PLAINTIFF M47/2018 v MINISTER FOR HOME AFFAIRS and Another

HIGH COURT OF AUSTRALIA

KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON and EDELMAN JJ

23 October, 22 November 2018, 13 February 2019 — Canberra

[2019] HCA 17

Citizenship and migration — Detention — Where plaintiff detained as unlawful non-citizen pending removal from Australia — Where plaintiff made false statements and failed to assist and cooperate — Where plaintiff's identity and nationality not known — Whether ss 189 and 196 of Migration Act 1958 (Cth) authorise plaintiff's detention — (CTH) Migration Act 1958 ss 189, 196, 198.

Courts and judicial system — Jurisdiction — Original jurisdiction — Special case — Where factual basis of questions for opinion of court relied on inferences concerning likelihood of plaintiff's future removal from Australia — Where plaintiff made false statements and failed to assist and cooperate — Whether inferences can be drawn — (CTH) High Court Rules 2004 r 27.08.5.

The plaintiff, an unlawful non-citizen, had been detained in immigration detention since arriving in the migration zone in 2010, and exhausted all rights under Australian law to seek a visa authorising entry into Australia. The defendants, the Minister for Home Affairs and the Commonwealth of Australia, contended that the plaintiff provided inconsistent information to the Department of Home Affairs and failed to cooperate in the department's attempt to establish his identity and nationality to locate a country to remove the plaintiff to. The plaintiff commenced proceedings in the original jurisdiction of the High Court of Australia, seeking a declaration that his detention was unlawful on the ground that it was not authorised by ss 189 and 196 of the Migration Act 1958 (Cth), seeking the issue of a writ of habeas corpus, or mandamus, requiring his release from custody. The special case contained an agreed set of questions of law and facts, but no agreement between the parties as to whether there was any prospect that the plaintiff would be removed from Australia in the reasonably foreseeable future. The plaintiff invited the court to draw one or more inferences as to there being no such prospect from the facts and documents identified in the case, and for the court to adopt the view of the minority in *Al-Kateb v Godwin* (2004) 219 CLR 562; 208 ALR 124; 79 ALD 233; [2004] HCA 37.

Held, per the court, finding that the special case for the opinion of the Full Court raised no factual basis for consideration of the lawfulness of the plaintiff's detention under ss 189 and 196 of the Migration Act 1958 (Cth):

Per Kiefel CJ, Keane, Nettle and Edelman JJ

(i) For an unlawful non-citizen seeking entry into Australia, matters relating to his identity cannot sensibly be thought to be private matters of legitimate concern only to him. No suggestion was made that his inconsistent accounts and refusal to cooperate were due to any medical condition or mental illness. The attempt on behalf of the plaintiff to turn his falsehoods to his advantage is rejected in accordance with the general disinclination of the courts to allow a party to take advantage of his or her own wrongful conduct: at [30]–[34].

(ii) The defendants' submission that the options for the plaintiff's removal have not yet been exhausted should be accepted: at [36].

(iii) The questions presented to the court upon the facts agreed between the parties do not fall to be resolved by the application of the onus of proof as if this court were

conducting a trial. The questions stated must be resolved in accordance with r 27.08 of the High Court Rules 2004 (Cth) on the agreed facts and documents, and the inferences that may properly be drawn from those facts and documents. The plaintiff assumed, by his pleading, the burden of establishing inferences as matters of fact: at [37]–[39].

Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97; [1996] 4 All ER 256, distinguished.

Per Bell, Gageler and Gordon JJ

(iv) In the absence of his cooperation, it cannot be known whether the plaintiff's identity can be established, nor can the court essay any conclusion as to the prospect or likelihood of his removal from Australia. It follows that none of the inferences on which the plaintiff relies is open: at [49].

Application

This was an application made by the plaintiff in the original jurisdiction of the High Court of Australia seeking a declaration that his detention was unlawful on the ground that it was not authorised by ss 189 and 196 of the Migration Act 1958 (Cth), and a writ of habeas corpus, or mandamus, requiring his release from custody.

R Merkel QC, *L T Livingston*, *E M Nekvapil* and *C G Winnett* instructed by *Human Rights for All Pty Ltd* for the plaintiff (Plaintiff M47/2018).

S P Donaghue QC, *Solicitor-General (Cth)*, *P D Herzfeld* and *Z C Heger* instructed by *Australian Government Solicitor* for the defendants (Minister for Home Affairs and Commonwealth of Australia).

