JUDICIAL RESPONSES TO THE INDEFINITE DETENTION OF NON-CITIZENS SUBJECT TO REMOVAL ORDERS:
A COMPARATIVE STUDY OF AUSTRALIA, THE UNITED KINGDOM AND CANADA.

by

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ABSTRACT

In the period 2004-2007, the highest courts of Australia, the United Kingdom and Canada handed down judgments on the legality of the indefinite detention of non-citizens, specifically non-citizens subject to a removal order whose removal was frustrated. Each of the governments claimed that its intention to remove the non-citizens if and when it became viable to do so sufficed to establish that their detention fell within an ‘immigration’ exception to non-citizens’ rights. The cases thus raised fundamental questions about the relationship between non-citizens’ rights and governments’ power to control national borders.

I argue that the indefinite detention of a non-citizen subject to a removal order is illegal. The detention of a non-citizen subject to a removal order is lawful if it can be justified as a proportionate measure to effect his or her removal. Indefinite detention fails this proportionality test and as such is an unlawful violation of a non-citizen’s rights. I develop my argument through case studies from the three jurisdictions.

I argue that the law of all three jurisdictions contained ample resources to support a ruling that indefinite detention was unlawful. The question then arises as to why this view did not prevail in every jurisdiction. I demonstrate that, taking into account variations in legal frameworks and doctrines, a judge’s response to indefinite detention is at base
determined by his or her answer to the question ‘does a non-citizen, against whom a valid removal order has been made, retain a right to liberty?’ The judge’s answer to this question flows through his or her adjudication on the scope of ‘immigration’ exceptions to legal protections of the personal liberty of non-citizens considered in the case studies.

I consider the best justification for the view that a removal order revokes a non-citizen’s right to liberty, provided by John Finnis. I argue that it rests on questionable understandings of citizenship, and in operation inevitably undermines the values of community solidarity it seeks to promote.
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CHAPTER 1:
INTRODUCTION.

1.1 Thesis statement.

This thesis considers the legality of the indefinite detention of non-citizens subject to a removal order. More particularly, it considers judicial responses to government claims that legislation authorises open-ended detention of such non-citizens. I argue that the indefinite detention of non-citizens subject to a removal order is best regarded as illegal. The detention of a non-citizen subject to a removal order is lawful if it can be justified as a proportionate measure to effect his or her removal. Indefinite detention fails this proportionality test and as such is an unlawful infringement of a non-citizen’s rights. I develop this argument through case studies drawn from three Commonwealth jurisdictions - Australia, the United Kingdom and Canada.

The highest courts of Australia, the United Kingdom and Canada handed down judgments on the legality of the indefinite detention of non-citizens in the period 2004-2007. The Australian, United Kingdom and Canadian governments each sought to justify the indefinite detention of non-citizens who were subject to a removal order but whose removal was frustrated. The government’s inability to remove the non-citizen arose either from practical difficulties in securing the cooperation of potential receiving states, or because a real risk of torture on return to the country of nationality was established, so rendering the non-citizen’s forcible return a violation of norms of constitutional and international law. In each case, the government claimed that its ongoing intention to remove the non-citizen if and when it became viable to do so sufficed to establish that the non-citizen’s detention fell within the scope of an ‘immigration’ exception to the non-citizen’s rights. The cases thus raised fundamental questions about the relationship between a non-citizen’s rights and the government’s power to control the border.1

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The legal position on the legality of the indefinite detention of non-citizens is different in each of the jurisdictions included in this thesis. The High Court of Australia upheld the indefinite detention of any non-citizen subject to a removal order. The United Kingdom House of Lords held that indefinite detention was incompatible with enacted rights. The Supreme Court of Canada subjected indefinite detention to procedural constraints, without in terms condemning indefinite detention as an unlawful violation of a non-citizen’s rights. I argue that the law of Australia and Canada, as well as the United Kingdom, had ample resources to support a ruling that indefinite detention was unlawful. I argue that this judgment on indefinite detention best serves the idea of law as an effective limit on power.

In light of my argument that Australian, Canadian and United Kingdom law supports a judgment that indefinite detention is unlawful, the question arises as to why this judgment has not prevailed in every jurisdiction. I will argue that the case studies included in this thesis demonstrate the influence of fundamental (and troubling) assumptions about citizenship on judicial reasoning. The problem lies in the ‘intellectual frame of mind with which we approach constitutional questions regarding regulation of aliens’. A judge’s understanding of citizenship, or more particularly the legal position of non-citizens, serves as the ‘intellectual filter’ through which arguments about the legality of the detention of non-citizens are run, rendering the same government arguments for indefinite administrative detention deeply disturbing to some judges’ conception of the rule of law, and untroubling to others.

1.2 Basic principles.

The law in Australia, the United Kingdom and Canada recognizes the principles of liberty and equal protection of the law. I argue that it is an implication of these principles, as

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3 A v Secretary of State for the Home Department [2005] 2 A.C. 68 [Belmarsh]. Belmarsh is the name of the prison where the detainees were held.
4 Charkaoui v Canada (Minister of Citizenship and Immigration) [2007] 1 S.C.R. 350 [Charkaoui].
6 Ibid.
contained in the law of each of these jurisdictions, that the relevant immigration statutes either do not authorise a power of indefinite detention, or are unconstitutional. Outside of certain narrow categories, persons may be detained for significant periods of time only following conviction for criminal offences. The issuance of a valid deportation order does not conclusively revoke a non-citizen’s liberty to be in the community. Detention pending deportation is only authorised for so long as is proportionate to the purpose of facilitating removal. It is this last statement that is most contested in the jurisprudence. I argue that the idea that indefinite detention can be rendered constitutional by confining its application to non-citizens amounts to the claim that the treatment of non-citizens can escape constitutional constraint. There were strong arguments against the constitutionality of such treatment in each of the jurisdictions under discussion. Indefinite detention for such purposes is fundamentally antithetical to a conception of the rule of law that has the best claim to our allegiance, one that takes seriously the law’s role as a restraint on state power.\(^7\) It offends the respective legal systems’ most basic understandings of liberty and proportionality. I here describe a broad-brush concept of proportionality, namely a requirement that where a measure infringes a right, the government has to justify it by establishing the existence of a legitimate purpose, and by showing that there is a sufficient connection between the desired end and the measure proposed to achieve that end.\(^8\)

