# HOW LONG IS TOO LONG? — THE IMPLIED LIMIT ON THE EXECUTIVE'S POWER TO HOLD NON-CITIZENS IN DETENTION UNDER AUSTRALIAN LAW

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Detention of non-citizens, particularly mandatory detention, is a substantial abrogation of an individual's right to freedom and it is therefore vital that the use of detention has a sound legal basis in Australia and can be subject to ordinary accountability mechanisms in our democratic and liberal system. Under Australia's current detention scheme, there have been very few limitations on the executive's power to detain non-citizens in Australia. However, recent developments in the Federal Court suggest that there may in fact be implied limitations on the power to detain. The discussion will begin by outlining the current power to detain and limitations imposed by courts in the past. It will then focus on the recent '*Al Masri*' cases in which the Federal Court has imposed an implied limitation on the executive's power to detain non-citizens in Australia.

**Current immigration detention situation and legislation in Australia**

All non-citizens who are unlawfully in Australia must be detained under Australia's current migration law and removed as soon as practicable[1]. Mandatory detention in certain circumstances began in 1994 and prior to this date, officers detained non-citizens on a discretionary basis[2]. To complement the imposition of mandatory detention in certain circumstances, a regime of 'bridging visas' was also introduced in 1994. A 'bridging visa' allows unlawful non-citizens to be released from detention with certain conditions.

There are three main reasons why non-citizens may be unlawful:

1) they remain in Australia after the expiry date of their visa and become an 'overstayer';

2) they enter Australia without a visa; or

3) they breach the conditions of their visa and the visa is subsequently cancelled.

Broadly speaking, a non-citizen who enters Australia illegally, for example, as a 'boat-person' will be subject to mandatory detention under Division VI of the Migration Act 1958 (Cth) (the Act). These detainees are only eligible to apply for a protection visa. Non-citizens who breach their conditions and have their visa cancelled or remain in Australia after the expiration of their visa are also subject to mandatory detention. However, a decision-maker may, in certain circumstances, issue these non-citizens with a bridging visa, thereby releasing the non-citizen from detention. The bridging visa regime is complex and its operation will not be examined in any detail in this discussion.

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There are currently six detention centres in Australia and on 9 January 2003, the number of non-citizens detained in detention centres was[3]:

| | |
|---|---|
| Villawood | 477 |
| Maribyrnong | 69 |
| Perth | 25 |
| Port Hedland | 145 |
| Baxter | 239 |
| Woomera | 109 |
| Christmas Island | 11 |
| Other Facilities | 101 |
| ***Total*** | ***1176*** |

After being placed in detention, non-citizens are given advice concerning visa options and have an opportunity to lodge an application for a substantive visa. Many detainees, particularly those who have entered Australia illegally as 'boat people', will lodge protection visa applications, as discussed above. While a detainee's visa application is being processed, the non-citizen must remain in detention or, in certain circumstances, may be released on a bridging visa. In 1998-99, 55% of all detainees were released within 3 months, although some detainees may be in detention for a period of many years[4].

If an application for a protection visa is refused by the primary decision-maker, the applicant may appeal to the Refugee Review Tribunal (the Tribunal). If the Tribunal upholds the primary decision, the applicant may appeal to the Federal Court if they believe they have a legal ground for review. The operation of the 'privative clause'[5] has substantially limited the grounds of review. However, the court has upheld the constitutional validity of the privative clause, but has read down the operation of the privative clause[6] and it is still possible for a non-citizen to seek review in limited circumstances, namely if the decision was affected by a jurisdictional error. If the non-citizen has exercised all their avenues of review or has chosen not to exercise their right to review and has not been granted a visa, the Australian government will commence action to remove the non-citizen, usually back to their home country. While the government is attempting to arrange removal of the non-citizen, they must remain in immigration detention or be granted a bridging visa.