Australian Human Rights Commission as amicus curiae, limited to its written submissions.

[1] Kiefel CJ, Keane, Nettle and Edelman JJ. Section 189 of the Migration Act 1958 (Cth) (the Act) provides that an officer[1] who knows or reasonably suspects that a person in the migration zone[2] is an unlawful non-citizen[3] must detain the person. Section 196 of the Act requires that an unlawful non-citizen detained under s 189 be kept in immigration detention until he or she is removed from Australia under s 198 or s 199, deported under s 200, or granted a visa.[4] Section 198(6) of the Act provides that an officer must remove an unlawful non-citizen "as soon as reasonably practicable" if the non-citizen is a detainee and an application for a visa has been refused and finally determined.

[2] The plaintiff is an unlawful non-citizen. He has been in immigration detention since his arrival in the migration zone in 2010. He has exhausted his rights under Australian law to seek a visa authorising his entry into Australia. The defendants, the Minister for Home Affairs ("the Minister") and the Commonwealth, rely on ss 189 and 196 of the Act as lawful authority to detain the plaintiff "for the purpose of removal from Australia as soon as that becomes reasonably practicable".

1. As defined in s 5(1) of the Act.
2. Other than an excised offshore place.
3. Within s 14 of the Act.
4. Or an officer begins to deal with the non-citizen under s 198AD(3) of the Act.

The proceedings

[3] The plaintiff commenced proceedings in the original jurisdiction of the Court seeking a declaration that his detention is unlawful on the ground that it is not authorised by ss 189 and 196 of the Act. He seeks the issue of a writ of habeas corpus, or mandamus, requiring his release from custody.

[4] The plaintiff claimed that there is, in fact, no prospect that he will be removed from Australia to another country. Against that background, it was said on his behalf that his continued detention is not authorised by ss 189 and 196 for two reasons. First, it was said that as a matter of construction, the mandate in ss 189 and 196 to keep an unlawful non-citizen in custodial detention suspends when his or her removal is not practicable at all, or in the reasonably foreseeable future, so that those provisions no longer authorise the plaintiff's detention. Secondly, it was said that even if ss 189 and 196 cannot be read as operating in that way, they are invalid in their application to the plaintiff because his continued detention is not sufficiently connected to a constitutionally permissible purpose of administrative detention, and so may be imposed only through the exercise of the judicial power of the Commonwealth by the courts designated by Ch III of the Constitution.

[5] In *Al-Kateb v Godwin*,[5] it had been found as a matter of fact that, although the "possibility of removal in the future remained",[6] there was "no real likelihood or prospect of removal of the appellant in the reasonably foreseeable future".[7] This Court held, by majority (McHugh, Hayne, Callinan and Heydon JJ), that the authority conferred by ss 189 and 196 of the Act is not limited, either as a matter of the proper construction of those provisions,[8] or as a matter of their constitutional validity,[9] to cases where there is a prospect of the detainee being removed to another country within the reasonably foreseeable future.

[6] The minority in *Al-Kateb* (Gleeson CJ, Gummow and Kirby JJ) concluded, on the basis of the finding of fact referred to above, that ss 189 and 196, properly construed, did not authorise the appellant's detention.[10] Gleeson CJ did not consider the constitutional question. Gummow J held that the administrative detention of aliens and their segregation thereby from the Australian community for a purpose unconnected with the regulation of their entry, investigation, admission or deportation is not compatible with Ch III of the Constitution.[11] His Honour also concluded that 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.[12] Kirby J agreed that indefinite detention at the will of the executive government, and according to its opinions, actions and judgments, is alien to Australia's constitutional arrangements.[13] In the present case, the plaintiff submitted, among other things, that the view of the minority should now be adopted by the Court.

5. (2004) 219 CLR 562; 208 ALR 124; 79 ALD 233; [2004] HCA 37 (*Al-Kateb*).
6. *Al-Kateb* at [105]. See also at [230], [295].
7. *Al-Kateb* at [2], [31], [33], [105], [145], [231], [278].
8. *Al-Kateb* at [34], [226]–[231], [298], [303].
9. *Al-Kateb* at [48], [267]–[268], [295], [303].
10. *Al-Kateb* at [22], [122]–[125], [145].
11. *Al-Kateb* at [110]–[111], [126]–[127], [139]–[140].
12. *Al-Kateb* at [126]–[127], [139]–[140].
13. *Al-Kateb* at [146].