In the legal systems under discussion, the principles of liberty and equal protection of the law are qualified in their application to non-citizens by non-citizens’ vulnerability to removal. All the judgments considered in this thesis accept that ‘[w]hile an alien who is actually within this country enjoys the protection of our law, his status, rights and immunities under that law differ from the status, rights and immunities of a… citizen in a

\(^7\) My use of the term ‘rule of law’ primarily draws on current English public law scholarship, concerned with the current English, or more broadly, common law, context: see e.g. T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) [Allan, *Constitutional Justice*]. All the jurisdictions studied are characterized by a robust state. The thesis does not touch on weak or failed states where the problem of protection from the state is less pressing than that of securing the protection of the state i.e. where the rule of law as ‘law and order’, the solution to anarchy, demands attention.

\(^8\) This broad-brush account of proportionality accommodates the Australian case-study, where the test of proportionality is whether a measure is ‘reasonably appropriate and adapted’ to a legitimate purpose: see further Chapter 2.
variety of important respects’. The most important respect in which an alien’s ‘status, rights and immunities’ diverge from those of a citizen is ‘the vulnerability of the alien to exclusion or deportation’. Corresponding to this vulnerability on the part of a non-citizen is a government power of deportation. Ordinarily, a non-citizen against whom a valid deportation decision is issued can be legally removed from the jurisdiction, the usual destination being his or her country of citizenship. I am concerned with cases in which there is a legal, or practical, impediment to removal. Attempts to reconcile a non-citizen’s vulnerability to removal with the principle of equal protection of the law generate the jurisprudence. This jurisprudence addresses the relationship between the deportation power and any relevant power of detention pending removal.

The judgments considered in this thesis range between two poles. At one end of the continuum are those judges who hold that the interpretation of the detention provisions contended for by the government, allowing for indefinite detention of non-citizens, is illegitimate discrimination. Those judges who hold that the provisions do not authorise indefinite detention, or that they do but are incompatible with legal rights as a consequence, can all be characterised as holding that such detention amounts to the arbitrary treatment of non-citizens. At the other pole are those who sanction such treatment as a legitimate instance of immigration regulation.

To frame the issue in rule of law terms, a commitment to the rule of law entails, at a minimum, that the government cannot discriminate unfairly between persons ‘by selective application of general principles it claims to honour’. The distinction between unfair discrimination and legal regulation must ultimately turn on whether the difference in treatment is sufficiently clearly related to legitimate government purposes. That is, there must be an adequate connection between a legitimate purpose and the class of persons affected. The legitimate purpose at issue is immigration control. I am concerned with the relationship between the power of deportation and an ancillary power, the power

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10 Ibid. at 29, Brennan, Deane and Dawson JJ.
11 Allan, Constitutional Justice, supra note 7 at 2.
12 Ibid. at 3.
to detain a non-citizen against whom a final deportation order or equivalent has been issued. The central issue in the jurisprudence on the indefinite administrative detention of non-citizens is whether such detention is *sufficiently related* to the legitimate government purpose of immigration control. And this is in turn dependent on how the government purpose of immigration control is understood and, more particularly, its relation with constitutional principles of liberty.

In the following section, I provide an initial outline of two competing judicial responses to the indefinite administrative detention of non-citizens. Throughout the thesis, I organize the jurisprudence on indefinite administrative detention of non-citizens with reference to these two responses.

### 1.3 Two judicial responses to indefinite detention of non-citizens.

The key case studies considered in this thesis are instances of detention of non-citizens subject to a deportation order.13 I am centrally concerned with *direct* challenges to statutory provisions that are claimed to authorise the indefinite detention of non-citizens. Insofar as I am concerned with the scope of the power to deport, it is with the implications of legal constraints on deportation for the authority to detain.

I argue that the cases disclose two distinct lines of judicial response. These responses were either given effect through statutory interpretation, including where such interpretation was driven by constitutional doctrine, or through declarations of incompatibility with rights. Both lines of response relied on the legal justification that detention facilitated deportation. The difference between the responses lay in what the judges held amounted to a sufficient connection between detention and deportation. Some judges adopted the position that only a real prospect of removal within the reasonably foreseeable future would justify detention of a non-citizen subject to a removal order. They either held that the relevant statutory provisions did not authorise indefinite detention, or that they did, but were incompatible with enacted rights.

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13 While some statutory regimes have distinct ‘removal’ and ‘deportation’ provisions, the distinction between the two terms is immaterial to the discussion in this thesis.
Conversely, those judges who reasoned that the *possibility* of removal sufficed to justify immigration detention upheld a statutory power of indefinite duration.

Under the first set of judicial responses, there is no legal authority to hold non-citizens in indefinite administrative detention, because such detention is not sufficiently connected to the legitimate government purpose of facilitating removal. It implements what I call a ‘rights-protecting’ model of immigration detention. In the clearest instances of this model, the test for what is reasonably necessary for deportation is specified in terms of a ‘reasonable foreseeability’ requirement, i.e. there has to be a real prospect of removal in the reasonably foreseeable future. Where a court or independent tribunal determines that this evidential requirement is not met, the connection between detention and deportation is held to be too tenuous to support an authority to detain.

An initial point about the operation of proportionality in the rights-protecting model is that it only applies to the duration of detention, not to the initial decision to detain. In this sense the model is distinct from any application of proportionality to the question of detention for the purposes of deportation *per se*. Further, it bears emphasizing that the rights-protecting model does not address the relevant non-citizen’s vulnerability to removal. It simply maintains that where there is no real prospect of removal within a reasonable timeframe, there is no authority to detain.