**Basis for the executive's power to detain unlawful non-citizens**

Section 51 of the Constitution gives the Parliament the power to make laws for the peace, order and good government of the Commonwealth with respect to naturalisation and aliens (s51(xix)), immigration and emigration (s51(xxvii)) and external affairs (s51xxix)). In addition, s61 provides for executive power to be vested in the Queen, exercisable by the Governor-General and states that it extends to the execution and maintenance of the laws of the Commonwealth.

Division VII of the Act provides the power for the Minister to detain unlawful non-citizens. While the operation of the detention scheme is complex, there are several key sections which are of importance for the following discussion. Section 189 of the Act 'Detention of unlawful non-citizens' states that:

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

Section 195 stipulates the time frame in which an unlawful non-citizen in detention can apply for a visa. Three situations in which a non-citizen may be released from immigration detention are allowed for in s196:

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
  (a) removed from Australia under section 198 or 199; or
  (b) deported under section 200; or
  (c) granted a visa.

Division 8 outlines the circumstances in which unlawful non-citizens may be removed from Australia. The key provision for the purposes of this discussion is s198(1), which states:

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

**The validity of the power to detain**

The power to detain and remove non-citizens under the Act has been upheld by the High Court. In *Chu Kheng Lim and Others v MILGEA and Another* [7] (*Lim*), the High Court examined the constitutional validity of the Minister's power to detain an alien pending deportation under the Act[8]. The High Court held that the power to detain is administratively necessary to maintain the laws in respect of ss51(xix) and (xxvii) and that the power to make laws for aliens gives rise to the power to detain aliens. However, the court held that the detention must be properly characterised as an incident of the executive power to exclude, admit and deport aliens. The law to detain an alien must not be punitive or penal in nature.

In addition, the court in *Lim* examined s54R[9], which provided that a court is 'not to order the release from custody of a designated person'. It was held that if detention of a non-citizen is found not be in accordance with the Act, that is, the detention itself is unlawful, then the courts have the power under s75(v) of the Constitution to release the detainee[10].

Beaumont J in *NAMU of 2002 v Secretary, Department of Immigration, Indigenous and Multicultural Affairs*[11] (NAMU) stated that *Lim* also stands for the proposition that:

> the character of the statutory authority to detain is determined by the particular statutory context and the purpose of that authority; that is to say, the crucial question is whether the authority is tied, in point of time, to that which is reasonably incidental to deportation or the processing of an application for an entry permit[12].

He also stated that 'if the law can be properly characterised as incidental to the executive power to process visas and to remove or deport non-citizens, then the law will not be punitive or penal'.

It is clear from *Lim* and subsequent cases which have upheld the decision in *Lim*, that the executive has the power to detain under the Act if the act of detaining is referable to the power in the Constitution to make laws for aliens. This, according to the courts, would include the power to exclude, admit and deport aliens. However, the courts have imposed a very important limitation on this power, namely, that the detention cannot be punitive or penal in nature.

**Are there any other limitations on the Minister's power to detain non-citizens?**

The courts have clearly stated that the detention power is limited by the Constitution and detention is not to be punitive or penal. It is to be used only with reference to the need to control the movement of aliens in and out of Australia. Beyond this, however, there are very few limits to the executive's power to detain non-citizens in Australia.

In the past twelve months, very interesting developments in this area have been occurring in the Federal Court. Courts have been asked to examine cases involving the writ of habeas

corpus and the power of the Federal Court to release a detainee from detention pending their removal from Australia. These cases have arisen from situations where efforts to remove the person have taken longer than expected, resulting in detention for an 'unreasonable' period of time. It is this aspect of the Federal Court's recent decisions regarding limits on detention that will be examined in the remainder of this discussion. Beginning with the seminal judgment of Merkel J in *Al Masri v MIMIA*[13] (*Al Masri*), subsequent judgements that have agreed and disagreed with Merkel J's decision will be examined. Finally, the Full Federal Court decision in *MIMIA v Al Masri*[14] will be discussed. These cases provide for a fascinating analysis of the climate of the current Federal court and the inclinations of judges to imply a limitation on the executive's power to detain.

