Migration Act was ‘silent’ on indefinite detention meant that they used a much lower standard to demonstrate parliamentary intent than has been required by the principle of legality. By considering the issue by reference to silence, their Honours were satisfied by any indication that indefinite detention had been considered. This standard is inconsistent with more than a century of case law on the principle. As discussed in Part II D, the numerous formulations of the principle share a similarly high standard for parliamentary intent; the principle requires not merely an indication, but rather ‘unmistakable and unambiguous’ language to demonstrate that Parliament has considered and accepted infringing the right.\footnote{Coco (1994) 179 CLR 427, 437.}

This lower threshold led to the related problem of Kiefel and Keane JJ being satisfied by the absence of express words limiting the duration of detention. The principle requires the presence of express words or a necessary implication to demonstrate parliamentary intent. In effect, their Honours required the sections to show an intention not to infringe a fundamental right for the principle of legality to apply. As discussed in relation to the Al-Kateb majority, this is an erroneous formulation of the principle. Relying on an absence of an express limitation on the legislation’s scope goes against the core premise of the principle — that there must be an undeniably clear expression of Parliament’s intention.\footnote{Ibid.}
After *M76*, the High Court made some notable comments about the nature of immigration detention in the recent case of *S4*, which unlike the above cases was not a challenge to indefinite detention. Plaintiff *S4*, who was found to be owed protection obligations, challenged the Minister’s exercise of power in granting him a temporary visa that prevented an application for a permanent visa. In holding that the Minister had exercised his power invalidly, the Court spent a significant portion of its unanimous judgment on immigration detention generally. These comments relate more to the constitutionality of detention, an issue that is not the focus of this article. Nonetheless, *S4* is relevant to the extent that it may impact on a future challenge to indefinite detention based on the principle of legality.

The Court in *S4* held that because of constitutional restraints, immigration detention can only be for one of three purposes: removal from Australia; receiving, investigating and determining an application for a visa; or determining whether to permit a valid application for a visa.\(^{169}\) These purposes need to be carried out as soon as reasonably practicable.\(^{170}\) Since removal is the last of the three purposes that must be carried out, the Court stated that the outer limit of the duration of detention is the *Migration Act*’s requirement that removal be effected as soon as reasonably practicable.\(^ {171}\)

These comments have been seen as indicating the willingness of the High Court to revisit the constitutionality of indefinite detention — which was upheld in *Al-Kateb* and challenged again in *M47* and *M76* — because if removal is not possible, detention may arguably no longer operate for a valid constitutional purpose.\(^ {172}\) A decision by the Court that indefinite detention is unconstitutional would lead to surer rights protections than the principle of legality, as Parliament could not re-legislate to provide the executive with this power. However, the principle of legality remains an important consideration for any future challenges to indefinite detention. It is not certain that the comments of the Court indicate a likely positive response to a future constitutional challenge.\(^ {173}\) But regardless, the proper interpretation of the *Migration Act* must be resolved prior to the constitutionality of the indefinite detention being considered. The question of whether indefinite detention is constitutional arises only if the Act actually permits this form of detention. If the principle of legality requires an interpretation that suspends detention when removal is not possible, then the Court is not required to determine whether the executive can constitutionally exercise a power of indefinite detention.\(^ {174}\)

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\(^{170}\) Ibid 543 [28].

\(^{171}\) Ibid 544 [33].

\(^{172}\) See, eg, Joyce Chia, ‘High Court Verdict Spells the End for Australian Immigration Detention As We Know It’, *The Guardian* (online), 11 September 2014 <http://www.theguardian.com/commentisfree/2014/sep/11/high-court-verdict-spells-the-end-for-australian-immigration-detention-as-we-know-it>.

\(^{173}\) As Hayne J’s *Al-Kateb* judgment shows, it can consistently be argued that detention for the purpose of removal is limited by the requirement to remove as soon as reasonably practicable (as in *S4*), but that indefinite detention remains for that purpose: (2004) 219 CLR 562, 640 [231].

IV Applying the Principle of Legality to Indefinite Detention

To justify the High Court revisiting the Al-Kateb interpretation, properly applying the principle of legality must result in a different conclusion than that reached by the Al-Kateb majority. In this section, the three-step process outlined in Part II D will be applied to show that the principle requires an interpretation of the Migration Act that does not permit indefinite detention.

A Does the Principle of Legality Apply?

