Chapter 13


Rosemary Huisman

Abstract

In 2004, Ahmed Al-Kateb, a stateless person who could not be deported, appealed to the High Court of Australia against “indefinite detention.” The appeal was lost in part because the different judgments gave various weight to the temporal aspects of the Migration Act. This paper examines and compares the “trace of time” in that legal reasoning, and the different interpretive strategies employed. Its account of interpretation uses a model of language as social semiotic, as theorised in systemic functional linguistics.

Keywords


1 “Indefinite Detention”

In 2004, the case of Al-Kateb v. Godwin was decided in the High Court of Australia, the highest court of appeal. The Migration Act of 1958 (as amended in 1992) decreed that “an unlawful non-citizen” must be kept in immigration detention until s/he could be “removed or deported” from Australia or granted a visa. Al-Kateb had been refused a visa, and so was an “unlawful non-citizen” who had no permission to remain in Australia, but he could not be removed as

1 Ahmed Ali Al-Kateb v. Philippa Godwin (2004) 219 Commonwealth Law Reports 562. I am indebted to Tony Blackshield for suggesting materials which could be relevant to this paper. For Al-Kateb, see Blackshield and Williams, Australian Constitutional Law, 655–66, 874–78.
he was a stateless person: his parents were Palestinian, so though he was born and had lived in Kuwait, he was not entitled to a Kuwaiti passport. Despite approaches to various middle eastern states, no other country would accept him. Caught in this legal limbo, Al-Kateb was appealing against indefinite detention.

Al-Kateb lost his appeal. The case was heard by the full court of 7 judges and narrowly decided, with 4 judges in the majority and 3 dissenting.2 This is a close decision; in support of their reasoning, six of the seven judges wrote detailed “reasons for judgment”3 (hereafter “judgment” for short, referred to in the United States as an “opinion”). The phrase “indefinite detention,” central to this appeal, foregrounds the trace of time in justice—to be erased or confronted?4—and in what follows I discuss the different judicial responses.

2 The Australian Migration Act

Each judgment is an interpretation of the relevant provisions of the Migration Act, a parliamentary statute, in its application to the agreed facts of the case. For the purposes of these judgments in Al-Kateb v. Godwin, the “critical provisions” (Gleeson para [5]) of the Australian Migration Act are sections 189, 196 and 198.5 Sections 189 and 196 deal with “detention of unlawful non-citizens” and section 198 deals with “removal of unlawful non-citizens”:

Section 189(1)

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

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2 MAJORITY: Michael McHugh; Kenneth Hayne; Ian Callinan; John Dyson Heydon.

DISSENTS: Murray Gleeson; William Gummow; Michael Kirby.

3 Conventionally, High Court “reasons for judgment” are printed in continuously numbered paragraphs (“para”). The judgment of Gleeson, as Chief Justice, appears first (paras 1–30), then, in order of appointment, McHugh (31–75), Gummow (76–143), Kirby (144–194), Hayne (195–270), Callinan (271–302), Heydon (303–304).

4 The word “trace,” for me, comes trailing its post-structuralist use by Jacques Derrida, along with his phrase “under erasure.” It evokes for me the image of the cloud-chamber, in the physics experiment, where the water-vapour path of ionization tells you where the particle has passed, though its actual presence escapes you. See many references to “trace” and “erasure” in the index to Kamuf, A Derrida Reader.

5 In written judgments referring to sections of the Act, “section” is usually abbreviated to s (as in “s 198”), but in those quoted in this paper I have expanded the abbreviation.