**Limitations implied by the text of the Act: the *Al Masri* decision**

Merkel J in *Al Masri* was the first judge to imply a limitation of reasonable period of time from the text of the Act. Mr Al Masri was a Palestinian detainee who applied for and was refused a Protection Visa. Mr Al Masri declared his desire to return home to Palestine instead of appealing his decision. The Government detained Mr Al Masri until such time as they were able to arrange for his deportation to the Gaza Strip. However, the Australian government encountered difficulties in arranging for his return to Palestine as Israel, Jordan and Egypt all refused to give the applicant permission to transit their country[15]. Mr Al Masri then appealed to the Federal Court for the issue of a writ of habeas corpus on the basis that his detention was unlawful as a matter of statutory construction, resulting from reading s196 in conjunction with s198. The Minister argued that the length of detention was irrelevant to the lawfulness of the detention and that the court had no power to order the release of the applicant, particularly in light of s196(3) of the Act, which states the court cannot order the release of a non-citizen from detention.

Merkel J examined ss196 and 198 of the Act. He stated (at 614) that 'when s196(1) is read together with s198 it is clear that detention is only to be until removal as soon as reasonably practicable'. He continued, stating that:

> in conferring the power to interfere with individual liberty by providing for detention pending removal as soon as reasonably practicable, must be taken to have intended that the power to detain be limited to the period during which the minister is taking reasonable steps to secure the removal and be exercisable only for so long as removal is reasonably practicable.

This limitation of reasonableness that Merkel J held to be found in s196 and s198 led to the conclusion that 'if a court is satisfied that the Minister is not taking "all reasonable steps" or that removal is "not reasonably practicable" the implicit limitations on the detention power will not have been complied with or met and continued detention of the removee will no longer be authorised by the Act'.

In the course of his judgement, Merkel J referred to several decisions of foreign courts that he believed to be analogous situations to the case before him. He examined the English case of *R v Governor of Durham Prison; Ex parte Hardial Singh*[16] which was an application for release from detention pending deportation. In that case, Woolf J stated that, if the implicit limitations on the power are not complied with, it is appropriate for a writ of habeas corpus to issue or for an order to be made for the detainee's release. Merkel J went on to explain that the principles stated by Woolf J in *Hardial Singh* were subsequently applied by the courts in Hong Kong and were approved by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre*[17] (*Lam*). *Lam* concerned the operation of the *Immigration Ordinance (Hong Kong)*, which conferred a power to detain pending removal from Hong Kong. The Court held that the burden lay on the executive to prove to the Court on the balance of probabilities the precedent or jurisdictional facts necessary to warrant the conclusion that the detention complied with the statutory limitations on the power. The

*Hardial Singh* principles were also applied in *Re Chung Tu Quan & Ors*[18] in Hong Kong. Finally, Merkel J looked at the US Supreme Court judgment in *Zadvydas v Davis*[19] in which the court held that deportable aliens held for removal must be released if a reviewing court finds no significant likelihood of removal in the reasonably foreseeable future.

Having examined cases which he considered to be similar from overseas courts, and considering the statutory construction of ss196 and 198, Merkel J's final order was that the detainee be released on conditions that required him subsequently to comply with 'arrangements made for his removal from Australia in accordance with s198 of the Act'.

