THE SAMUEL GRIFFITH SOCIETY

SIR HARRY GIBBS MEMORIAL ORATION

SATURDAY 25 MAY 2024

GOLD COAST

OVERTURNING *AL-KATEB V GODWIN*: UNANSWERED QUESTIONS ABOUT THE RULES OF PRECEDENT

Introduction

In November 2023, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,[1] the High Court of Australia unanimously overturned its earlier majority decision from 2004 in *Al-Kateb v Godwin*.[2] But the High Court did so in an unusual way. The Court did not reopen or depart from what was described as the statutory interpretation holding of the majority in *Al Kateb*. It only reopened and departed from the constitutional holding in that case. All members of the Court held that the constitutional holding in *Al-Kateb* was inconsistent with the requirement of the unchallenged principle set out by this Court in a case called *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ("*Lim*")[3] that legislation that provides for executive detention must be reasonably capable of being seen as necessary for a legitimate end or purpose. Six members of the Court held that the Parliament's purpose was "refuted" or not legitimate.[4]

---

1 (2023) 97 ALJR 1005.

2 (2004) 219 CLR 562.

3 (1992) 176 CLR 1 at 33.

4 (2023) 97 ALJR 1005 at 1016 [44], [46].

I held that the purpose was legitimate but that detention was not reasonably capable of being seen as necessary for that purpose.[5]

There are unanswered questions concerning the overruling of *Al-Kateb v Godwin* that I will address in this paper. They concern the precise role of precedent in a decision by the High Court to reopen and depart from one of its earlier decisions. I will use the overruling of *Al-Kateb v Godwin* to discuss these issues in respect of decisions on statutory and constitutional interpretation. It is remarkable that the most clarity that is usually provided when a submission is made that the High Court should overrule one of its own decisions is by reference to the application of a list of factors. Yet, how the matters in that list should be applied, and the weight which each of them should bear, can be very controversial.

This controversy was brought into sharp focus a couple of months before the decision in the *NZYQ case* in a case called *Vanderstock v Victoria*[6] in which four members of the High Court overturned the earlier decision of the High Court in *Dickenson's Arcade Pty Ltd v Tasmania*.[7] As Justice Steward observed, the decision that they overturned in *Dickenson's Arcade* had been affirmed, followed, or not departed from on nine occasions over the course of half a century.[8] In overturning that decision the majority also rejected the reasoning of at least twenty four present or past members of the Court.[9] Justice Steward described the new rule as departing from a principle that had been "carefully worked out in a significant number of cases".[10] So what is the methodology that could lead some judges to support such constitutional change in the teeth of decades of precedent and the views, sometimes very strongly held, of many other Justices of the Court?

---

5 (2023) 97 ALJR 1005 at 1017-1018 [53].

6 (2023) 98 ALJR 208; 414 ALR 161.

7 (1974) 130 CLR 177.

8 *Vanderstock v Victoria* (2023) 98 ALJR 208 at 386 [748]; 414 ALR 161 at 376.

9 *Vanderstock v Victoria* (2023) 98 ALJR 208 at 365-366 [651]; 414 ALR 161 at 350.

10 *Vanderstock v Victoria* (2023) 98 ALJR 208 at 393 [782]; 414 ALR 161 at 385.

In the early days of the High Court, before strong streams of jurisprudence had developed from the Court, Sir Isaac Isaacs appeared to express the view that when a judge of the High Court is satisfied that a constitutional precedent is unprincipled, the judge's obligation to follow their conscience in relation to their view of principle completely excluded any consequential considerations that might arise from overruling past precedent. But, even in those early days, Sir Isaac Isaacs was careful to require the judge's view to be that the true state of the law was *plainly* in conflict with what had been held by judicial predecessors. He said:[11]

> "If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right".

The point I want to make in this paper, by reference to the overruling of the *Al-Kateb* decision is to add nuance to this view. Naturally, the starting point before a Justice of the High Court can depart from a previous decision of the Court is a strong conviction that the previous decision was incorrect as a matter of principle. I agree with Sir Isaac Isaacs that this conviction must be held sufficiently strongly that the judge can say that the decision was "manifestly wrong"[12] or "plainly erroneous"[13] or, in more recent, polite and collegiate language, that there are "compelling reason[s]" of principle to the contrary.[14] But that conviction about lack of principle should only be one dimension of the analysis, albeit (as it has always been treated) the dimension with the most weight.

---

11 *Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278.

12 See *R v The Commonwealth Court of Conciliation and Arbitration, ex parte The Brisbane Tramways Co Ltd (No 1)* (1914) 18 CLR 54 at 58 (Griffith CJ); *Cain v Malone* (1942) 66 CLR 10 at 15 (Latham CJ).

13 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13 (Mason CJ).