The second set of judicial responses gives legal sanction to the indefinite administrative detention of non-citizens. This set of responses implements what I call a ‘rights-precluding’ model of immigration detention, where the right precluded is a right to liberty on the part of a non-citizen against whom a deportation order has been issued. The rights-precluding model is satisfied with a much more tenuous linkage between detention and deportation. Under this model, detention is authorised provided that the government is making efforts to remove the non-citizen and as long as removal remains a future

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14 In this, the rights-protecting model is consistent with the case law on Art 5(1)(f) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 211, Eur. T.S. 5 [ECHR] (see in particular the discussion of *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413 in Chapter 3) and with the position in Australian constitutional law established in *Lim, supra* note 9 (discussed in Chapter 2).
prospect. A *bona fide* attempt to remove the non-citizen is all that is required of the detaining government, which is presumed to be doing its best in a world of complicated international relations. On this model, the judicial role in review of administrative detention of non-citizens is simply to ensure that the government continues to pursue removal in good faith.

The rights-precluding model may also extend to a second justification for indefinite administrative detention, namely that if a non-citizen against whom a deportation order has been issued cannot be removed from the country, he or she can, nevertheless, be removed from the ‘community’ into immigration detention. This second justification for the detention of a non-citizen subject to a removal order is usually downplayed by judges who foreground the first justification, the future possibility of removal. However, the more tenuous the possibility of removal, the more prominent this second justification becomes. In rare cases, judges openly rely upon isolation from, or protection of, the national community as an independent rationale for immigration detention, to support indefinite administrative detention of non-citizens where there is no prospect of removal. I will argue that part of what is troubling about the legal reasoning under the rights-precluding model is the ambiguous relationship between the first and second justifications.

The prospects for removing a non-citizen will often be uncertain. The rights-protecting and rights-precluding models of immigration detention represent two different responses to this situation of uncertainty. The difference is not about the probability of removal. Rather, it is about where the burden of uncertainty should fall. Thus, the difference does not arise from a different appreciation of the facts, but is normative. On the rights-protecting model, a court is prepared to order release on the basis that it is not satisfied that there is any prospect of removal in the reasonably foreseeable future. It is possible that circumstances will change such that the non-citizen will be able to be removed, but in the meantime, it is not appropriate that the non-citizen should bear the burden of that

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15 See e.g. Al-Kateb, supra note 2 at para. 45, McHugh J; paras. 255, 247, Hayne J.; Heydon J agreeing. See also Zadvydas v Davis, 533 U.S. 678 (2001) [Zadvydas] at 708 and 713, Kennedy J (in dissent) (discussed most fully in chapter 6).
uncertainty. Where the prospects of removal are doubtful, it is the state’s authority to hold a non-citizen in immigration detention that has to give.

Conversely, the judges whose reasoning aligns with the rights-precluding model make much of the fact that it is not impossible that circumstances will change such that, even if the present prospects for detention look dim, things may look very different in the future.\(^\text{16}\) So long as the possibility of removal is not precluded, there is still a sufficient ‘hinge’ with removal to authorise the detention. The bottom line is that it is not for the citizenry to bear any risk associated with a non-citizen’s continued presence.

### 1.4 Competing ‘building blocks’ of our constitutional scheme?

Repeatedly, the literature on the indefinite administrative detention of non-citizens returns to the idea that ‘[t]he problem of the indefinitely “irremoveable” foreigner…is a boundary problem of the intersection of…two building blocks of our constitutional scheme’.\(^\text{17}\) The building blocks are the state’s power to ‘admit, exclude and expel aliens’ on the one hand, and constitutional principles of liberty and equality on the other. The central difference between the two models of immigration detention introduced above is the priority they accord as between these ‘building blocks’.

On the rights-protecting model, the core of the argument against the legality of the indefinite detention of a non-citizen subject to a removal order is that the purpose of immigration detention is to facilitate removal, and if the non-citizen’s removal is frustrated, that purpose no longer obtains and cannot be used to justify detention. There is an acceptance that the authority to detain non-citizens is subject to legal qualification.

\(^{16}\) ‘[T]he most that could ever be said in a particular case where it is not now, and has not been, reasonably practicable to effect removal, is that there is now no country which will receive a particular non-citizen whom Australia seeks to remove, and it cannot now be predicted when that will happen’: Al-Kateb, supra note 2 at para. 229, Hayne J [emphasis in original].

These legal qualifications emanate, by a variety of doctrinal routes, canvassed in the thesis, from a non-citizen’s interest in liberty.

Judicial reasoning that follows the rights-precluding model tends to emphasize that it is integral to a state’s sovereignty that it be able to decide who enters, and remains, in its territory. Any qualification on the absolute nature of this power is seen as a threat to the state. Qualifications are seen to carry the risk that the power of exclusion will ‘crumble, eroded by newly enforceable constitutional principles of equality before the law, and by rights as ancient as liberty (immunity from coercion and imprisonment)’.18 On the rights-precluding view, citizenship is equated with membership. Any resident non-citizen is simply a ‘guest’ and the host is free to revoke the invitation at will. Deportation is simply a refusal by the government to harbour persons it does not want. The tension between a state’s power of exclusion and expulsion and constitutional rights is resolved by denying that those rights have any bearing on judicial interpretation of the relevant statutory powers or on constitutional adjudication on those powers.19

Indefinite administrative detention of non-citizens is seen to maintain a state power that underlies and encompasses the deportation power, namely a power to exclude non-citizens from ‘the community’.20 If the removal of a non-citizen against whom a deportation order has been issued is frustrated, at least he or she does not remain ‘at large’ in the national community. Here, an understanding that the immigration power serves to protect the citizenry from non-citizens rises to prominence.21 A supporting argument starts with the observation that in the absence of an indefinite detention power, a non-citizen who cannot be removed may gain some form of release into the national community. This release is characterized as a form of de facto citizenship that circumvents, and so undermines, the normal decision-making mechanisms through which