This is an important decision. It indicates a willingness on the part of the judiciary to argue that there are limitations on the executive power to detain, and to declare that this power cannot go unrestrained. Mary Crock,[20] argues that the decision in *Al Masri* has 'begun a trend of sorts in the Federal Court. Although the prevailing jurisprudence in that court on the effect of the privative clause has induced a mood of judicial deference in the review process, there have been other occasions where single judges have ordered the release of asylum seekers from detention'[21]. However, not all Federal Court judges are convinced that the executive has overstepped the power conferred on it by the Act. Merkel J's decision has invoked both criticism and support from within the Federal Court. Inevitably, the *Al Masri* case was quickly followed by further appeals on the basis that detention was unlawful in the circumstances. Following Merkel J's decision, a few days after his release from detention, Mr Al Masri was removed from Australia[22]. Despite Mr Al Masri's removal, the Minister lodged an appeal to the Full Federal Court. The appeal was heard on 2 October 2002 and the Full Federal Court judgement was delivered on 15 April 2003. In the meantime, the subsequent cases that were heard demonstrate the uncertainty and the difference in views among judges in the Federal Court in relation to this issue.

**Subsequent cases**

The Federal Court has been split over the ruling in *Al Masri.* In *Al Khafaji v MIMA*[23] (*Al Khafaji*), Mansfield J had the first opportunity to support the *Al Masri* decision or to declare it wrong. Mr Al Khafaji's application for a protection visa was refused by the primary decision-maker and the Refugee Review Tribunal. Mr Al Khafaji asked several times to be returned to Syria. However, he had no travel documents and the Australian government encountered difficulties in arranging his return. Consequently, he remained in detention indefinitely and sought a writ of habeas corpus declaring this unlawful. The judge stated that the initial detention of the applicant was lawful under s189 of the Act, and the applicant agreed.

The applicant argued, following the reasoning in *Al Masri*, that 'the detention power in ss196 and 198 is impliedly limited so that he may be detained under those provisions only for as long as:

- the respondent is taking all reasonable steps to secure the removal of the applicant from Australia as soon as is reasonably practicable; and

- the removal of the applicant from Australia is "reasonably practicable", in the sense that there must be a real likelihood or prospect of removal in the reasonably foreseeable future'.

The Minister argued that the decision in *Al Masri* was plainly wrong and should therefore not be followed by Mansfield J. He claimed that the circumstances in which a person is to be released from 'immigration detention' are exhaustively defined by ss 191 and 196(1) and (2) of the Act. The statutory regime under the Act involves both the deprivation of liberty of the person and the assumption of control over the person. He pointed out that the obligation to detain contained in ss 189 and 196 of the Act is imposed in unqualified terms and does not

allow for the possibility of lawful release from detention except in the circumstances strictly defined by ss 191 and 196(1) and (2) of the Act.

The Minister also argued that the word 'reasonably' in relation to the word 'practicable' indicates the obligation is to be measured against all the circumstances, including the fact that removal often involves complex and sensitive discussions at executive level between governments having regard to circumstances in the country proposed for return. The focus, he argued, is upon whether the removal is reasonably practicable, rather than upon whether it is or may be achievable within some measurable time frame.

Mansfield J agreed with Merkel J's decision and found that 'the removal of the applicant from Australia is not 'reasonably practicable', because there is not at present any real prospect of the applicant being removed from Australia in the reasonably foreseeable future'. Mansfield J ordered that Mr Al Khafaji be released from detention under the powers conferred on him by s39 of the Judiciary Act. He also ordered him to report to his solicitor's office directly after his release and inform them of his new address. He was ordered to report to the Department daily, and to comply with any orders from the Australian Government concerning his removal from Australia.

This decision can be contrasted with *Daniel v MIMIA*[24], in which Whitlam J strongly disagreed with the judgment of Merkel J in *Al Masri*. Mr Daniel's application for a protection visa was refused by the primary decision-maker and the Refugee Review Tribunal. Mr Daniel was in immigration detention and requested release on the basis that 'there is no reasonable likelihood of removal of the applicant to Iraq within a reasonable time', following the decision of Merkel J in *Al Masri.*

Whitlam J analysed Merkel J's use of foreign cases in some detail, and concluded that the legislation in question in these cases was not analogous to the sections in the Act. Whitlam J said that he considered that 'Merkel J's constructs rest on a flawed analysis of these cases'. He agreed with the criticism of Beaumont and French JJ in *WAIS v MIMIA*[25] and *NAES v MIMIA*[26] and he found that the 'decision in *Al Masri* is plainly wrong'. Accordingly, he was not bound to follow Merkel J's decision and he ruled that Mr Daniel could not be released from detention. Whitlam J held that ss 196 and 198 did not impose an implied limitation on the Minister's power to detain and as such, Mr Daniel's detention was lawful and not subject to interference from the courts.