14 *Hill v Zuda Pty Ltd* (2022) 275 CLR 24at 34-35 [25].

As an overall summary of this paper, I come today to honour the remarks of Sir Harry Gibbs in the *Second Territorial Senators' Case*[15] when he said of Sir Isaac Isaacs' approach that:

> "[L]ike most generalizations, this statement can be misleading. No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court."

In the *First Territorial Senators' Case*[16] Sir Harry Gibbs had dissented along with Barwick CJ and Stephen J. In the *Second Territorial Senators' Case*, Sir Harry explained that he still thought that the *First Territorial Senators' Case*[17] was wrongly decided. It may be that he thought that it was plainly wrong. But he nevertheless followed it as a matter of precedent. He said that no new arguments had been presented and the consequences were too great to justify overruling the decision, including the effect on the expectations of the people of the Territories who had acted on the decision in the *First Territorial Senators' Case*.[18]

In *John v Federal Commissioner of Taxation*,[19] five members of the High Court considered the decision of Gibbs CJ some years after the *First Territorial Senators' Case* in *The Commonwealth v Hospital Contribution Fund*.[20] The Justices in *John* summarised four matters that Gibbs CJ had set

---

15 *Queensland v Commonwealth* (1977) 139 CLR 585 at 599.

16 *Western Australia v Commonwealth* (1975) 134 CLR 201.

17 *Western Australia v Commonwealth* (1975) 134 CLR 201.

18 *Queensland v Commonwealth* (1977) 139 CLR 585 at 599-600

19 (1989) 166 CLR 417 at 438-439.

20 (1982) 150 CLR 49 at 56-58.

out as considerations for whether to overrule a decision. Those matters are: (i) whether the earlier decision rested on a principle carefully worked out in a succession of cases; (ii) whether there was a difference between the reasons of the justices constituting the majority in the earlier decision; (iii) whether the earlier decision had achieved a useful result or had led to considerable inconvenience; (iv) whether the earlier decision had been independently acted upon. These became known as the "*John* factors". As can often be the case when a principle is named after a case, the description of these factors merely as the "*John* factors" can betray a lack of understanding. The factors did not actually come from the *John* decision, they are not exhaustive factors, and, most importantly, they are not of the same weight.

In treating these four factors as something of a shopping list it is common to overlook a distinction that Sir Harry had implicitly drawn in the *Second Territorial Senators' Case* between two different dimensions to those factors. On the one hand the first two factors are concerned with matters of principle. They focus upon the cogency of reasoning and principle upon which the decision is based including the fit that the decision has with the corpus of precedent. On the other hand, the second two factors are concerned with the consequences of the decision (the usefulness of its result and whether it had been acted upon). In short, the first dimension is concerned with considerations of principle involving the fit and the justification for the legal rule while the second dimension is concerned with consequences of overturning the legal rule. Those two dimensions are not always entirely separate although the first has always been treated as having the greatest weight. What I intend to do this morning is to illustrate the importance of understanding these two dimensions of overruling by reference to the overruling of a case where their application presented a number of difficult and unanswered questions. That is the case of *Al-Kateb*.

Mr Al-Kateb and the highly unstable decision in *Al-Kateb v Godwin*

In December 2000, a 24-year-old Palestinian man called Mr Al-Kateb arrived in Australia by vessel without a passport and without an Australian visa. Mr Al-Kateb was stateless. He had lived most of his life in Kuwait but he had no citizenship there, or anywhere else.[21] He fell within a class of

---

21 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 596 [79].

stateless people who were not covered by the Refugees Convention.[22] Mr Al-Kateb was taken into immigration detention.[23] He was detained under s 189(1) of the *Migration Act 1958* (Cth) which, when read with s 196(1)(a), requires that a person known or reasonably suspected to be an unlawful non-citizen be detained by an immigration officer and "be kept in immigration detention until [relevantly] he or she is ... removed from Australia".

Mr Al-Kateb applied for a protection visa. He claimed that although he was not one of the hundreds of thousands of other Palestinians deported from Kuwait after the Gulf War, he nevertheless feared persecution by the Kuwaiti authorities including arrest, imprisonment and torture.[24] Mr Al-Kateb's application for a protection visa was refused and proceedings for judicial review of that refusal decision and an appeal were dismissed.[25] During this time, Mr Al-Kateb remained in immigration detention.[26] In June 2002, Mr Al-Kateb told the relevant Department that he wished to be removed from Australia. He asked to be returned to Kuwait. He said that if that was not possible then he wished to be sent to Gaza.[27]

The Department investigated whether Mr Al-Kateb could be removed from Australia to Kuwait, Egypt, the Palestinian territories, Syria or Jordan. The investigations were unsuccessful. No other country was identified to which Mr Al-Kateb could be removed.[28] An application by Mr Al-Kateb which sought various forms of relief including declarations as to the unlawful nature of his potentially indefinite immigration detention, and for habeas corpus and release, was refused on 3 April 2003 despite the judge concluding that "removal from Australia is not reasonably practicable at the present time as

---

22 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 602 [99], referring to the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

23 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 630 [195].