[7] Pursuant to r 27.08 of the High Court Rules 2004 (Cth), the parties agreed upon a special case, stating questions of law for the opinion of the Full Court and setting out the facts said to be necessary to enable the Full Court to decide those questions. At the end of oral argument, the questions were answered as follows:

(1) On their proper construction, do ss 189 and 196 of the Act authorise the present detention of the plaintiff?
Answer: Does not arise.

(2) If so, are those provisions beyond the legislative power of the Commonwealth insofar as they apply to the plaintiff?
Answer: Does not arise.

(3) What relief, if any, should issue to the plaintiff?
Answer: None.

(4) Who should pay the costs of and incidental to this special case?
Answer: The plaintiff.

[8] At that time, the Court announced that it would publish its reasons at a later date. Our reasons now follow.

Controversial inferences of fact

[9] The procedure by way of special case provided for by r 27.08 of the High Court Rules allows the Court to determine questions of law where the parties are able to agree upon the facts that are said to give rise to those questions. In the present proceeding, the special case contains no agreement between the parties to the effect that there is currently no prospect that the plaintiff will be able to be removed from Australia in the reasonably foreseeable future.

[10] Rule 27.08.5 of the High Court Rules allows the Court to "draw from the facts stated and documents identified in the special case any inference, whether of fact or law, which might have been drawn from them if proved at a trial".[14] The plaintiff was thus able to argue that the facts in the special case gave rise to one or more inferences of fact of the kind which engaged the reasoning of the minority Justices of the Court in *Al-Kateb*. In particular, the plaintiff invited the Court to draw one or more of the following inferences from the facts stated, and documents identified, in the special case:

(1) there is no real prospect or likelihood that the plaintiff will be removed from Australia potentially in his lifetime, or alternatively during his natural life;

(2) there is no real prospect or likelihood that the plaintiff will be removed from Australia within the reasonably foreseeable future;

(3) the plaintiff's removal from Australia is not practically attainable; and

(4) the defendants are not presently able to effect the plaintiff's removal within a reasonable period.

[11] The drawing of one or more of these inferences is of critical importance to the argument advanced by the plaintiff. As the defendants submitted, if none of these inferences is drawn, the correctness of *Al-Kateb* does not arise for decision

14. Rule 27.08.5, like its predecessor, O 35 r 1(4) of the High Court Rules 1952 (Cth), overcomes a difficulty that arose under procedures whereby a case was stated by an authority or a lower court to enable a higher court to determine a question of law. In such cases, the facts stated were required to be taken as the ultimate facts for the purpose of determining the question, and the court determining that question was not at liberty to draw inferences of fact: see *Merchant Service Guild of Australasia v Newcastle & Hunter River Steamship Co Ltd* (1913) 16 CLR 591 at 622–4; *Mack v Commissioner of Stamp Duties (NSW)* (1920) 28 CLR 373 at 381; *R v Rigby* (1956) 100 CLR 146 at 150–1; [1957] St R Qd 266.

because, even on the minority view in that case, ss 189 and 196 of the Act provide lawful authority for the plaintiff's detention.

[12] It is not necessary to attempt to expound the differences in the formulation of these inferences, or the significance of those differences. That is because none of the inferences may be drawn from the facts agreed, and the documents referred to, in the special case.

[13] For the sake of completeness, it should be noted that senior counsel for the plaintiff also sought to mount further arguments that the present case should be determined in the plaintiff's favour for reasons which were said not to depend on the drawing of one or more of the inferences set out above. No purpose would be served by essaying those arguments here because, ultimately, senior counsel for the plaintiff conceded that if one or more of the inferences were not drawn in the plaintiff's favour, the questions posed in the special case as to the operation and validity of ss 189 and 196 of the Act do not arise.

The contentions of the parties

[14] On the plaintiff's behalf, it was said that the plaintiff is a stateless person. It was said that the defendants remain unsatisfied of the plaintiff's identity and have been unable to locate any country to which he could be removed, notwithstanding the steps they have taken over almost nine years. That state of affairs is unlikely to change. It was said that the Department's[15] unsuccessful efforts to locate a country to which to remove the plaintiff demonstrate that there is no real prospect, as distinct from a mere possibility, of removal.