In *NAKG of 2002 v MIMA*[27] and *Applicant WAIA of 2002 v MIMIA*[28], Jacobsen and Finkelstein JJ respectively agreed with the decision in *Al Masri* and ordered the release of the applicants from detention on the basis that there was an implied limitation on the Minister's power to detain, if removal was not carried out within a reasonable period of time. On the other hand, in *WAIS v MIMIA*[29] and *NAES v MIMIA*[30], French and Beaumont JJ respectively held that the decision in *Al Masri* was wrong and ss196 and 198 did not impose a limitation on the Minister's power to detain.

**The Full Federal Court decision on *Al Masri***

The Minister appealed the decision in *Al Masri.* Although Mr Al Masri departed Australia soon after the decision of the primary judge was handed down and the senior counsel for Mr Al Masri therefore asked for the appeal to be dismissed, the Court found that there was a very significant legal issue to be tried and that it would be 'wrong and unfair to the Minister and his officers to allow the order for release to stand if it were in fact based on an erroneous view of the law'[31]. Black CJ, Sundberg and Weinberg JJ heard the appeal and unanimously dismissed it. They stated that the primary issue in the appeal is:

> whether the power and duty of the appellant Minister to detain an unlawful non-citizen who has no entitlement to a visa but who has asked to be removed from Australia continues during a time when there is no real likelihood or prospect of that person's removal in the reasonably foreseeable future…The question is whether the Act authorises and requires the indefinite and possibly even permanent administrative detention of such a person[32]

The Minister argued that the trial judge's construction of the Act was not supported by the language of the Act or the context of the provisions regarding detention. The 'duty to remove a person as soon as reasonably practicable [s198] imposed a duty to seek to remove but that the authority to detain was unaffected by the prospects of a successful removal'[33]. He argued this construction was consistent with the Constitution and said s198(1) was 'reasonably appropriate and adapted' for the purposes of migration processing. It was the 'purpose of detention, and not its duration, that was determinative of validity'[34].

The arguments for Mr Al Masri supported the trial judge's construction of ss189, 196 and 198 of the Act. If s196 was construed to permit indefinite detention, it would be invalid of one or more of 4 grounds:

1) It would be contrary to the exclusive vesting of the judicial power of the Commonwealth in the courts under chapter III of the Constitution; or

2) It would not be supported by a head of power under s51; or

3) It would be an impermissible ouster clause purporting to prevent the court from reviewing detention; or

4) It would be a breach of s75(v) of the Constitution as a limitation on the courts to grant orders in the nature of habeas corpus.[35]

The Human Rights and Equal Opportunity Commission (HREOC) intervened by leave in the case. It submitted that 'constitutional limitations and principles of statutory construction all supported the implied temporal limitation on the power to detain pursuant to s196 found by the trial judge'[36]. HREOC also submitted that the trial judge's construction was supported by general principles of statutory construction found in international law, and that the statute should be interpreted in a manner consistent with Australia's obligations under international treaties. Therefore, the International Covenant on Civil and Political rights needed to be considered. Under common law principles of statutory interpretation, HREOC submitted that there must be clear words before a statute would be construed as removing a fundamental right or freedom.

The judges began by reasserting the proposition that the current detention scheme is lawful under the constitution and outlined the position in Australia, following *Lim* and other significant cases concerning detention. They held that 'detention depends upon the status of the person, and in that sense the detention regime is clearly administrative, mandatory and indefinite'[37].