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18 Finnis, supra note 17 at 417.
19 I develop the idea that ‘citizenship as membership’ underlies the rights-precluding approach in Chapter 6, Part II.
20 For a clear example see Hayne J’s reasons in Al-Kateb, supra note 2. Gummow J’s dissent criticised Hayne J’s notion of ‘exclusion from the community’: See Chapter 2.
21 See e.g. the dissenting judgment of Kennedy J in Zadvydas, supra note 15 at 713: ‘the motivation to protect the citizenry from aliens determined to be dangerous is central to the immigration power itself’.
the government grants permission to remain. A power of indefinite immigration detention is further supported by the image of deportation proceedings as ‘sensitive foreign relations’ with judicial intervention threatening to place ‘foreign relations…into judicially supervised receivership’. It is argued that in the absence of such an unqualified power, the detaining state could be held hostage by the non-citizen’s state of nationality, forced against its will to indefinitely prolong the non-citizen’s presence in the community.

1.5 The case studies.

My thesis centres on the Australian High Court’s decision in Al-Kateb v Godwin [Al-Kateb], that of the House of Lords in A v Secretary of State for the Home Department [Belmarsh], and the Canadian Supreme Court’s decision in Charkaoui v Canada [Charkaou]. In what follows, I introduce the legal framework in each jurisdiction, focussing on the presence or absence of enacted or entrenched guarantees of personal liberty.

1.5.1 Structural differences between the three jurisdictions.

The thesis considers the legality of the indefinite administrative detention of non-citizens subject to a removal order as it arises in three common law legal orders, Australia, the United Kingdom and Canada. Australia has a federal constitution, conferring enumerated heads of legislative power on the national government [Constitution]. Legislation can be invalid as contrary to the Constitution. There is neither an entrenched nor an enacted

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22 See the majority judgment of McHugh J in Al-Kateb, supra note 2 at para 46, discussed in Chapter 2.
23 Zadvydas, supra note 15 at 712, Kennedy J (dissent), quoted with approval in Al-Kateb, supra note 2 at para 285, Callinan J.
24 Ibid.
25 Al-Kateb, supra note 2.
26 Belmarsh, supra note 3.
27 Charkaoui, supra note 4. Other contemporary common law decisions by highest appellate courts on the indefinite administrative detention of non-citizens not included as case studies in this thesis are Zadvydas, supra note 15 and Zaoui v A.G. [2005] 1 N.Z.L.R. 577 (N.Z.C.A. and N.Z.S.C.). The influence of Zadvydas on Al-Kateb and Charkaoui is such that the decision merits extended discussion at various points in the thesis.
28 The Commonwealth of Australia Constitution Act, 1900 (U.K.), 63 & 64 Vict., c. 12 [Constitution].
national bill of rights. The *Constitution* has been construed to imply a separation of judicial and non-judicial powers at the federal level. One implication of the separation doctrine is the general proposition that a person can only be detained by order of a court. This proposition is subject to exceptions, one of which is immigration detention. The issue that arises is whether administrative detention of a non-citizen subject to a removal order, where there is no real prospect of removal, can be justified as immigration detention, so falling within the exception. Constitutional reasoning has a direct bearing on statutory interpretation by way of a presumption that statutes are to be interpreted consistently with the *Constitution* so far as it is possible to do so.

The United Kingdom has a statutory bill of rights, the *Human Rights Act 1998* [HRA].29 Under the HRA there is a right to liberty (Art 5) that is subject to an express exception for deportation purposes (Art 5(1)(f)).30 The question that arises is whether administrative detention where there is no real prospect of removal can be justified as being for deportation purposes, and so fall within the exception to the liberty right. If detention in such circumstances is not ‘with a view to deportation’ this has the further consequence that the primary justification for confining the detention measures to non-citizens is not present. In the absence of an alternative justification, the measures would contravene the prohibition on discrimination under the HRA.31 In the United Kingdom, legislation cannot be invalidated.32 The United Kingdom is also a State Party to the *European Convention on Human Rights* [ECHR]33 and is accordingly bound by decisions of the European Court of Human Rights [ECtHR].34 The HRA gives legislative sanction to the courts adopting a strong interpretive approach to ensure compatibility with Convention rights (s 3). Where legislation cannot be interpreted consistently with Convention rights,

30 Under the HRA, rights adopted from the ECHR, supra note 14 and protocols have been given a statutory footing as ‘Convention rights’: HRA, s 1. Among these Convention rights is that to liberty and security of the person (ECHR, Art 5). Under that Article, an exception is made to the prohibition on deprivation of liberty for ‘the lawful arrest or detention…of a person against whom action is being taken with a view to deportation’: Art 5(1)(f).
31 ECHR, supra note 14, Art 14.
32 European Community law does, however, take precedence over inconsistent national law: *European Communities Act* 1972, s 2; *R v Secretary of State for Transport Ex P Factortame Ltd* [1990] 2 A.C. 85.
33 ECHR, supra note 14.
34 ECHR, supra note 14, s 46.
use may be made of a declaration of incompatibility (s 4). A declaration formally
conveys the court’s view that a measure is incompatible with the relevant Convention
right. Legislation found incompatible with a Convention right remains in full force and
effect. Since one of the primary purposes of the HRA is to provide a successful litigant
with a remedy, courts will strive to interpret legislation compatibly with Convention
rights. Section 3 is the only means by which Convention rights can be protected without
further intervention by Parliament. But the practical effect of a declaration should not be
overlooked. Where a declaration of incompatibility has become final in its entirety,\footnote{Meaning that the declaration was not subject to appeal, in whole or in part.} Parliament has remedied the incompatibility identified, either by primary legislation or a
remedial order under s 10 of the HRA,\footnote{Section 10 of the HRA provides for a ‘fast-track’ procedure whereby primary legislation may be amended by ministerial order.} or had taken steps to do so.\footnote{See e.g. the table on declarations of incompatibility in Jack Beatson, Stephen Grosz, Tom Hickman, Rabinder Singh with Stephanie Palmer, \textit{Human Rights: Judicial Protection in the United Kingdom} (London: Sweet & Maxwell, 2008) at para 5-154.}