The fundamental right that is infringed by indefinite detention is personal liberty. In the context of immigration, where great value is placed on control of borders, use of terms such as liberty can lead to confusion with a right of entry. Rather than referring to a right to be at liberty, it is clearer to refer to the aspect of personal liberty infringed — namely, the ‘fundamental principle’ of freedom from detention except pursuant to lawful authority,¹⁷⁵ which was Blackstone’s defining feature of personal liberty.¹⁷⁶ This right is distinguishable from the freedom from arbitrary detention that has been considered to be infringed by mandatory immigration detention despite valid legislation.¹⁷⁷ There can be little doubt that personal liberty, which has been described as ‘the most elementary and important of all common law rights’,¹⁷⁸ falls within the definition of fundamental rights regardless of how the criteria are framed.¹⁷⁹ Recognition of the importance of the freedom from detention dates back to the Magna Carta statement that ‘no freeman shall be taken or imprisoned … but … by the law of the land’,¹⁸⁰ and it has been justiciable by writ of habeas corpus since the passing of the Habeas Corpus Act in 1679.¹⁸¹

Justices Kiefel and Keane in M76 were the only justices from Al-Kateb, M47 and M76 to explicitly contend that this fundamental right did not extend to non-citizens. In support of their proposition that no fundamental right was infringed, their Honours stated that there was no ‘principle of the common law that an alien who is unlawfully in Australia is entitled to be at liberty in the Australian community’.¹⁸²

Contrary to their Honours’ contention, there are a number of cases that have indicated that the right to personal liberty extends to non-citizens without distinction as to the means of their entry. For instance, in Re Bolton, Deane J stated:

¹⁷⁵ Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1, 13 (Mason CJ) (‘Chu Kheng Lim’).
¹⁷⁸ Trobridge v Hardy (1955) 94 CLR 147, 152 (Fullagar J).
¹⁷⁹ See, eg, Re Bolton (1987) 162 CLR 514, 517; Ruddock v Taylor (2005) 222 CLR 612, 632 [70].
¹⁸¹ Ibid.
¹⁸² M76 (2013) 251 CLR 322, 380 [184].
The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate.\(^\text{183}\)

English case law has similarly recognised in the context of habeas corpus that ‘[e]very person within the jurisdiction enjoys the equal protection of our laws’ without distinction.\(^\text{184}\) Somewhat curiously, in \(S4\) (decided after \(M76\)) Kiefel and Keane JJ, as members of the unanimous decision, echoed these comments:

An alien within Australia, whether lawfully or not, is not an outlaw. An alien within Australia, whether lawfully or not, cannot be detained except under and in accordance with law.\(^\text{185}\)

The case that Kiefel and Keane JJ did rely on in \(M76\) (\(Chu Kheng Lim\))\(^\text{186}\) should not be considered to be authority for the proposition that the right to personal liberty does not extend to non-citizens. Their Honours relied in particular on the statement from \(Chu Kheng Lim\) that non-citizens’ rights:

differ from the status, rights and immunities of an Australian citizen in a variety of important respects. For present purposes, the most important difference ... lies in the vulnerability of the alien to exclusion or deportation.\(^\text{187}\)

With respect to their Honours, this statement should be seen only as recognition of the limitations of non-citizens’ right to liberty, not a rejection of that right. The executive and legislature undeniably have the power to exclude or deport a non-citizen in circumstances that are inapplicable to citizens. But this power only demonstrates that the right to personal liberty is more limited for non-citizens than citizens. That this underlying right still exists was made clear by the \(Lim\) plurality when they outlined the restrictions on executive action against non-citizens:

Neither public official nor private person can lawfully detain [a non-citizen] or deal with his or her property except under and in accordance with some positive authority conferred by the law.\(^\text{188}\)

Justices Kiefel and Keane’s \(M76\) judgment, in particular the focus on the unlawful means of entry of Plaintiff \(M76\),\(^\text{189}\) arguably demonstrates the confusion that can occur between the right of entry of a non-citizen and this underlying fundamental right to personal liberty. A non-citizen’s unlawful means of entry and lack of visa may mean their liberty can validly be infringed more easily. But as the above statements recognise, once here, the right to personal liberty of all individuals requires any infringement to be supported by statutory authority. The principle of legality then operates to ensure this authority is clearly expressed.


\(^{184}\) \(Khawaja v Secretary of State for the Home Department\) [1984] 1 AC 74, 111 (Lord Scarman).