24 *Applicant X v Minister for Immigration & Multicultural Affairs* [2001] FCA 1489 at [2]-[3].

25 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 602 [100].

26 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 603 [107].

27 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 602 [102].

28 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 603 [103]-[104].

there is no real likelihood or prospect of removal in the reasonably foreseeable future".[29]

Subsequently, and during Mr Al-Kateb's potentially indefinite detention, the Full Court of the Federal Court of Australia (Black CJ, Sundberg and Weinberg JJ) handed down its decision in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*.[30] In that decision the Full Court unanimously held that the power of the Commonwealth Executive under s 196(1) of the *Migration Act* to keep a person who was detained under s 189 in detention was subject to an implied limitation that the power did not apply "where there was no real prospect of removal and thus no real prospect of detention coming to an end within any reasonably foreseeable timeframe".[31] Since the Full Court concluded that the provisions did not authorise indefinite detention the Full Court did not need to decide whether indefinite detention would be constitutionally valid. Nevertheless, the Full Court expressed serious doubt about the constitutional validity of the provision if it were interpreted to allow indefinite detention. The doubt expressed by the Court was said to arise due to the principle espoused by the High Court in *Lim*.[32]

Shortly after the *Al Masri* decision, orders were made by consent releasing Mr Al-Kateb from immigration detention subject to conditions. Nevertheless, an appeal was removed to the High Court from the primary judge's refusal to make declarations as to the unlawful nature of potentially indefinite detention of Mr Al-Kateb.[33] The High Court, by a majority of 4:3, overruled the decision in *Al Masri*. The majority was comprised of McHugh, Hayne, Callinan and Heydon JJ. The dissentients were Gleeson CJ, Gummow and Kirby JJ. The ratio decidendi comprised two rules of the case,

---

29 *SHDB v Goodwin* [2003] FCA 300 at [9]. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 603 [105].

30 (2003) 126 FCR 54.

31 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 85 [122].

32 *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at 73 [71].

33 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 596 [78], 603-604 [107].

sometimes described as "holdings".[34] The reasons of Callinan J differed from the other three members of the majority in one key respect: Callinan J treated the relevant purpose as one to be assessed by reference to the subjective purposes of the Executive.[35] Due to that difference, the holdings of the majority can only be expressed as part of the ratio decidendi at a high level of generality to encompass the reasons of all four members of the majority.

The first holding of the majority was its statutory interpretation holding. It was essentially that the requirements of ss 189(1) and 196(1), together with s 198, meant that executive detention of a suspected unlawful non-citizen must continue until removal, or deportation, or the grant of a visa.[36] The second holding of the majority was its constitutional holding. Expressed at a high level of generality this holding was that such executive detention was compatible with Ch III of the *Constitution*.[37]

The result in *Al-Kateb* was, and for nearly two decades remained, highly unstable. The three dissenting Justices in *Al-Kateb* (Gleeson CJ, Gummow and Kirby JJ) dissented in strong terms, supporting the earlier decision in *Al Masri*. As early as 2005, the Full Court of the Federal Court of Australia was speculating upon the possibility that *Al-Kateb* might be overruled by rejecting the constitutional holding based on the High Court's earlier decision in *Lim*.[38] In 2012, in *Plaintiff M47/2012 v Director-General of Security*,[39] one of the minority Justices from *Al-Kateb* (Gummow J) and another (Bell J) were critical of the statutory interpretation holding of the majority in *Al-Kateb*. In 2014, the Full Court of the Federal Court speculated

---

34 See *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 542 [59].

35 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 661-662 [298]-[299].

36 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 581 [33]-[35], 643 [241], 659-660 [292], 662-663 [303].

37 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 [44]-[45], 651 [268], 662-663 [303].

38 *Minister for Immigration and Multicultural and Indigenous Affairs v Lorenzo* [2005] FCAFC 13 at [81].

39 (2012) 251 CLR 1 at 59 [114], 60-61 [117]-[120], 193 [532].

that the decision in *Al-Kateb* might at some stage be overturned.[40] In 2022, a Justice of the Federal Court explained that a habeas corpus application would have been upheld if the court were not bound by the decision in *Al-Kateb*,[41] and in 2023 the Full Court of the Federal Court observed that "[t]he decision of the High Court in *Al-Kateb* has been the subject of commentary, much of it adverse" and that "[i]t is sometimes suggested that the High Court might come to a different decision if the issue were to be considered again".[42]

The *NZYQ case* and the challenge to *Al-Kateb*

In the special case in *NZYQ*,[43] NZYQ brought a direct challenge to the decision in *Al-Kateb* in relation to: (i) the statutory interpretation holding that ss 189(1) and 196(1) as a matter of statutory interpretation authorised the detention of NZYQ; and (ii) the constitutional holding that such statutory authority for detention by the Commonwealth Executive was consistent with Ch III of the *Constitution*.