However, despite acknowledging that the current detention scheme is legal, the judges held that constitutional considerations pointed 'very strongly to the need and foundation for a limitation such as the second found by the primary judge'. While the judges examined the constitutional position of ss189 and 196 in some detail, they did not decide the issue on a constitutional basis, as they considered the central issue in the appeal 'could be determined by the application of well-established principles of statutory construction concerning fundamental rights and freedoms'. They commenced with the decision *Coco v The Queen*[38] and the oft-cited passage that 'courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly

manifested by unmistakable and unambiguous language'. They stated that the 'right to personal liberty is among the most fundamental of all common law rights'[39] and that the 'common law's concern for the liberty of individuals extends to those who are within Australia unlawfully'[40]. They concluded that the current detention scheme does not intend in clear language that a person should be kept in detention indefinitely when there is no likelihood of removal. The language of neither s196 nor s198 (1) suggested that the parliament intended to curtail the fundamental right of personal liberty for an unlimited duration.

The judges examined the international cases that Merkel J had based his decision on in detail and conclude that Merkel J had been correct in using the cases as analogous decisions. They also concluded that the cases gave more weight to their interpretation that the language of the Act does not intend to curtail completely the right to liberty. In addition, they examined Australia's obligations under international law. They held that it was a 'compelling conclusion that detention [of a non-citizen with no likelihood of removal] would be arbitrary detention within the meaning of Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), and stated that they were 'therefore fortified in their conclusion that s196(1) should be read subject to an implied limitation'[41].

The judges concluded that although the reasoning of Merkel J was not entirely correct, they agreed with the conclusion that the current detention scheme clearly does not allow for indefinite detention. They outlined the cases that had subsequently disagreed with Merkel J's decision and stated that they 'do not agree with these criticisms'. The judges also disagreed with the argument that the writ of mandamus to compel MIMIA to remove Mr Al Masri was a more appropriate form of relief. The judges held that the writ of habeas corpus was an appropriate remedy.

In dismissing the appeal, the judges emphasised that the implied limitation on detention, would be unlikely to have a frequent operation. They held that the 'limitation is not encountered merely by length of detention and it is not grounded upon an assessment of the reasonableness of the duration of the detention'. A decision to rely on the limitation 'should not be taken lightly'. Furthermore, releasing a person from detention does not mean that the person has acquired rights in Australia. They are still subject to the Migration Act and could be detained again as soon as the possibility of removal in the foreseeable future became real. In this way, while clearly stating that the implied limitation exists, the judges made it clear that it is not a decision to open the doors of detention.

Following the decision of the Full Court, the Minister applied for special leave to have the case decided in the High Court. The special leave application was held in conjunction with requests to remove two cases on similar issues to the High Court. The High Court granted permission for the two cases (*Al Khafaji* and *SHDB*[42]) to be heard but declined special leave for *Al Masri*. The decision not to hear *Al Masri* as based mainly on the fact that the other two cases raised the same issues and therefore any ruling given on *Al Khafaji* and *SHDB* would deal with the issues. In addition, Mr Al Masri had returned home, whereas the applicants in *Al Khafaji* and *SHDB* were still in Australia.

The Minister has also introduced the *Migration Amendment (Duration of Detention) Bill* 2003 which deals in part with the issues raised in *Al Masri*. The Explanatory Memorandum states that the aim of these amendments is to 'put it beyond doubt that an unlawful non-citizen must be kept in immigration detention unless a court finally determines that:

- The detention is unlawful; or
- He or she is not an unlawful non-citizen.'

At the time of writing, the Bill had not yet been passed in the Senate. The content of this Bill is worth a separate discussion and will therefore not be examined in any detail here; suffice

to say that its mere introduction adds to complexity of the current relationship between the judiciary and the executive in this area.

