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Final Examination Notes

Ada Lo Lam Wong

z3291072

Lecturer: Meiring de Villiers

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Constitutional and International Contexts

1 Constitutional Powers – Immigration Power and Aliens Power

Section 51: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (xix) naturalization and aliens;
- (xxvii) immigration and emigration;

1.1 Aliens Power

1.1.1 *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72

- **FACTS** – Shaw came to Australia as a UK citizen in 1974 on a permanent entry permit. In 2001, his visa was cancelled under s 501(2) of the *Migration Act* as he had a substantial criminal record and did not pass the character test.
- **ISSUE** – Did Shaw come under sections 51(xix) and 51(xxvii)?
- **HC majority** – Parliament’s exercise of power was valid on basis of Aliens **Power to make laws regarding all non-citizens** without exception. Cut-off date is 1949 (*Citizenship Act*)
 - [31] ‘the applicant entered Australia as an alien in the constitutional sense. Re Minister for Immigration and Multicultural Affairs ... this being so, he did not lose that status by reason of his subsequent personal history in this country.’
 - [32] ‘the aliens power has reached all those persons who entered this country after the commencement of the Citizenship Act on 26 January 1949 and who were born out of Australia of parents who were not Australian citizens and who had not been naturalised’
- **HC minority** – applicant came as a ‘subject of the Queen’ and not an alien. Cut-off date is 1986 (*Australia Act*)
 - McHugh J – [52] ‘the applicant, who arrived in Australia in 1974 and was permanently living in Australia on 3 March 1986, is a subject of the Queen of Australia. He is not an alien within the meaning of s 51(xix) of the Constitution.’
 - Kirby J – [95] ‘In my view it refers to someone who is outside the Australian community and its fundamental loyalties, that is, outside Australian nationality. Applied today and for future application, I would accept that such community and such loyalties are marked off by citizenship of birth and descent, and citizenship by naturalisation.’
 - Kirby J – [113] ‘at the time the applicant arrived in Australia in 1974 as a boy of 2 years, he was not an “alien” for constitutional purposes. He could not thereafter, by legislation of the kind invoked, having retrospective operation, be turned into an “alien”.’

1.1.2 *Pochi v MacPhee* [1982] HCA 60

- **FACTS** – Pochi was granted citizenship but never sworn in and officially became a citizen.
- **HC** – As long as he was not **officially a citizen he is an ‘alien’**
 - Gibbs CJ – [9] ‘the Parliament can in my opinion treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian.’

1.2 Immigration Power

1.2.1 *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72

- **HC minority** – Immigration Power only refers to the **process of immigration**. Once they have become members of the Australian community, they are not under Immigration Power.
 - McHugh J – [46] ‘A long line of authority establishes that the immigration power does not authorise the parliament to make laws with respect to persons who have immigrated to Australia, made their permanent homes here and become members of the Australian community.’
 - Kirby J – [64] ‘the federal constitutional power with

- respect to “immigration” is not open-ended. It does not permit the indefinite regulation by federal law of persons who once were (or whose parents or family were) immigrants. The applicable power is addressed, as such, to “immigration”. This is a process.’
- Kirby J – [116] ‘the power to make laws with respect to immigration is lost once an immigrant has arrived in Australia and become a member of the Australian community.’

1.2.2 *MIMIA v Nystrom* [2006] HCA 50

- HC – noted that the *Migration Act* had been amended to reflect that ‘aliens’ are all ‘non-citizens’
 - [13] “immigrants” were required to hold entry permits in order to enter and to remain in Australia (thereby excluding persons who, by absorption into the Australian community, had ceased to be immigrants in the constitutional sense), the amendments required all “non-citizens” to hold an entry permit.’