The defendants submitted that the circumstances of NZYQ were distinguishable from those of Mr Al-Kateb because, unlike Mr Al-Kateb, NZYQ had been refused a Safe Haven Enterprise Visa because he was considered to be a danger to the Australian community. The Solicitor-General of the Commonwealth relied, in this respect, upon remarks by Gleeson CJ in dissent in *Al-Kateb* that if a detainee was regarded as a dangerous person, that might be a matter "that could affect the detainee's right to be released from administrative detention, or the terms and conditions of release".[44] But this reliance was not for the purpose of suggesting that there was any legal principle that could lead to different legal treatment of NZYQ compared with

---

40 *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at 21-22 [105]-[108]. See also at 3 [3].

41 *Sami v Minister for Home Affairs* [2022] FCA 1513 at [38].

42 *DMH20 v Minister for Home Affairs* (2023) 296 FCR 256 at 258 [8].

43 (2023) 97 ALJR 1005 at 1009 [6].

44 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 580 [29].

Mr Al-Kateb or for any terms and conditions to be imposed on the writ of habeas corpus.

The point made by the Solicitor-General of the Commonwealth was to emphasise the *consequences* of overturning the result of *Al-Kateb*. Evidence was also tendered by consent that showed that numerous aliens were held in detention who had committed very serious offences but for whom there might be no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. Those matters were rightly relied upon as relevant to a consideration of whether to grant leave to reopen the decision in *Al-Kateb*.

Reopening decisions and reopening essential reasoning

In most cases in the High Court where leave is sought to reopen an earlier decision, the application is to depart from the result of the case. But sometimes the application might only be to depart from the reasoning of the case. In other words, the ratio decidendi of a case (the "reasons for deciding") might be wrong although the result is right for different reasons.[45] As I explained in *Vunilagi v The Queen*,[46] in these unusual cases the Court might depart from part or all of the ratio decidendi of a case, even if the result is considered to be right for different reasons.

The common premise of the parties in the *NZYQ case* was even more unusual. NZYQ did not seek leave just to reopen the result in *Al-Kateb.* Nor did NZYQ just seek leave to reopen all of the reasoning in *Al-Kateb*. Instead, NZYQ sought leave separately to reopen each of two different *aspects* of the reasoning with separate challenges to each of those aspects. The defendants adopted that assumption in oral submissions, and hence the special case proceeded on the basis that leave was required separately to reopen each of (i) the statutory interpretation holding and (ii) the constitutional holding in *Al-Kateb*. The potential difficulties in the parties' assumption were not explored in written or oral submissions in the High Court. The Court in the *NZYQ* case

---

45 See *Ross Smith v Ross Smith* [1963] AC 280 at 293. See also Cross and Harris, *Precedent in English Law*, 4th ed (1991) at 131-132.

46 (2023) 97 ALJR 627 at 659 [154]; 411 ALR 224 at 260.

therefore confined itself to the observation that "[i]t was common ground that leave to reopen *Al-Kateb* should be considered separately for each of the two holdings of the majority".[47]

One potential difficulty of assuming that the two holdings needed to be reopened separately is that many of the matters to be considered when assessing the *consequences* of reopening and departing from *either* of the holdings in *Al-Kateb* required consideration of whether the court will depart from *both* holdings. To reiterate: these matters include whether the decision as a whole had achieved a useful result, whether it led to inconvenience, and the extent to which it had been independently acted on.[48]

Despite the overlap in the consideration of these consequential matters, in some cases it will be possible to conclude that one holding should be reopened and overruled and another should not. The reason that this is sometimes possible is because greater weight in the analysis should be attached to issues of principle (namely the correctness of the decision as a matter of principle, including the place of the decision in the stream of authority) than should be attached to consequences.[49] The overruling of *Al-Kateb* is an example of this. On the one hand, the justifications for and against the statutory interpretation holding in *Al-Kateb* were arguably finely balanced even if different judges have sometimes expressed their (opposing) conclusions in strong terms. But on the other hand, the defendant in the *NZYQ case* argued that the constitutional validity holding in *Al Kateb* was not a matter of fine balance if (as the Court concluded) it was inconsistent with the principle in *Lim* because that principle had not been challenged and was accepted to be part of an entrenched stream of constitutional discourse.

A larger obstacle to the existence of a separate requirement for leave to reopen different holdings in a case might arise if the two holdings were not sufficiently independent of each other. For instance, in a case where questions of both statutory and constitutional interpretation arise it is not

---

47 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1011 [15].