**The significance of the *Al Masri* cases**

These cases are very important both from an administrative law perspective and a human rights perspective. They highlight the benefits of an administrative law system in which the actions of the executive are not taken for granted but instead are thoroughly monitored and held accountable. A similar question regarding the executive power to detain under the Constitution arose from the circumstances surrounding the 'Tampa' incident in 2001. Armed Australian Service troops boarded a Norwegian vessel containing rescued asylum seekers heading for Christmas Island. A group of lawyers in Melbourne brought proceedings on behalf of the detainees on board the MV Tampa, requesting the writ of habeas corpus and arguing that the detention was unlawful[43]. One issue that arose was whether or not the executive power in s61 supported the government's actions. The judge at first instance, North J, held the executive was acting unlawfully and beyond its power and held that the writ of habeas corpus should be issued. On appeal, the court split 2-1, with the Chief Justice agreeing with the primary decision and Beaumont and French JJ arguing that the prerogative power of s61 did allow the executive power to detain the asylum seekers on board the Tampa. The government won this issue in court, but it is significant that overall, the Federal Court was evenly split 2-2[44]. In addition, it is worth noting that Beaumont and French JJ upheld the executive's power to detain in this case and these same two judges, when faced with *Al Masri* type decisions, also dismissed the appeals, stating that the executive's power to detain was not limited in those circumstances.

The *Al Masri* cases, like the Tampa incident, highlight the extent to which the executive is prepared to argue that its power to detain is subject to limitations. In issuing the writ of habeas corpus and limiting the executive's power to detain non-citizens, judges have exerted their role as a counter-balance to executive power under the system of separation of powers. The problem for this system in Australia currently, however, is the extent to which this type of accountability is becoming obsolete. According to Pringle and Thompson, the Tampa affair marked a 'strengthening of the executive at the expense of the legislature, judiciary – and the separation of powers'[45]. They go on to argue that the High Court in the 1990s was typified by decisions that proved the court to be 'defending separation of powers and a defender of liberal democracy against executive excess'. Cases relating to representative government, individual rights, freedom of expression and native title were heralded as keeping the executive and the legislature accountable to the rule of law. However, the court of the 21st century has not been quite so willing to defend liberal democracy. Judgments like that of Merkel J in *Al Masri,* Black CJ, Sundberg and Weinberg JJ in the appeal and North J in the first Tampa decision[46] indicate that some members of the judiciary continue to see it as their role to keep the executive accountable. However, the counter judgments following *Al Masri* and in the Full Court decision of the Tampa case[47] demonstrate that there is an equally strong tendency to submit to parliamentary supremacy.

It has been argued by several scholars that, in the area of migration law in particular, judges are reluctant to restrain the executive. Dr Simon Evans questions the extent to which the Migration Act has abrogated the executive power in s61 of the Constitution, insisting that s61 is not meant to be unlimited, allowing the executive to do whatever it thinks is in the 'national interest'[48]. If the rule of law is to be a meaningful concept, he argues, then s61 must also be constrained by the rule of law. North and Decle also argue that the area of migration law in particular is one in which the courts have been reluctant to rein in the decisions of the executive and the legislature. They argue that as well as the importance of the separation of powers, the significance of human rights and international treaties should not be underestimated. Although this discussion has not focused on international law, it is important to note that the reasonableness of periods of time spent in detention raises very important

questions in relation to our international obligations. On the other hand, according to McMillan, it is not the role of the courts to 'usurp the legislative and executive roles in formulating and articulating public policy'[49]. If, as the courts have held time and time again, the executive's right to detain is lawful and the power to do so stems directly from the Constitution, then it is not the court's role to imply limitations on that power from clever constructions of the text of the Migration Act. There are no simple solutions to the questions that these issues raise, and the *Al Masri* cases are yet another example of the difficulty faced in maintaining the separation of powers.