Canada has both a federal constitution and an entrenched bill of rights, the \textit{Canadian
Charter of Rights and Freedoms} [\textit{Charter}].\footnote{\textit{Canadian Charter of Rights and Freedoms}, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11 [\textit{Charter}].} Liberty is a protected interest under the \textit{Charter} and detention is precluded unless it is imposed ‘in accordance with the principles
of fundamental justice’ (s 7) or ‘can be demonstrably justified in a free and democratic
society’ (s 1). A legislative provision that infringed a \textit{Charter} right and was not justified
under s 1 would be invalid. A question that arises in the \textit{Charter} context is whether
detention of a non-citizen subject to a deportation order, in circumstances where there is
no real prospect of removal, infringes s 7. If it is found to do so, then a further question
arises as to whether it is justified under s 1. To the extent that the administrative
detention of non-citizens in these circumstances is not authorized by the purpose of
facilitating deportation, an alternative reason for its confinement to non-citizens is
needed. In the absence of a satisfactory reason, the detention will be found to be
discriminatory, in contravention of the equality right in s 15. As in the Australian
context, constitutional reasoning has a direct bearing on statutory interpretation by way of
the presumption that statutes should be interpreted compatibly with the Charter so far as is possible.

Finally, although there is no single common law position on statutory interpretation, the common law of each jurisdiction studied in this thesis recognizes a presumption against the legislative abrogation of personal liberty. This presumption can support an interpretive approach whereby a statutory power of detention for the purposes of deportation will be read as not extending to indefinite detention, unless indefinite detention is explicitly provided for.\(^{39}\)

### 1.5.2 Choice of case studies.

My selection of case studies is driven in part by my argument that the presence or absence of enacted or entrenched guarantees of personal liberty is not determinative of the legality of the indefinite detention of non-citizens subject to removal orders. As introduced above, I argue that the jurisprudence is structured by two different judicial responses to the prospect of indefinite immigration detention, one leading to a finding that such detention is unlawful, and one allowing for it. I show that both lines of judicial response were available in both Australia and the United Kingdom, in the sense that both jurisdictions contained rights-protecting and rights-precluding judgments. In relation to Canada, I demonstrate that the jurisdiction contained the legal resources to support the rights-protecting model. Conversely, I outline the legal arguments accepted by the Canadian Supreme Court that led it to give legal sanction to a status quo that conforms with the rights-precluding model.

A second reason for my choice of case studies is that they provide clear examples of three distinct points on the continuum of judicial responses to the indefinite detention of non-citizens. In *Al-Kateb*, a majority of the High Court held that there were negligible constitutional limits on the power of detention of non-citizens subject to a removal order.

\(^{39}\) Or if the provisions would be rendered wholly inoperative if not read as providing for indefinite detention.
The decision constituted a clear example of a rights-precluding decision. Turning to the House of Lords decision in *Belmarsh*, I argue that it constituted a clear example of the rights-protecting approach. The House of Lords ruled that detention for the purpose of deportation was necessarily of limited duration. The relevant statutory provisions were characterized as national security provisions and the decision to confine the detention provisions to non-citizens was held to be discriminatory. While the decision left the validity of the law unaffected, it clearly stated that the relevant statutory provisions were incompatible with the United Kingdom’s rights commitments.

One might expect that where there is stronger rights protection, through a bill of rights, and more so through an entrenched bill of rights, judges would adopt the rights-protecting model. I argue that *Charkaoui* undermines this assumption. In *Charkaoui*, the Canadian Supreme Court postponed any decision on the lawful duration of detention of a non-citizen subject to a deportation order. The Court instead relied on procedural constraints to address any future violation of rights on a case by case basis. I argue that it effectively endorsed a status quo that conformed to the rights-precluding model. However, the decision does not neatly align with that model. The Court largely avoided discussion of the legal merits of the challenge to the indefinite detention of non-citizens subject to deportation order. Nonetheless, detainees have benefitted from the procedural reforms required by the Court.

The issues of statutory and constitutional interpretation arise in a diverse range of legal contexts and circumstances. The two models of immigration detention outlined above supply the jurisprudence with a constant pattern despite this diversity. This pattern amidst diversity grounds my claim that more than any particular rights framework what matters are judicial understandings of the legal position of non-citizens, available in each of the jurisdictions considered.

1.6 Organization of the thesis.

I consider the case studies in chronological order, with reference to the decisions of each country’s highest appellate court on the legality of the indefinite administrative detention
of non-citizens. **Chapter 2** is the Australian case-study, anchored by the *Al-Kateb* decision of the High Court of Australia, delivered on 6 August 2004. **Chapter 3**, the English case study, is organized around the *Belmarsh* decision of the House of Lords (16 December 2004). The Canadian case study is **Chapter 4**, centred on the decision of the Supreme Court of Canada in *Charkaoui* (23 February 2007). **Chapter 5** examines developments subsequent to the above three decisions, insofar as they bear on their evaluation. I provide a brief update on the Australian legal position. I then look at the final stage in the *Belmarsh* litigation, the decision of the Grand Chamber of the ECtHR in *A v United Kingdom*.

The rest of Chapter 5 is devoted to legal developments in the United Kingdom and Canada consequent on *Belmarsh* and *Charkaoui*.

In the concluding chapter, **Chapter 6**, the underlying premises of the rights-protecting and rights-precluding models are identified. Further, the understanding of citizenship that underlies the rights-precluding account, and its rationale, are critically discussed. I conclude that what drives the jurisprudence in each jurisdiction is the substantive position adopted on the effect of a removal order on a non-citizen’s liberty interest. In developing this thesis, I engage with a defence of the rights-precluding model offered by John Finnis as he has supplied the best justification for that model. I argue that his account rests on a questionable account of citizenship. Further, when his account is implemented it ultimately undermines the values it seeks to promote. The rights-protecting model is to be preferred, as demanded by a meaningful commitment to the equal protection of the law for all within the jurisdiction.