\(^{185}\) \(S4\) (2014) 312 ALR 537.

\(^{186}\) \(Chu Kheng Lim\) (1992) 176 CLR 1.

\(^{187}\) Ibid 29 (Brennan, Deane and Dawson JJ).

\(^{188}\) Ibid 19 (Brennan, Deane and Dawson JJ) (emphasis added).

\(^{189}\) \(M76\) (2013) 251 CLR 322, 380 [184].
B Has the Principle of Legality Been Overridden?

1 Are There Express Words?

For the Migration Act to contain express words of intent the sections must be specific in referring to the fundamental right — personal liberty — and the situation in which this right has been infringed. There is a categorical difference between detention for a limited time to achieve a stated purpose and indefinite detention. The sections must show that Parliament has considered that personal liberty could be infringed in this latter context, where removal may not be ‘reasonably practicable’, and has accepted that detention should continue.

The nature of the rights infringement requires the sections to be particularly clear in referring to indefinite detention. Personal liberty is one of the most significant fundamental rights and indefinite detention without trial is the most severe abrogation possible of that right. As the Full Federal Court said in Al Masri, ‘it may be said that the more serious the interference with liberty, the clearer the expression of intention to bring about that interference must be’. This is not a consideration of the merits of the infringement. Rather, it is recognition that the more important the right and serious the infringement, the less likely it is that Parliament would intend that consequence.

There is nothing in the express wording of ss 189, 196 or 198 that indicates that Parliament considered that removal may not be possible. The sections do not state what is to happen if removal cannot be effected. Moreover, the use of ‘until’ in s 196, a word that has temporal implications, indicates that Parliament assumed that detention would eventually end. Detention under s 196 is depicted as a temporary means to an end, with the end being the grant of a visa or removal. The use of ‘as soon as’ in s 198 in requiring removal ‘as soon as reasonably practicable’, instead of, for example, ‘if it becomes reasonably practicable’, further indicates that Parliament assumed it would be a matter of when, not if, detention is concluded.

Section 196(3), which McHugh J placed great emphasis on in Al-Kateb also does not demonstrate parliamentary intent. McHugh J contended that this section shows Parliament intended detention to continue until one of the conditions in s 196 is satisfied. Even if this is accepted, it does not mean that Parliament has considered the possibility that those conditions may never be satisfied. For example, the section could simply be intended to prevent the release of an individual by injunction prior to a legal challenge on the merits of an immigration decision.

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190 See Part II D 2.
195 Extracted on page 170 of this article.
The absence of express words in s 196(3) can be contrasted with s 196(5)(a). This subsection (in conjunction with ss 196(4), (4A)) applies to individuals detained because of visa cancellation on character grounds under s 501 or for deportation by order of the Minister due to criminal behaviour and perceived security risks under s 200. Subsection 196(5)(a) requires detention to continue ‘whether or not there is a real likelihood of the person detained being removed … in the reasonably foreseeable future’. The use of ‘whether or not’ demonstrates that Parliament has considered the possibility that removal may not be reasonably practicable, yet decided detention should continue. For the few non-citizens detained under s 501 or s 200 and to whom this section applies,\(^{197}\) the principle of legality will likely be rebutted by this wording. However, this section did not apply in \(Al-Kateb\), \(M47\) or \(M76\) and does not apply to the majority of non-citizens currently in indefinite detention. In fact, the Bill that introduced s 196(5)(a) originally extended to all detainees, but was amended to apply only to those of ‘character concern’ due to Parliament’s unwillingness to grant a broad power of indefinite detention\(^{198}\) — the very power that is now claimed.

2 \hspace{1em} \textit{Is There a Necessary Implication?}

Since there are no express words of intent, the principle can only be rebutted by a necessary implication that Parliament intended indefinite detention. While they did not phrase it in such terms, Kiefel and Keane JJ in \(M76\) effectively found an implied intention to permit indefinite detention from the absence of words limiting the duration. However, their Honours did so without demonstrating that this was a \textit{necessary} implication. An implication is necessary if the restricted interpretation (whereby detention is suspended when removal is not reasonably practicable) either renders the sections inoperative or largely frustrates their purpose.\(^{199}\) The sections are clearly not inoperative if the restricted interpretation is adopted; the provisions continue to operate for all other detainees whose claims are being processed or for whom removal is reasonably practicable.