[15] The defendants submitted that their inability to establish the plaintiff's identity and country of origin is due to the plaintiff's want of cooperation. Many aspects of the information provided by the plaintiff are inconsistent, and these inconsistencies are not explicable by genuine uncertainty, ignorance or medical difficulties on the part of the plaintiff. That being so, it cannot be accepted that it is beyond the power of the plaintiff to provide accurate and verifiable information concerning his identity and nationality. It cannot be said that the plaintiff's nationality cannot be established, because what might be achieved with the plaintiff's cooperation cannot be known. In particular in this regard, there is at least some reason to think that he is most likely Algerian, and the Algerian Embassy has advised that in order to make real progress in attempting to establish the plaintiff's identity and nationality, it would be valuable to know the plaintiff's true name and his place and date of birth, the names of his parents and their dates of birth, and his residences, if any, in Algeria. Accordingly, it was said, the Court cannot infer that the plaintiff is a stateless person or that there is no real likelihood or prospect of removal in the reasonably foreseeable future.

[16] In addition, the defendants argued that the Department, while continuing its attempts to establish the plaintiff's identity and nationality, has approached various countries to ascertain whether they might be prepared to accept the plaintiff for resettlement. These approaches are continuing, notwithstanding that the defendants have not identified a country willing to accept the plaintiff as a

15. In these reasons, a reference to "the Department" is a reference to:
    (i) from 28 January 2010 to 17 September 2013, the Department of Immigration and Citizenship;
    (ii) from 18 September 2013 to 19 December 2017, the Department of Immigration and Border Protection; and
    (iii) from 20 December 2017 to the present, the Department of Home Affairs.

national or as a person with a right of entry. While none of those approaches has yet resulted in a favourable response, the defendants do not accept that the task is hopeless. Even though the defendants accept that there is currently no country willing to accept him as a national or as a person with a right of entry, the Department is continuing to attempt to make genuine attempts to identify countries that might accept the plaintiff. The defendants contend that in these circumstances the options for the plaintiff's removal from Australia have not yet been exhausted.[16]

[17] To understand the parties' submissions, it is necessary to refer to the highly unusual circumstances of the present case.

The plaintiff's circumstances

[18] The plaintiff arrived in Australia by aeroplane at Melbourne airport on 28 January 2010. He had previously identified himself to authorities in other countries using at least three different names. When he travelled to Australia he did so on a Norwegian passport under a fourth name. The plaintiff destroyed that passport and presented himself to immigration officers in Australia under a fifth name, as a "citizen" of Western Sahara. It may be significant that, when the plaintiff was told that no Norwegian interpreter was available to assist him, he advised that his second preference was for an Algerian interpreter.

[19] The plaintiff had previously identified himself to Danish authorities as a citizen of Iraq born in 1990, and to authorities in the Netherlands under a different name as a citizen of Gaza, Israel, born on 1 March 1988. In or about 2007, he applied for protection in Iceland under a different name, as a "citizen" of Western Sahara born in 1991. On 30 December 2009, the plaintiff was intercepted at Singapore airport attempting to travel to New Zealand via Australia on a counterfeit British passport which gave his date of birth as 27 March 1989. On or around 5 January 2010, the plaintiff sought asylum in Germany using the same date of birth.

[20] In this proceeding the plaintiff has sworn an affidavit to the effect that:

(i) he does not know but believes that he was born in the Canary Islands, Spain, and was taken to Western Sahara as a new-born baby;

(ii) he does not know the name, date of birth or ethnicity of his mother but he believes that she resided in Western Sahara around the time of his birth; and

(iii) he has no information about his father.

[21] Understandably, given the different accounts given by the plaintiff on other occasions, this account has not been accepted by the defendants.

[22] At the time of his arrival, the plaintiff held a Norwegian temporary residence permit which entitled him to reside in Norway ("the Norwegian Permit"). During the currency of that permit, on 29 March 2010, the plaintiff made a written request to the Department that he be removed from Australia. The Norwegian Permit expired on 24 September 2010. The plaintiff applied for the renewal of the Norwegian Permit, but his application was rejected by the Norwegian government on or around 7 November 2011.

16. Compare *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; 304 ALR 135; 136 ALD 457; [2013] HCA 53 (*Plaintiff M76/2013*) at [147].