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CHAPTER 2:
AUSTRALIA.

Under the aliens power, the Parliament is entitled to protect the nation against unwanted entrants by detaining them in custody. As long as the detention is for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by Parliament is not examinable in this or any other domestic court. It is not for the courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights.

*Al-Kateb v Godwin*, McHugh J

In *Al-Kateb v Godwin* [*Al-Kateb*], the High Court of Australia determined by majority (McHugh, Hayne, Heydon and Callinan JJ; Gleeson CJ, Gummow and Kirby JJ dissenting) that the *Migration Act 1958* (Cth) [*Migration Act*] authorised the indefinite administrative detention of a non-citizen who had no right to be in Australia. It further determined that the *Australian Constitution* [*Constitution*] supported federal legislation for the indefinite detention of non-citizens who do not enjoy a statutory right to be in Australia. The *Al-Kateb* majority judgment provides a clear example of the rights-precluding model of immigration detention. The judgment sanctioned legislative conferral of extensive coercive powers on the executive, subject to only minimal judicial supervision.

The *Al-Kateb* majority found that, even in the absence of any explicit provision to that effect, the *Migration Act* authorised the indefinite detention of a non-citizen who, through no fault of his own, could not be removed. The majority did not view the admitted ‘tragic’ consequences for the non-citizen as a matter of relevance to the interpretation of the statutory provisions or to the application of constitutional limits on federal legislative power. *Al-Kateb* was a controversial judgment. The power of indefinite detention

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1 *Al-Kateb v Godwin* (2004) 219 CLR 562 [*Al-Kateb*] at para 74, McHugh J.
2 *Commonwealth of Australia Constitution Act, 1900* (U.K.), 63 & 64 Vict., c.12 [*Constitution*].
4 Immediately following the decision in *Al-Kateb*, the Federal President of the Labor Party, the Australian Democrats and the Greens called for a bill of rights to override the *Migration Act*: see Meaghan Shaw, ‘Ban
upheld in *Al-Kateb* has come to serve as a reference point in contemporary debates about the adequacy of legal protection for human rights in Australia.\(^5\)

McHugh J, a member of the *Al-Kateb* majority, pronounced the result in the case ‘tragic’;\(^6\) but held that there was nothing the Court could do in the continuing absence of a national bill of rights in Australia.\(^7\) I disagree. The *Al-Kateb* minority were correct in their judgment that Australian law supported a different interpretation of the *Migration Act*, and in their further judgment that it can be implied from the *Constitution* that the detention of non-citizens who have no right to remain in Australia must be a proportionate measure to effect their removal from Australia.

To observers familiar with jurisdictions that have bills of rights, it might appear that *Al-Kateb* illustrates that a bill of rights is necessary in order for statutory interpretation to be solicitous of individual rights.\(^8\) It is true that the *Al-Kateb* majority read general statutory words as authorising a dramatic exercise of coercive power against non-citizens. Protection of the fundamental rights of non-citizens is tenuous in the current Australian context. But the contingency of this result needs to be appreciated. The *Al-Kateb* indefinite detention: Lawrence’, The Age (12 August 2004) 4. The Greens media release stated that the legislative provisions ‘make every immigration detention centre in Australia another Guantanamo Bay: Greens Media Release, ‘Bill of Rights: One way to defeat indefinite detention’ (6 August 2004). In late March 2005, apparently in response to community pressure and backbench members of its own party (see e.g., Louise Dodson, ‘Set them free: PM’s big shift on boat people’, Sydney Morning Herald, (23 March 2005); Elizabeth Colman & Steve Lewis, ‘PM eases stance on detainees’, The Australian (23 March 2005)) the government announced that a new visa class would be established that allowed some unsuccessful asylum seekers whose removal from Australia was not reasonably practicable to be released from detention unless and until it became reasonably practicable to remove them. The announcement was given effect in *Migration Regulation 1994 (Cth)*, Sch 2 [Visa] Subclass 070.


\(^6\) *Al-Kateb* supra note 1 at para 31, McHugh J.

\(^7\) Australia did, and does, not have a bill of rights binding on the federal government (which has legislative power over ‘aliens’ and ‘immigration’). The Australian Capital Territory and the state of Victoria have adopted a charter of rights: see *Human Rights Act 2004 (A.C.T.)* and *Charter of Human Rights and Responsibilities Act 2006 (Vic).*

minority and the Full Court of the Federal Court of Australia in an earlier judgment discussed below held that the *Migration Act*’s detention provisions did not authorise indefinite detention. These judgments support my argument that there were in Australia legal resources to protect the liberty of non-citizens.

2.1 The legal context of the Australian case-study.

2.1.1 The *Constitution* and federal legislative power.

In the absence of a national bill of rights, the *Constitution*’s provision for the exercise of federal legislative power and for the separation of federal judicial power assumes particular importance in any discussion of the legality of administrative detention. It is sometimes said that there has been an historical shift in Australia from reliance on a legally unrestrained prerogative power to deal with immigration, to reliance on statutory powers. It would be more precise to say that where immigration legislation used to be skeletal in nature, containing little more than a broad conferral of substantially unfettered powers on the executive, it is now highly prescriptive, imposing numerous obligations on immigration officials. This shift occurred in response to changes in judicial attitudes toward the legal regulation of executive discretions.

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10 To take the first text on Australian immigration law, Mary Crock cites *Musgrove v Toy* [1891] AC 272 [Musgrove], and *Robtelmes v Brenan* (1906) 4 CLR 395 [Robtelmes], as decisions supporting a prerogative power of government to admit, expel and exclude aliens: Mary Crock, *Immigration and Refugee Law in Australia* (Sydney: The Federation Press, 1998) [Crock, Immigration and Refugee Law in Australia], 15 footnote 10. This is perhaps a loose use of the prerogative to embrace statutory conferrals of broad and unfettered powers on the executive.