Similarly, the restricted interpretation does not frustrate the purpose of the sections. The High Court decision in \(S4\) expressly limited the possible purposes of detention under the \textit{Migration Act} to either: detention for effecting removal from Australia or detention for the visa application process. Importantly, the Court effectively ruled out detention being for the purpose of segregating non-citizens without a visa from the community, which had been raised previously.\(^{200}\) The non-citizens held in indefinite detention are detained for the purpose of removal, as they have exhausted all their visa application avenues. Arguably, the sections do not operate for their purpose when removal of a detainee is not possible.\(^{201}\) This would mean the purpose would not be impacted by that detainee’s release. Even if the sections continue to operate for this purpose, which Hayne J contended in

\(^{197}\) See, eg, \(BHFC\) [2014] FCAFC 25 (24 March 2014).


\(^{199}\) See Part II D 2 (b).


\(^{201}\) Ibid 608 [122] (Gummow J).
the release of a non-citizen who would otherwise be indefinitely detained does not meet the high standard of frustration of purpose required to demonstrate parliamentary intent. As in other cases in which the principle has been used, a restricted interpretation of the Act excludes a small group from the sections’ operation (those for whom removal is not reasonably practicable), but still applies the sections to other targets of the legislation (all other detainees for whom removal remains a possibility). The purpose is impacted only for a ‘small percentage’. It cannot be said that the purpose is relatively valueless in the situation in which it was designed to operate. It is possible that Parliament legislated to permit detention for the purpose of removal without intending or considering the possibility of indefinite detention. This intention may be an available implication, but it is not necessary.

C How Should the Sections be Interpreted?

As Gleeson CJ noted in *Al-Kateb*, there is a constructional choice in s 196 between the natural meaning, which permits indefinite detention, and an interpretation that suspends detention until removal becomes reasonably practicable. This choice is available due to the absence of express words or a necessary implication that Parliament intended indefinite detention. Since the sections have not addressed the situation of a non-citizen detained indefinitely, the interpretation suspending indefinite detention should be adopted because it minimises the infringement on personal liberty. Any practical difficulties that this interpretation may cause are irrelevant since inconvenience is not a basis for not applying the principle of legality.

An interpretation suspending detention creates an unexpressed exception to the sections for individuals whose detention becomes indefinite. Contrary to Hayne J’s contention in *Al-Kateb*, ‘as soon as reasonably practicable’ is not transformed to ‘soon’ or ‘for so long as it appears likely to be possible of proximate performance’ by this interpretation. The requirement to remove as soon as reasonably practicable continues to operate in the same manner with respect to all other detainees. The only individuals to whom it does not apply are the small group who face indefinite detention. This requirement would also apply again to this group if removal ever became reasonably practicable. Implying an unexpressed exception into a section is a common result of applying the principle of legality.

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202 Ibid 640 [231].
209 Plaintiff M47/2012, ‘Submissions of the Plaintiff (Revised)’, Submission in *Plaintiff M47/2012 v Director-General of Security*, 8 June 2012, 11 [54].
V Why the Principle of Legality Should be Applied

Whether to revisit *Al-Kateb* 10 years after it was decided raises important policy points for the High Court. In *M76*, Hayne, Kiefel and Keane JJ all raised policy arguments for not overturning *Al-Kateb* regardless of the correctness or otherwise of the majority’s interpretation, based largely on the length of time that had elapsed since *Al-Kateb*. The question of whether the principle must be applied has also taken on added significance following the Court’s comments in *S4* regarding the constitutionality of immigration detention. This section outlines two reasons why, as a matter of policy, the Court should revisit the *Al-Kateb* interpretation and strictly apply the principle of legality.

A Following Parliament’s Intent

First, the High Court’s obligation to follow Parliament’s intention requires the *Al-Kateb* interpretation to be revisited. The primary justification for overturning an interpretation is that the previous application of interpretive principles was ‘wrong in a significant respect and that the Court should give effect to the intention of the Parliament’. As Mason J said in *Babantiaris v Lutony Fashions Pty Ltd*:

> If an appellate court, particularly an ultimate appellate court, is convinced that a previous interpretation is plainly erroneous then it cannot allow previous error to stand in the way of declaring the true intent of the statute.