[23] Between 2010 and 2017, the plaintiff lodged a number of applications for protection visas, as well as an application for a bridging visa and an application for a safe haven enterprise visa.[17] In some of these applications, the plaintiff stated that he had in the past used false names, personal details and passports. Each application was refused by a delegate of the Minister.[18]

[24] In interviews with officers of the Department which took place between 2010 and 2013, the plaintiff said that his parents were dead and that he had no relatives. In 2013, he said on two occasions that he had a Norwegian wife and son. On a third occasion in 2013, he again claimed he had a Norwegian son. In 2017, he said that he did not have a son in Norway.

[25] On 31 May 2012, the plaintiff attended a meeting with officials of the Moroccan Embassy organised by the Department. He was told that the meeting was for the purpose of assisting the Department in the process of investigating his identity. He participated in the meeting for some time, but then walked out advising that he did not wish to participate further. The Moroccan officials advised the Department that in their view the plaintiff was not from Western Sahara, but appeared to be an Algerian, who spoke "fluent (and not childlike) Algerian Berber dialect". The Moroccan officials also stated that it was unlikely that the plaintiff was from Las Palmas in that he could not identify any suburb, city or village at Las Palmas.

[26] In an interview on 24 September 2014 with officers of the Department, the plaintiff claimed to have been born in Tindouf, Algeria. In that interview, he claimed that his parents were living in Dakhla, Western Sahara, and that he had three brothers living in Algeria. On this occasion, the plaintiff claimed that his elder brother, with whom he communicates on Skype, told him that he, the plaintiff, was born in 1987. The plaintiff was adamant that he would not accept being removed to Algeria or Morocco. It may be noted that during an earlier interview with officials from the Algerian Embassy on 28 June 2012, he refused to speak Arabic.

[27] In an interview on 22 March 2016, the plaintiff informed an officer of the Department that he had no knowledge of his parents as he was an orphan. On 27 April 2016, he said that he lived with his parents until he was six years of age, when he went to Spain. On 30 May 2016, he claimed that he was born in El Paso in Spain.

[28] On 8 November 2018, the Department wrote to the plaintiff's solicitor seeking the plaintiff's agreement to the Department's proposal to arrange meetings between the plaintiff and the Moroccan and Algerian Embassies in Canberra in order to establish the plaintiff's identity and nationality. The plaintiff's solicitor replied that the plaintiff declined to attend any further meeting because the Commonwealth had not demonstrated the utility of a further meeting in terms of establishing the plaintiff's identity. In light of the plaintiff's position, the Department did not seek to arrange the foreshadowed meetings. Given that whether or not the proposed meetings would assist in establishing the plaintiff's identity could not be known with any reasonable certainty unless the meetings took place, and given that it is not apparent that attending the meetings would

17. The application for a safe haven enterprise visa was made after the minister exercised his power under s 48B of the Act to permit the plaintiff to make a further protection visa application.
18. With the exception of the first protection visa application, which was withdrawn, and the application for a bridging visa, which was determined to be invalid by a delegate of the minister.

have cost the plaintiff anything, the response given on behalf of the plaintiff tends to confirm his distinct preference for a policy of non-cooperation with the Department.

[29] The uncertainty surrounding the plaintiff's identity and nationality also affects his prospects of resettlement in a country other than his home. Thus, for example, on 8 November 2018, an officer of the Department met with an official of the Embassy of the United States of America in Canberra in relation to the possibility of resettling the plaintiff in the United States. The official advised that the United States would not be in a position to settle the plaintiff at that stage, having regard to the ongoing questions surrounding the plaintiff's identity.

Should the inferences be drawn?

[30] In the Department's dealings with the plaintiff, he has adopted a posture that involves, at best, non-cooperation and, at worst, deliberate obfuscation and falsehood. No good reason has been advanced for the adoption of this posture. For an unlawful non-citizen seeking entry into Australia, matters relating to his identity cannot sensibly be thought to be private matters of legitimate concern only to him. Further, it was not suggested that the plaintiff's inconsistent accounts of his personal background and his refusal to cooperate with the authorities are due to any medical condition or mental illness on his part. The possibility that the inconsistencies in the plaintiff's accounts of his origins might be explicable by difficulties of that kind was explicitly raised with senior counsel for the plaintiff before the special case was referred to the Full Court,[19] and no suggestion to that effect has subsequently been made on the plaintiff's behalf.