48 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439.

49 See *Vunilagi v The Queen* (2023) 97 ALJR 627 at 661 [161]-[162]; 411 ALR 224 at 262.

uncommon for an argument to be made that if the better interpretation of a provision would lead it to be unconstitutional then s 15A of the *Acts Interpretation Act 1901* (Cth) can operate to require that the meaning of the provision be "read down"[50] or reinterpreted in order to ensure that it is constitutionally valid. On this view, statutory and constitutional holdings would not be sufficiently independent of each other.

This issue did not arise in the *NZYQ case* because neither NZYQ nor the defendant relied on the general command of s 15A to "read[] down" or reinterpret the meaning of the statutory provisions. Rather, NZYQ relied upon the specific command in s 3A(1) of the *Migration Act*, read with s 3A(2). That specific command is not concerned with the interpretation or "reading" of a provision. It is an instruction to courts that, with some exceptions,[51] where a provision would have some invalid constitutional application but at least one valid application, then the meaning of the provision "is to have every valid application" and not the invalid application.[52] This technique is long established.[53] It has been distinguished by me[54] and by others in the High Court[55] from the process of "reading" or interpreting the meaning of the statutory words by describing it as "disapplication" or "partial disapplication".

---

50 *Clubb v Edwards* (2019) 267 CLR 171 at 319 [426].

51 If the intention of Parliament is taken to require the application of a provision in an all-or-nothing way (to every circumstance or none), or if the disapplication of a provision to circumstances where it would be invalid would change the substance of the valid application.

52 *Migration Act 1958* (Cth), s 3A(1).

53 See *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357 at 368-369; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 369; *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454, 456; *Nominal Defendant v Dunstan* (1963) 109 CLR 143 at 151-152; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 20, 26; *Coleman v Power* (2004) 220 CLR 1 at 56 [110].

54 *Clubb v Edwards* (2019) 267 CLR 171 at 313-322 [415]-[433]; *Comcare v Banerji* (2019) 267 CLR 373 at 458-459 [209]-[211]; *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 at 261-262 [107]; *Palmer v Western Australia* (2021) 272 CLR 505 at 581-582 [227]-[228]; *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655 at 697 [217]; 403 ALR 1 at 51; *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298 at 336 [184]; 408 ALR 684 at 728.

55 *LibertyWorks Inc v The Commonwealth* (2021) 274 CLR 1 at 35 [89]; *Thoms v The Commonwealth* (2022) 276 CLR 466 at 495-496 [75]-[77].

The distinction is that the technique does not adopt a narrower meaning of a provision but instead adopts a narrower application of a provision.

The considerations when re-opening decisions or essential reasoning

The so-called "John factors"

As I explained at the outset of this speech it is common for the High Court, when considering whether to overrule one of its previous decisions, to have regard to the so-called *John* factors, a list of four, non-exhaustive considerations of Sir Harry Gibbs that were summarised by five members of the High Court in *John v Federal Commissioner of Taxation*.[56] But, as the High Court said in the *NZYQ case*, those considerations may have different weight.[57] To reiterate, the first two factors concern the force of the principle upon which the decision in question rests: was the principle a cogent one, understood in the same way by the Justices who accepted it, and carefully developed in a succession of cases? By contrast with matters concerning principle, the second two factors concern the consequences of overruling: the usefulness or inconvenience of the decision and whether it has been independently acted upon outside the courts.

The first two factors affect the force with which a belief is held that the result or ratio decidendi in the earlier case cannot be justified. In that sense, they are concerned with whether a decision is justified. As I explained in *Vunilagi,* even a decision that, in isolation, is contrary to legal principle might be justified if, for example, it has become embedded and streams of jurisprudence have developed around it.[58] For instance, a decision that might be thought to be contrary to principle might have been reached by unanimous reasoning which was developed by a succession of cases in related areas of law.

---

56 (1989) 166 CLR 417 at 438-439.

57 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1011 [17].

58 *Vunilagi v The Queen* (2023) 97 ALJR 627 at 661 [161]; 411 ALR 224 at 262.