2 Doctrine of Separation of Powers

2.1.1 *Al-Kateb v Godwin* [2004] HCA 37

- FACTS – Al-Kateb was stateless as in he has no real likelihood or prospect of removal to another nation.
- ISSUE – whether indefinite detention with no prospect of removal was a valid exercise of executive power or if it amounts to punitive detention.
- Gleeson CJ – on principle of legality, in this ambiguity the Act should not be read to curtail rights
 - [21] ‘The Act provides that the appellant must be kept in detention until he is removed from Australia under s 198, and s 198 provides that he must be removed as soon as reasonably practicable. The Act does not say what is to happen if, through no fault of his own or of the authorities, he cannot be removed.’
 - [22] ‘In a case of uncertainty, I would find it easier to discern a legislative intention to confer a power of indefinite administrative detention if the power were coupled with a discretion enabling its operation to be related to the circumstances of individual cases ... The absence of any reference to such considerations, to my mind, reinforces the assumption that the purpose reflected in s 196 (removal) is capable of fulfilment, and supports a conclusion that the mandated detention is tied to the validity of that assumption.’
- McHugh J – there is no ambiguity: Al-Kateb should be indefinitely detained, the detention is not punitive and Constitutionally valid
 - [33] ‘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.’
 - [45] ‘As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive. The Parliament of the Commonwealth is entitled, in accordance with the power conferred by s 51(xix) and without infringing Ch III of the Constitution, to take such steps’
- Kirby J – if there is no prospect of removal, then s 198 can no longer apply to detain him
 - [122] ‘If the stage has been reached that the appellant cannot be removed from Australia and as a matter of reasonable practicability is unlikely to be removed, there is a significant constraint for the continued operation of s 198. In such a case s 198 no longer retains a present purpose of facilitating removal from Australia which is reasonably in prospect and to that extent the operation of s 198 is spent.’
 - [140] ‘However, the purposes are not at large. The continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government. The reason is that it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III.’
- Hayne J – just because he cannot be removed now does not mean he can NEVER be removed
 - [231] ‘Because there can be no certainty about whether or when the non-citizen will be removed, it cannot be said that the Act proceeds from a premise (that removal will be possible) ... even if, as in this case, it is found that “there is no real likelihood or prospect of [the non-citizen's] removal in the reasonably

foreseeable future", that does not mean that continued detention is not for the purpose of subsequent removal.'

2.1.2 *Chu Kheng Lim v Minister for Local Government & Ethnic Affairs* [1992] HCA 64

- ISSUE – whether s 54R disallowing courts to release someone from immigration detention is infringement on judicial power to punish under s 71.
- HC majority – s 54R is invalid as it purports to convey judicial power on the executive, not because mandatory detention is necessarily punitive.
 - [38] 'A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid.'
 - [39] 'the lawful imprisonment of an alien while that person's application for entry is being determined is not punitive in character because the purpose of the imprisonment is to prevent the alien from entering into the community until the determination is made. But if imprisonment goes beyond what is reasonably necessary to achieve the non-punitive object, it will be regarded as punitive in character.'
- HC majority – only citizens have a right not to be imprisoned without a court order
 - [24] 'the citizens of this country enjoy, at least in times of peace ... a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.'
 - [26] 'While an alien who is actually within this country enjoys the protection of our law, his or her status, rights and immunities under that law differ from the status, rights and immunities of an Australian citizen in a variety of important respects. ... its effect is significantly to diminish the protection which Ch.III of the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process.'

3 International Law and Executive Power

3.1 Executive Power

Section 61: The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

3.1.1 *Ruddock v Vadarlis* [2001] FCA 1329 (Tampa Case)

- FACTS – *MV Tampa* rescued 433 refugees in international waters. When they requested permission to enter Australia, it was refused. When they declared a state of emergency and entered anyway, they were boarded and anchored by SAS Troops.
- ISSUE – whether the Australian government had the executive power to detain the refugees on board *Tampa*.
- FCA – it is **within a nation's executive power to exclude non-citizens**
 - [186] '[under International law] A State could also do all those things which must be done for the effective exercise of the power to expel.'
 - [193] 'the executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion.'
 - [193] 'The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australia community, from entering.'