[31] Because the plaintiff has contributed to the frustration of lines of enquiry as to his identity and nationality, what might be established about his identity and nationality if he were to assist the Department in its enquiries cannot be known. It certainly cannot be inferred that genuine assistance from the plaintiff would not be helpful. As the Algerian Embassy stated, information as to the plaintiff's true name and place and date of birth, the true names and dates of birth of his parents, and details of his residences, if any, in Algeria, would be valuable in making progress to establish the plaintiff's identity and nationality.

[32] Such information has not been forthcoming from the plaintiff, and the Court has been given no good reason to regard the plaintiff as incapable of giving a factual and verifiable account of those matters should he choose to do so. Indeed, the plaintiff seeks to take advantage of difficulties to which he has contributed to contend that enquiries as to his identity and country of origin have no prospect of success.

[33] In this regard, the plaintiff submitted that his own statements that he has no knowledge as to his parentage or family are manifestly unreliable, going so far as to argue that without independently verifiable material capable of substantiating his identity, there is no real possibility, prospect or likelihood of the defendants identifying any country to which he could be returned, and no real possibility, prospect or likelihood of any new information coming to light. This is not an attractive argument.

[34] The attempt on behalf of the plaintiff to turn his falsehoods to his advantage needs only to be noted to be rejected in accordance with the general disinclination of the courts to allow a party to take advantage of his or her own

19. *Plaintiff M47/2018 v Minister for Home Affairs* [2018] HCATrans 221 at 4–5, 7.

wrongful conduct.[20] There is no basis in the materials before the Court for any conclusion other than that the plaintiff has deliberately failed to assist the defendants in their attempts to establish his true identity and nationality when, so far as the agreed facts are concerned, he does not appear to have anything legitimate to lose by cooperating. Absent any explanation for the inconsistent and irreconcilable statements made by the plaintiff, some of those statements must be deliberate falsehoods.

[35] That the plaintiff has chosen to adopt a course of non-cooperation involving the deployment of falsehoods also tends to suggest that he may be seeking to hide something which he fears might be discovered if he cooperates with the Department. As Gibbs J observed in *Steinberg v Federal Commissioner of Taxation*,[21]"[t]here may be circumstances in which an inference can be drawn from the fact that the witness has told a false story, for example, that the truth would be harmful to him". In the present case, there is at least a live possibility that the prospect of concern to the plaintiff is removal to Algeria.

[36] In addition, the Department is still engaged in pursuing the possibility of removing the plaintiff from Australia. There is no reason to doubt that this pursuit is genuine and further, given the posture of non-cooperation adopted by the plaintiff, the Court is in no position to conclude that the pursuit is futile. The defendants' submission that the options for the plaintiff's removal have not yet been exhausted should be accepted.[22]

[37] For the sake of completeness, it should be noted that, on behalf of the plaintiff, it was also said that the defendants bear the onus of proving the facts concerning the identity of the plaintiff's parents and his place of birth in order to show that there is a real prospect of removing the plaintiff to his country of origin within a reasonable time. It was said that because those facts are not verifiable independently of the inconsistent information provided by the plaintiff, the defendants cannot discharge that burden. In this regard, the plaintiff placed reliance on the decision of the Judicial Committee of the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre*.[23]

[38] *Tan*affords the plaintiff no assistance. In that decision, the applicants' claims for habeas corpus were determined upon evidence adduced at trial by the parties and findings made upon that evidence, rather than upon facts stated in a special case agreed between the parties.[24] Thus, in relation to the issue as to whether the detention of some applicants could be justified as detention "pending removal", it was held that because the evidence was that the Vietnamese government had unequivocally refused to accept the return of the applicants, the continuing detention of the applicants could not be said, on the evidence, to be "pending removal".[25] Whatever may be the position in a trial on evidence, the special case procedure adopted by the parties in the present case was adopted as an alternative to such a trial. The special case contains no agreed fact of the kind that was of crucial importance in *Tan*. The questions presented to the Court upon the facts agreed between the parties do not fall to be resolved by the application

20. *Gnych v Polish Club Ltd* (2015) 255 CLR 414; 320 ALR 489; 147 ALD 511; [2015] HCA 23 at [45].
21. (1975) 134 CLR 640 at 694; 7 ALR 491 at 50.
22. Compare *Plaintiff M76/2013* at [147].
23. [1997] AC 97; [1996] 4 All ER 256 (*Tan*).
24. *Tan* at AC 103, 107, 109–10.
25. *Tan* at 109, 115–16.

of the onus of proof as if this Court were conducting a trial. The questions stated by the parties must be resolved in accordance with r 27.08 of the High Court Rules on the agreed facts and documents and the inferences that may properly be drawn from those facts and documents.