By contrast, the second two questions concern the consequences of overruling the result of the earlier case, or departing from its ratio decidendi, irrespective of the force with which it is thought to be wrong. In *Vunilagi* I put the point in this way:[59]

> Although both dimensions of consideration are important, greater importance lies with the dimension of justification that is concerned with the correctness of the result or reasoning, as a matter of legal principle and structural legal integrity: even an argument against re-consideration based on "widespread practical ramifications and ... extraordinary confusion" cannot prevail if it is clear that the interpretation is incorrect in the sense of being unprincipled and structurally inconsistent.
>
> Hence, even where there are large consequences for re-explaining or overruling an earlier result or ratio decidendi, the dominant approach in this Court has been to re-explain or overrule the earlier case where it is "clearly wrong" or "manifestly wrong", in the strong sense that the result or ratio decidendi is not a matter upon which "[r]easonable minds may differ" because it both "conflicts with well established principle" and "fails to go with a definite stream of authority".
>
> There may even be cases that are so fundamentally contrary to basic principle, involving reasoning that is so abhorrent or involving such significant and manifest error or injustice, that the result or reasoning should never be permitted to stand even if the decision might be thought to have become structurally embedded and even if overruling would lead to large consequences. Such cases are likely to be extremely rare. But, if and when those cases arise, a judge's ethical duty precludes timorous acceptance of grave injustice even if the price of that duty is perpetual dissent.

The challenge to *Al-Kateb* on the statutory interpretation holding

Considerations of principle in relation to the statutory interpretation holding

As I have explained, it might be argued that the justifications for and against the statutory interpretation holding of *Al-Kateb* were finely balanced. On the one hand, the language of ss 189(1) and 196(1) (read with s 198)

---

59 *Vunilagi v The Queen* (2023) 97 ALJR 627 at 661 [162]-[164]; 411 ALR 224 at 262-263 (footnotes omitted).

appears clear. The words were described by Hayne J as "intractable".[60] The words appear to suggest that a person reasonably suspected by an immigration officer to be an unlawful non-citizen must be detained (s 189(1)) and "must be kept in immigration detention until ... he or she is removed from Australia" (s 196(1)(a)). No exception is made for a person for whom there is no real prospect of removal becoming practicable in the reasonably foreseeable future.

On the other hand, the meaning of words is never intractable when they are interpreted in context. When context is taken into account it has been held that white can mean black or dark grey,[61] "inconsistent" can mean "consistent",[62] and "12 January" can mean "13 January".[63] Context also shapes the purpose of a provision which, in turn, shapes the meaning and application of the text. As *Jones v Commonwealth* recently illustrated,[64] the purpose of a provision can lead to a more confined application of a power than the application which the semantic terms of the provision might seem to require.

The purpose of a provision is interpreted according to the ordinary rules of statutory interpretation.[65] In the application of those rules, the purpose of a provision must be set at the correct level of generality which is usually

---

60 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 643 [241].

61 See *Mitchell v Henry* (1880) 15 Ch D 181 at 190, 194.

62 *Fitzgerald v Masters* (1956) 95 CLR 420 at 426-427.

63 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 773, 780, 783.

64 See *Jones v Commonwealth* (2023) 97 ALJR 936 at 971 [171] fn 200; 415 ALR 46 at 89, citing *Walton v Gardiner* (1993) 177 CLR 378 at 409, *Katsuno v The Queen* (1999) 199 CLR 40 at 57 [24], and *The Commonwealth v AJL20* (2021) 273 CLR 43 at 100-101 [124]-[125].

65 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 26 [60]; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50]; *Brown v Tasmania* (2017) 261 CLR 328 at 362 [96], 432 [321]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 656 [169]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336at 425 [242].

more general than the mere semantic terms of the provision.[66] For instance, no party or intervener in *Al-Kateb* or in the *NZYQ case* submitted that the purpose of ss 189(1), 196(1) and 198 was at the high level of generality simply to detain aliens. That would simply be a purpose of detention for the sake of it. Rather, as the Solicitor-General of the Commonwealth neatly crystallised the view, the position of the majority in *Al-Kateb* on the purpose of the provisions could be expressed in words adapted from Dixon J,[67] as "detention *pending removal*". In short, it is a purpose of removal of particular classes of alien.

The division between the majority and the minority on the statutory interpretation issue in *Al-Kateb* might ultimately reduce to whether the purpose of ss 189(1) and 196(1) of the *Migration Act* should be stated at that high level of generality ("removal of classes of alien from Australia") or at a level of greater specificity ("removal of classes of alien *for whom there is no real prospect of removal becoming practicable in the reasonably foreseeable future*"). If the purpose were stated at that level of specificity and with that exclusion, then that purpose could confine the application of the provisions so that executive power would not extend to the detention of unlawful non-citizens for whom there is no real prospect of removal becoming practicable in the reasonably foreseeable future.

The specific approach to purpose was clearly taken by Gummow J in the minority in *Al*-Kateb, who described the purpose as "facilitating removal from Australia *which is reasonably in prospect*".[68] That purpose would mean that a person for whom there was no real prospect of removal becoming practicable in the reasonably foreseeable future could not continue to be detained.