11 See for example the following statement by French J in *NAAV v Minister for Immigration* (2002) 123 FCR 298 at para 399: The most recent changes to the *Migration Act* are the latest in a long series of over 100 amending Acts since it was enacted in 1958. The Act now comprises in excess of 740 sections. Its operation is supported by hundreds of regulations set out in two volumes. Significantly for present purposes, it is a statute replete with official powers and discretions, tightly controlled under the Act itself and under the Regulations by conditions and criteria to be satisfied before those powers and discretions can be exercised.

12 More particularly, the change was registered in relation to the procedural rights of migration applicants. For introductions see Crock, *Immigration and Refugee Law in Australia*, supra note 10 at 279-283 and Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action*, 3rd ed (Sydney: Lawbook Co., 2004) [Aronson, Dyer and Groves] at 381-384. These two accounts focus on the seminal case of *Kioa v West* (1985) 159 CLR 550 [*Kioa v West*].
From the foundational authorities of Australian immigration law, dating from the late nineteenth and early twentieth centuries, executive power over immigration has required statutory authorisation. Power over immigration regulation has not been based on extra-statutory executive power whether derived from the historical prerogative or any notion of inherent executive power. Australian jurisprudence on the state’s power of exclusion has always been a jurisprudence of statutory interpretation.

Given that executive powers in the immigration context flow from federal legislation, the Constitution’s grants of legislative power are the logical starting point for a discussion of the constitutional limits on those powers. Australia came into existence as a political and legal entity through the Federation of British colonies under the Constitution. The Constitution divides legislative powers between federal Parliament and the legislatures of the Australian States. This division is achieved by enumerating the subject-matters on which federal Parliament can legislate. Federal legislation is only valid to the extent that it can be grounded in one of these heads of power. Unlike Canada, there is no list of

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13 My reading of the foundational Australian case on the government’s power to exclude aliens, Musgrove (supra note 10) is that the Privy Council explicitly relied on the statute to reach its decision. While this interpretation of the statute was transparently shaped by an understanding of expansive executive power over immigration, the result was ascribed to particular, contentious, rules of statutory interpretation: namely that payment tendered is not equivalent to payment (of a Poll Tax on entry), and that an act in respect of which a penalty is imposed must be taken to be forbidden, even if it is not expressly prohibited. I am supported in a reading of Musgrove that does not treat it as relying on prerogative powers by Black CJ’s minority judgment in the Tampa decision: see Ruddock v Vadarlis (2001) 110 FCR 491 [Tampa] at para 10, Black CJ; cf at para 112 and 186, Beaumont and French JJ respectively. Black CJ’s reading is preferred by Geoffrey Lindell in ‘Reflections on the Tampa Affair’ (2002) 4:2 Constitutional Law and Policy Review 21 [Lindell]. The foundational Australian case on a right to deport aliens, Robtelmes similarly required that the power have a statutory foundation: see supra note 10 at 401 and 403, Griffith CJ.

14 Plender states that the foundational authorities of immigration law in the Anglo-American legal world date from the late 1880s and early 1890s: see Robert Plender, International Migration Law, 2nd ed (Dordrecht: Martinus Nijhoff Publishers, 1988) at 2; see also James A.R. Nazfiger, ‘The General Admission of Aliens Under International Law’ (1983) 77 Am. J. Int’l L. 804 [Nazfiger] at 807. This holds true for Australian jurisprudence. The foundational Australian case on the government’s right to exclude aliens, Musgrove v Toy, supra note 10, dates from 1891. The point is clearly not that before this time people did not immigrate, but simply that before this time the issue of a state’s right to exclude aliens was not expressed as a power over immigration. The immediate catalyst for the American and Australian case law of this period was Chinese emigration to those countries.

15 For further discussion of claims of a prerogative power of exclusion and expulsion see Chapter 6, section 6.5 below.

16 The Australian Constitution was an Act of British Parliament. The text was predominantly drafted in a series of Conventions in the 1890s attended by delegates of the various colonies that went on to become states, and adopted by voters in those colonies in referenda held in the period 1898 to 1900.

17 Note that federal legislation may be characterised as falling within an implied incidental power to legislate on each of the enumerated federal subject-matters, see further my discussion of Chu Kheng Lim v
enumerated state or provincial powers. The power of the state legislatures is subject to external limits imposed by the *Constitution*, including the requirement that in the event of inconsistency between (valid) federal and state legislation, federal legislation will prevail.\(^\text{18}\) But as a matter of internal limits, the power of state legislatures is plenary.\(^\text{19}\)

The heads of federal legislative power relevant to the present chapter are sections 51 (xix) and (xxvii): ‘s 51. The Parliament shall, subject to this *Constitution*, have powers to make laws for the peace, order and good government of the Commonwealth with respect to: –

…(xix) Naturalization and aliens’ and ‘(xxvii) Immigration and emigration’. I shall refer to these as the aliens and immigration powers respectively.

The *Constitution* makes no mention of Australian citizenship.\(^\text{20}\) In constitutional terms, Australian citizenship is no more than a ‘mere legal inference’ from the constitutional text.\(^\text{21}\) Instead, phrases such as ‘people of the Commonwealth’\(^\text{22}\) and ‘subject of the Queen’\(^\text{23}\) are employed, reflecting the ‘political realities’ at Federation.\(^\text{24}\) The new

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\(^{18}\)&nbsp;Section 109 of the *Constitution*, headed ‘Inconsistency of Laws’ states: When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.’

\(^{19}\)&nbsp;There are caveats to the plenary power of the state legislatures, which can be ignored for the purposes of the present discussion. For an introduction to these caveats see for example Tony Blackshield and George Williams, *Australian Constitutional Law & Theory*, 3rd ed. (Sydney: Federation Press, 2002) [Blackshield and Williams] at chapter 11 ‘State Constitutions’.