As outlined in Part II A, Parliament’s intention is an objective construct derived from the application of accepted rules of construction. The legitimacy of this objective concept is dependent on the Court always using the rules of construction that have been accepted. Failure to do so would undermine Parliament’s position as primary lawmaker, since it could not know when drafting legislation if courts will or will not apply these rules. Since the principle of legality is an accepted rule of construction, it is not an optional consideration for the High Court. Applying it is ‘to act conformably with legislative intention’. The converse is also true. If the principle is not applied, the Court cannot say that it has complied with the process necessary to ‘find’ Parliament’s intention, meaning that it has not fulfilled its primary role in interpreting legislation.

In *M76*, Kiefel and Keane JJ rejected the argument that Parliament’s intention had not been followed in *Al-Kateb*. Their Honours stated that given Parliament had not overruled *Al-Kateb* by legislative amendment, the ‘suggestion that the majority view did not give effect to the will of Parliament has little practical attraction’. While this analysis appears logical, it goes against the objective concept of parliamentary intent. Their Honours effectively contended

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214 See above nn 41–2 and accompanying text.
216 Hayne J also highlighted the lack of legislation overturning *Al-Kateb*, but used this as a policy justification not to revisit *Al-Kateb*: *M76* (2013) 251 CLR 322, 366 [125].
217 Ibid 382 [194].
that Parliament’s intention was apparent in the inactions of Parliament — namely, the failure to legislate to overrule Al-Kateb. However, the Court’s obligation is not to decipher the motivations behind parliamentarians’ acts: it is to interpret the words of the legislation. The actions or omissions of parliamentarians cannot overrule the intention displayed in the words of the legislation. Additionally, the intention that is sought by the Court relates to the Parliament that passed the legislation and not the Parliament reacting to the decision. Regardless of Parliament’s subsequent behaviour, the failure to apply an accepted rule of construction meant that the Court failed to give effect to the objective intention.

B Protecting Fundamental Rights

Second, overturning the interpretation adopted by the Al-Kateb majority would also strengthen the principle of legality as a rights-protective tool. Even if S4 does indicate a willingness to revisit the constitutionality of indefinite detention, there is real benefit in the Court strictly applying the principle. To determine a constitutional argument from a non-citizen in the position of Plaintiffs M47 and M76, it would be necessary to accept the Al-Kateb majority’s interpretation. In doing so, the Court would be accepting the weakening of the requirements for displacing the principle that was inherent in the Al-Kateb approach. Overturning the majority’s misapplication would provide the Court with an opportunity to clarify the high standard required to displace the principle as well as the need for its consistent application. This is particularly significant as it is only through a strict and consistent application of the principle that the rights-protective benefits outlined in Part II C are realised.

VI Conclusion

Another challenge to the indefinite detention regime appears inevitable after a majority of justices in M76 left open the possibility of revisiting Al-Kateb. This article has suggested that the High Court should reconsider its earlier interpretation of the Migration Act if the opportunity presents. The proper application of the principle of legality to the Act requires an interpretation that suspends detention when it becomes indefinite. Sections 189, 196 and 198 do not show, by either express words or necessary implication, that Parliament considered that removal could never be practicable and intended detention to nonetheless continue.

It has been contended that overturning Al-Kateb is necessary for the High Court to fulfil its constitutional role in interpreting legislation. The Court must apply the principle of legality because it is one of the accepted rules of construction known to Parliament. While the Court may decide the principle is rebutted, it is unacceptable for the principle not to be considered. If the Court follows, in future cases, the Al-Kateb majority’s decision, it would be failing in its fundamental responsibility by not giving effect to the intention of Parliament as expressed in the legislation.

218 See Part II A.
219 See Bropho (1990) 171 CLR 1, 23.
Whether the principle is applied has broader implications for the ability and willingness of the High Court to protect fundamental rights. There is real benefit in the Court revisiting the principle of legality’s application to the *Migration Act*. Accepting the *Al-Kateb* interpretation would weaken a bedrock of the legal system; namely, the strong rights protections gained from a judiciary that ensures the legislature and the executive remain accountable to the people. Properly applying the principle would strengthen its position within the Australian rule of law and lead to the correct legal outcome to a pressing social issue, while respecting the constitutional position of Parliament. The Court has before it an entirely legitimate means to prevent the indefinite detention of more than 30 individuals and reinforce its guardianship role. If an opportunity to revisit *Al-Kateb* arises, there is no reason for the Court to consign itself to once again adopting the inhumane approach.