But for one matter there is little textual or contextual indication of such a qualified purpose of ss 189(1) and 196(1) of the *Migration Act*. That one

---

66 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 656-657 [168]-[172]; *The Commonwealth v AJL20* (2021) 273 CLR 43 at 110 [146]; *Alexander v Minister for Home Affairs* (2022) 276 CLR 336 at 378 [103]; *Unions NSW v New South Wales* (2023) 97 ALJR 150 at 167 [71]; 407 ALR 277 at 295-296.

67 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 581.

68 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 608 [122] (emphasis added).

matter is a principle that has been described as the principle of legality. The principle of legality is a principle of statutory interpretation that treats the intention that Parliament is taken to have as conforming with reasonable expectations based on past experience. The more fundamental a right, privilege or liberty that the legislation appears to affect, and the greater the detraction from that right, privilege or liberty, the less likely it is that Parliament will be taken to have that intention.[69] The principle of legality is sometimes described as a "presumption". Some of the most common instances are the presumptions, which give rise to implications, that intention or knowledge is an element of a criminal offence and that hearings will be conducted with procedural fairness. In a speech in 2021, James Allsop explained that these presumptions "arise out of basic moral values that far pre-date the creation of our Constitution" and that although the presumptions can be displaced by statutory language, "we must not forget that the act of presuming is based on the contention that the people, who entrusted power to the government, are entitled to expect that the power will be exercised in a predictable, equal and fair manner".[70]

The principle of legality can have great force where the question of statutory interpretation concerns whether a person should lose their fundamental right to liberty or whether a provision should extend to deprive persons of their liberty. It has less force, but still some force, where there is plainly an intention to remove liberty but the question is merely the *extent* to which a person or people will be deprived of liberty.[71] As French CJ, Kiefel and Bell JJ said of the principle of legality in that context:[72]

---

69 *Hurt v The King* (2024) 98 ALJR 485 at 506 [106]. See also *Momcilovic v The Queen* (2011) 245 CLR 1 at 46-47 [43]; *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd [No 2]* (2016) 95 NSWLR 157 at 167 [46]; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574 at 654 [212]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 623 [159]; *Stephens v The Queen* (2022) 273 CLR 635 at 653 [34].

70 Allsop, "Law, Power and Government Responsibility" (14 October 2021, keynote address to the Australian Government Legal Services Conference) 10. See also *Stephens v The Queen* (2022) 273 CLR 635 at 653 [34].

71 *Hurt v The King* (2024) 98 ALJR 485 at 506 [107].

72 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 582 [11], cf at 605-606 [81].

> "It is a principle of construction which is not to be put to one side as of 'little assistance' where the purpose of the relevant statute involves an interference with the liberty of the subject. It is properly applied in such a case to the choice of that construction, if one be reasonably open, which involves the least interference with that liberty."

Nevertheless, the principle of legality operates only as an interpretative presumption. If Parliament's words are clear, they must be given effect. As Callinan J observed in *Al-Kateb*, a presumption cannot be made even against legislation that is contrary to an international obligation "to displace the clear and unambiguous words of Parliament".[73] The issue in *Al-Kateb* was whether the words of the legislation in their context were sufficiently clear to preclude an alternative purpose and meaning being derived with the assistance of the so-called principle of legality.

It is, therefore, a question of evaluative judgement whether the principle of legality has sufficient force to reduce the purpose and meaning of ss 189(1) and 196(1) of the *Migration Act* from one of "removal" for the relevant classes of aliens to one that is more specific and more qualified such as "facilitating removal from Australia which is reasonably in prospect".[74] The justification in *Al-Kateb* on the statutory interpretation holding is therefore one upon which, even after very careful reflection, "different minds might reach different conclusions".[75] In *Al-Kateb* four minds reached one conclusion and three reached the other.

In deciding whether the statutory interpretation holding in *Al-Kateb* should be reopened, the considerations of principle might therefore be said to be ones about which there are reasonable arguments on both sides. That finely balanced dimension of principle in favour of reopening the decision

---

73 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 661 [298].

74 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 608 [122].

75 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 603. See also *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 193 [532].

could more easily be overwhelmed by consequential or pragmatic considerations which weigh against reopening.[76]

Consequential or pragmatic considerations

Ultimately, it was the consequential or pragmatic considerations that precluded the Court from reopening the statutory interpretation holding in *Al Kateb*. As the joint reasons in the *NZYQ case* explained,[77] in the nearly two decades since the decision in *Al-Kateb*, the Commonwealth Parliament passed legislation amending the *Migration Act* in numerous respects, in reliance upon that decision. In circumstances in which the arguments of principle about the statutory interpretation holding in *Al-Kateb* might have been finely balanced, the consequential consideration of nearly two decades of reliance by the Commonwealth Parliament was significant.