## Conclusion

This discussion has aimed to provide an overview of the current situation in Australia in regards to certain limitations on immigration detention. Detention itself has been held lawful by Australian courts, but the recent *Al Masri* cases have held that there is an implied limit to the executive's power to detain using statutory construction of the text. On the other hand, there were several judges in the Federal Court who argued that there is no implied limitation on the power to detain. These cases are therefore important not only because they encourage us to consider the scope of the executive's power in relation to immigration issues, but also because of what they reveal about the current climate in the Federal Court. The Full Court's decision in *Al Masri* comes at a significant time in the history of the relationship between the courts and the executive in Australia, particularly in the area of migration law. While a High Court decision on *Al Khafaji* and *SHDB* will be significant in relation to the legal issue of implied limitation on detention, it will not resolve the tension between the Courts and the executive in regards to detention and migration law.

**Endnotes**

1 Mary Crock and Ben Saul *Future Seekers, Refugees and the Law* NSW, The Federation Press (2002) at 76.
2 Justice AM North and Peace Decle 'Courts and Immigration detention: 'Once a Jolly Swagman camped by a Billabong' (2002) 10 *Aust Jo of Admin Law Vol* 1 at 18 (North and Decle).
3 Immigration Fact Sheet 86 – Immigration Detention.
4 Mary Crock and Ben Saul *Future Seekers, Refugees and the Law* NSW, The Federation Press (2002) at 80.
5 S474 Migration Act 1958.
6 See, for example, *Plaintiff S157 v Commonwealth* (2003) 195 ALR 598.
7 (1992) 176 CLR 1.
8 *Al Masri v MIMIA* (2002) 192 ALR 609.
9 S54R is no longer in the same form in the Migration Act; it has been replaced with s196(3).
10 North and Decle at 18.
11 [2002] FCA 907.
12 Per Beaumont J at 9-12.
13 (2002) 192 ALR 609.
14 (2003) 197 ALR 241.
15 North and Decle at 23.
16 [1984] 1 WLR 704.
17 [1997] AC 97.
18 [1995] 1 HKC 566.
19 533 US 678 (2001).
20 Mary Crock, 'You have to be stronger than razor wire – Legal issues relating to the detention of refugees and asylum seekers' (2002) 10 *Aust Jo of Admin Law* 33.
21 *Ibid* p55.
22 *Ibid.*
23 [2002] FCA 139.
24 [2003] FCA 20.
25 [2002] FCA 1625.
26 [2003] FCA 2.
27 [2002] FCA 997.
28 [2002] FCA 1621.
29 [2002] FCA 1625.

30 [2003] FCA 2.
31 *MIMIA v Al Masri* (2003) 197 ALR 241.
32 *Ibid* at paragraph 2.
33 *Ibid* at paragraph 38.
34 *Ibid* at paragraph 40.
35 *Ibid* at paragraph 44.
36 *Ibid* at paragraph 45.
37 *Ibid* at paragraph 31.
38 (1994) 179 CLR 427.
39 *MIMIA v Al Masri* at paragraph 86; cf *VFAD and Williams v The Queen* (1986) 161 CLR 278.
40 *Ibid* at paragraph 89; cf *Kioa v West* (1985) 159 CLR 550.
41 *Ibid* at paragraphs 153-155.
42 *SHDB v Godwin & Ors* [2003] FCA 300.
43 North and Decle at 19.
44 *Ibid* p20
45 Helen Pringle & Claire Thompson ' The Tampa Affair and the Role of the Australian Parliament' (2002) 13 *Pub L Rev* 128.
46 *Victorian Council for Civil Liberties v MIMA* (2001) 110 FCR 452.
47 *Ruddock v Vadarlis* (2001) 110 FCR 491.
48 Simon Evans 'The Rule of Law, Constitutionalism and the MV Tampa' (2002) 13 *Pub L Rev* 94.
49 John McMillan 'Justiciability of the Government's Tampa Actions' (2002) 13 *Pub L Rev* 89.