[39] In addition, the plaintiff's contention that the defendants bear the onus of negativing the inferences which he propounds is a distinctly unfair departure from the course adopted by the plaintiff in his statement of claim, where he asserted the inferences on which he seeks to rely as matters of fact. The plaintiff assumed, by his pleading, the burden of establishing those inferences as matters of fact.[26] It is not only "an elementary rule of the law of evidence", but "a rule of common sense"[27] that the burden of proof is upon the party who asserts a fact, not on the party who denies it. That is not to overlook that where, as here, the claim is one for habeas corpus, the onus is on the defendant Minister to justify the plaintiff's detention.[28] But where, as here, the plaintiff's detention is apparently lawful — because it is admitted that the plaintiff is an unlawful non-citizen, and ss 189 and 196 of the Act are lawful authority to detain an unlawful non-citizen for the purpose of lawful removal from Australia as soon as that becomes practicable — the plaintiff carries at least an initial evidentiary burden of establishing that there is reason to suppose that his detention has ceased to be lawful by reason that it is no longer reasonably foreseeable that he will be removed from Australia.[29]

[40] This consideration is compelling in this case: it is the plaintiff, not the defendants, who could reasonably be expected to provide information on the facts relating to the identity of his parents and their place of birth and residence. Insofar as the special case is deficient by reason of the absence of this information, that deficit does not provide a basis for drawing any one of the inferences urged by the plaintiff. In that regard, the present case brings to mind the considerations of common sense underlying the maxim stated by Lord Mansfield in *Blatch v Archer*[30] that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted".

26. *Fraser v Victorian Railways Commissioners* (1909) 8 CLR 54 at 59, 66, 72; 15 ALR 93; *Attorney-General (NSW) v Martin* (1909) 9 CLR 713 at 721–2 (*Martin*); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd; The Kingswood* [1942] AC 154 at 174; [1941] 2 All ER 165.
27. *Martin* at 721–2.
28. *R v Davey; Ex parte Freer* (1936) 56 CLR 381 at 385; *Liversidge v Anderson* [1942] AC 206 at 245; [1941] 3 All ER 338; *Trobridge v Hardy* (1955) 94 CLR 147 at 152; [1956] ALR 15; *R v Governor of Metropolitan Gaol; Ex parte Di Nardo* [1963] VR 61 at 62.
29. *Greene v Secretary of State for Home Affairs* [1942] AC 284 at 295, 306; compare *R v Governor of Brixton Prison; Ex parte Ahsan* [1969] 2 QB 222 at 231; [1969] 2 All ER 347; *Yoxon v Secretary to the Department of Justice* (2015) 50 VR 5; [2015] VSC 124 at [35]–[40]; and see Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed, 2017, at [14-110].
30. (1774) 1 Cowp 63 at 65; 98 ER 969 at 970. In this court see, for example, *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439; 178 ALR 1; 32 MVR 289; [2001] HCA 12 at [36].

Conclusion

[41] The inconsistent statements made by the plaintiff as to his identity and place of origin are not explicable by genuine uncertainty or ignorance, and so it cannot be assumed that it is beyond his power to provide further information concerning his identity that may shed positive light on his prospects of removal. Neither can it be concluded that the options for his removal within a reasonable time, if his cooperation is forthcoming, have been exhausted.

[42] Accordingly, the Court answered the questions referred to it on the basis that the inferences urged by the plaintiff were not available and no factual basis for the application of the view of the minority in *Al-Kateb* was established. The result was that no question arose as to the lawfulness of the plaintiff's detention.

[43] Bell, Gageler and Gordon JJ. The plaintiff has been held in detention by officers of the second defendant since his arrival in Australia on 28 January 2010. The defendants rely on ss 189 and 196 ("the provisions") of the Migration Act 1958 (Cth) to authorise the plaintiff's detention. In proceedings commenced in the Court's original jurisdiction, the plaintiff challenges the lawfulness of his detention on the ground that, on their proper construction, the provisions have ceased to authorise his detention; alternatively, on the ground that, in their purported operation on him, the provisions exceed the legislative power of the Commonwealth and, to that extent, are invalid. The factual predicate of the challenge, in each way it is put, is the inability of the defendants to establish the plaintiff's identity at any time in the future such that there is "currently no practical possibility" of his removal from Australia to any other country.