In the *NZYQ case*, the Minister also relied upon a further important consequence. The Minister suggested that a consequence of overturning the result of *Al-Kateb* would be the release from detention of people such as NZYQ who had committed serious offences and who might be a danger to the Australian community. It is true that, independently of immigration detention, a range of options exist under State laws for applications for orders to be made by the courts in relation to such people upon their release from prison, or prior to it, if they are considered to be a sufficient threat to the safety of the community. But those State scheme were not an answer to the submission of the Solicitor-General of the Commonwealth which was concerned with detention by the Commonwealth.[78]

---

76 See *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599-600, 603-604. See also *Vanderstock v Victoria* (2023) 98 ALJR 208 at 355-356 [606]-[610]; 414 ALR 161 at 338-339.

77 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1011-1012 [19]-[23].

78 Compare *Criminal Code* (Cth), Divs 104, 105A. See, eg, *Thomas v Mowbray* (2007) 233 CLR 307; *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68.

The challenge to *Al-Kateb* on the constitutional validity holding

Reopening the constitutional validity holding

That brings me to back to the point that I made at the start of this paper. The *John* factors concerning overruling, which were summarised from those first set out by Sir Harry Gibbs, are not all factors of the same weight. Although the same *consequences* weighed against reopening both the statutory interpretation holding and the constitutional interpretation holding in *Al-Kateb*, the considerations of principle have always been treated as having greater weight.

In the *NZYQ case*, the dispositive reasoning of six members of the Court was broader than my reasoning on the question of principle. In my reasons I held that the Commonwealth Parliament had a legitimate purpose which should be characterised at a higher level of generality similar to that taken by the majority in *Al-Kateb* in the statutory interpretation holding which had been unanimously upheld. That level can be described as "removal of classes of alien from Australia". In that respect, I prefer the views of Callinan J in *Al-Kateb* that the general purpose of removal or "deportation" has been "traditionally and rightly recognised" as a legitimate purpose of the Commonwealth Parliament.[79] In ss 189(1) and 196(1) of the *Migration Act* the Commonwealth Parliament had that one single purpose concerned with classes of aliens. The Commonwealth Parliament did not have a separate purpose for every future alien that depended upon the unknown future circumstances of that particular alien.

In my view, the general purpose of the Commonwealth Parliament did not become punitive merely because it might not be achieved in the reasonably foreseeable future in some limited cases. The Commonwealth Parliament passes many laws where the purpose of those laws cannot be implemented to its full effect in every single instance of the laws' application. That is no different from ordinary life. The example I gave in the *NZYQ case* was a specialist sports squad which has a program for training for the

---

79 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 659 [291].

Olympics.[80] That purpose remains legitimate even if some members of the squad might not have any prospect of making the Olympics in the reasonably foreseeable future. So too, the general purpose of the Commonwealth Parliament's law remains legitimate even if it is not achieved in every instance of its application.

In my view, however, the means adopted by the Parliament in achieving the purpose were not "proportionate" (which is shorthand for the unchallenged requirement expressed in *Lim* that the constitutional separation of powers required that the means of executive detention must be reasonably capable of being seen as necessary for a legitimate purpose[81]). The difficulty of principle with the constitutional holding in *Al Kateb*, in my view, was that it was inconsistent with that proportionality principle in *Lim*.[82] The decision in *Lim* was not challenged in the *NZYQ case* and had been developed and relied upon in numerous cases over more than 30 years. Hence, although the statutory interpretation holding was a matter upon which reasonable minds might differ, the decision in *Lim* made it extremely difficult to justify the constitutional holding in *Al-Kateb*.

As I explained in the *NZYQ case*, my view was that ss 189(1) and 196(1) of the *Migration Act* were inconsistent with the proportionality requirement in *Lim* because detention of those aliens was not reasonably capable of being seen as necessary for their removal if they could not practically be removed. As McHugh J, who was himself in the majority in *Al-Kateb*, had said in *Re Woolley; Ex parte Applicants M276/2003*,[83] "[n]one of the Justices in the majority in [*Al-Kateb*] applied the 'reasonably capable of being seen as necessary' test as the determinative test for ascertaining whether the purpose of the detention was punitive".

---

80 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1018 [53].

81 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33.

82 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at 1018 [54].

83 (2004) 225 CLR 1 at 30-31 [71].

In short, the considerations of legal principle, the first two weighty considerations developed by Sir Harry Gibbs, including the unchallenged and long-standing decision of this Court in *Lim*, outweighed the consequential considerations in relation to the constitutional holding.

Conclusion

In conclusion, the most basic message from this speech is a simple one. It is a message about the importance of nuance. Lawyers love lists. The list provided in *John* of the factors to consider when re-opening or overruling a High Court decision was lifted from the reasoning of Sir Harry Gibbs who had thought long and hard about this issue at least since his wrestle with conscience in the *Second Territorial Senators Case*. But the list should not be understood without the application of nuance that Sir Harry knew to underlie it.