[44] As Kiefel CJ, Keane, Nettle and Edelman JJ in their joint reasons explain, the revised special case stating questions of law for the opinion of the Full Court does not contain agreement that there is no prospect of the plaintiff's removal from Australia in the reasonably foreseeable future. Prior to the hearing, the parties were notified that the Court would be assisted by the identification of the inferences that the plaintiff invites the Court to draw from the facts stated and the documents identified in the special case[31] as would give rise to the questions of law.

[45] In response to that invitation the plaintiff identified four inferences of fact:

(1) there is no real prospect or likelihood that the plaintiff will be removed from Australia potentially in his lifetime, alternatively during his natural life;

(2) there is no real prospect or likelihood that the plaintiff will be removed from Australia within the reasonably foreseeable future;

(3) the plaintiff's removal from Australia is no longer practically attainable;

(4) it has become apparent that the defendants have not been able to effect the plaintiff's removal within a reasonable period.

[46] The fourth inference was reformulated on the hearing to make clear that it, too, looks forward from the plaintiff's present situation. Senior counsel for the plaintiff stated that each inference is a different way of expressing the conclusion that there is no real prospect or likelihood that the plaintiff will be deported from Australia.

31. Rule 27.08.5 of the High Court Rules 2004(Cth).

[47] The procedural history, the questions of law reserved for the opinion of the Full Court and the facts are set out in the joint reasons of Kiefel CJ, Keane, Nettle and Edelman JJ and need not be repeated. As their Honours observe, the possibility of the existence of a medical explanation for the inconsistent accounts given by the plaintiff of his history was raised with his senior counsel before the special case was referred to the Full Court.[32] There is nothing in the special case to suggest that the plaintiff suffers from a psychiatric or other medical condition which would affect his capacity to give a coherent, factual account of his background including the reasons for giving inconsistent accounts in the past. We agree with their Honours' reasons for the conclusion that the plaintiff has deliberately failed to assist the defendants in their attempts to establish his true identity.

[48] The plaintiff's argument builds on the practical necessity for the Department of Home Affairs ("the Department") to establish his identity before any other country will agree to receive him. The plaintiff points to the advice prepared by the Complex Identity Advice section of the Department that, in light of his lengthy history of providing false, misleading and/or inconsistent information, any determination as to his identity must be made "exclusively on independently verifiable information". Accepting this criterion, the plaintiff submits that the only information that might produce a change in his circumstances is objective information and he observes that nothing in the special case identifies "any independently verifiable information that is prospectively available". The "real question", in the plaintiff's submission, is whether the Court is satisfied that he is withholding information that is independently verifiable about his birth and his parents' identity.

[49] The circumstance that any account that the plaintiff now gives of his identity and nationality will require verification by independent evidence says nothing as to the prospect of that evidence being available. One inference to be drawn from the materials in the special case is that it is within the plaintiff's power to give a factual account of his name, date and place of birth, and that of his parents. An allied inference is that it is within the plaintiff's power to cooperate in other ways with requests made by the Department in its attempt to establish his identity and nationality. In the absence of his cooperation, it cannot be known whether the plaintiff's identity can be established, nor can the Court essay any conclusion as to the prospect or likelihood of his removal from Australia. It follows that none of the inferences on which the plaintiff relies is open. Senior counsel for the plaintiff acknowledged that in these circumstances the first two questions reserved for the Full Court's opinion do not arise. The answers to the third and fourth questions follow as of course.

Orders

The questions stated in the special case for the opinion of the Full Court are answered as follows:

1. On their proper construction, do ss 189 and 196 of the Migration Act 1958 (Cth) authorise the present detention of the plaintiff?
   Answer: Does not arise.

32. At [30].

2. If so, are those provisions beyond the legislative power of the Commonwealth insofar as they apply to the plaintiff?
   Answer: Does not arise.
3. What relief, if any, should issue to the plaintiff?
   Answer: None.
4. Who should pay the costs of and incidental to this special case?
   Answer: The plaintiff.

JEREMY LEITH
SOLICITOR