\(^{20}\)&nbsp;Mention is made of citizenship of a foreign power. Section 44(i) refers to ‘citizen…of a foreign power’ in discussing the course of listing disqualifications from serving as a Commonwealth Parliamentarian. Concepts of membership of the community are also contained in sections 34 and 117 see infra note 23.

\(^{21}\)&nbsp;See Kim Rubenstein, *Australian Citizenship Law in Context* (Sydney: Lawbook Co, 2002) [Rubenstein, *Citizenship Law in Context*], Chapter 2 at 38. The phrase is taken from an exasperated utterance by one of the constitutional drafters, John Quick, on 2 March 1898, as to the continued rejection of a constitutional definition of citizenship: see Kim Rubenstein, ‘Citizenship and the Constitutional Convention Debates: A Mere Legal Inference’ (1997) 25 FLR 295 at 295.

\(^{22}\)&nbsp;The phrase ‘people of the Commonwealth’ appears in s 24 providing for the electors of the House of Representatives. Section 7, which provides for the electors for the Senate, refers to the ‘people of the State’.

\(^{23}\)&nbsp;Section 34 provides that a qualification for a member of the House of Representatives is that they be ‘a subject of the Queen’. Section 117 is the other provision containing a concept of membership, specifying that ‘[a] Subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if her were a subject of the Queen resident in such other State.’

\(^{24}\)&nbsp;‘Political realities’ is Kirby J’s phrase from *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 480. The omission of citizenship is not because the concept did not form part of the legal lexicon of the time. The issue of Australian citizenship was a subject of heated debate in the constitutional conventions, and a conscious decision was made to exclude it from the constitutional text: Kim Rubenstein, ‘Citizenship and
community post-Federation was not defined by an Australian nationality distinct from a British one, and Australian citizenship only came into existence with the entry into force of the *Australian Citizenship Act 1948* (Cth). Until then, the main legal distinction was between British subjects and aliens. However, there operated a ‘de facto’ administrative Australian citizenship’, which distinguished between those British subjects who could be deported, and those who could not. The main mechanism of this de facto administrative Australian citizenship was the infamous dictation test. The test provided that persons would be prohibited from landing, or deported, if they failed to write out a passage of fifty words in a European language as dictated by the officer. A concise account of the dictation test was offered by the High Court in 1936, ‘It was merely a convenient and polite device...for the purpose of enabling the Executive Government of Australia to prevent the immigration of persons deemed unsuitable because of their Asiatic or non-European race.’

The judgments discussed in this chapter focus on the aliens power. Reliance on the aliens power, as opposed to the immigration power, to regulate immigration is a relatively recent phenomenon. For more than seven decades after Federation it was primarily the

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the Centenary – Inclusion and Exclusion in 20th Century Australia’ (2000) 24 MULR 576 at 580. A prominent reason for the absence of Australian citizenship in the *Constitution* was the difficulty in devising a formulation that preserved the racially exclusionary features desired: See Rubenstein, *Citizenship Law in Context*, supra note 21 at Chapter 2. Rubenstein discusses a range of other obstacles to the inclusion of citizenship in the *Constitution*, including indeterminacies arising from attempts to transplant citizenship into a legal system that had not employed the status, the difficulties posed by an individual’s status as simultaneously a member of a colony, soon to be a state, and of the British Empire, as well as the new nation, and the lack of agreement as to what, if any, rights and responsibilities flowed from citizenship.

25 The Act was originally named the *Nationality and Citizenship Act 1948* (Cth) but was renamed by the *Australian Citizenship Act 1973* (Cth).


27 The dictation test was abolished by the *Migration Act*. The White Australia policy continued to be implemented in the absence of this particular statutory mechanism, and was only unequivocally abolished under the Whitlam government, which came to power in 1972 (although a number of steps had been taken prior to that time that can be characterized as ‘dismantling’ it): see Gwenda Tavan, *The Long, Slow Death of White Australia* (Melbourne: Scribe Publications, 2005).

28 *Immigration Restriction Act* 1901 (Cth) ss 3(a), 7 and 14. In the notorious case of the unwanted Czech dissident Egon Kirsch, he proved to be fluent in so many European languages that the officer who wished to deport him was reduced to administering a test in Scottish Gaelic. The High Court held the resulting decision to deport him unlawful on the grounds that Scottish Gaelic was not a ‘European language’ within the meaning of the Act: *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234. Sections of the Australian Scottish community were incensed by the judgment, demonstrating in protest.

29 *R v Davy; Ex parte Freer* (1936) 56 CLR 381, 386.
immigration power that was relied upon to authorise immigration legislation. It was assumed that a British subject could not be an alien so that grounding legal authority in the aliens power would leave a ‘huge gap’, preventing the deportation of those from elsewhere in the British Empire travelling on British passports. The *Immigration Restriction Act 1901* (Cth) was based on the immigration power.

Under the immigration power, it was the High Court that came to define who could freely enter and remain and who could be excluded and removed. The High Court addressed the question of who was subject to the immigration power with reference to the concept of ‘community’: ‘[t]he ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a member of the Australian community.’ The concept has been subject to judicial criticism for lacking the legal specificity of connecting factors such as domicile, residence, personal presence or citizenship. This lack of specificity may, as a matter of history, have been the point. For its intelligibility, the concept of ‘community’ relied on certain widespread assumptions concerning the habits and mores, and particularly ethnic composition, of the Australian populace. ‘Community’ was an indeterminate legal concept well suited to support the ‘de facto administrative citizenship’ of early racially-informed immigration policy.

The motivation for the shift from the immigration to the aliens power was a line of judicial authority holding that an ‘immigrant’ could be ‘absorbed’ into the Australian

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31 *R v MacFarlane: Ex parte O’Flanagan and O’Kelly* (1923) 32 CLR 518 (the ‘Irish Envoys’ case) at 556, Isaacs J.
32 *Potter v Minahan* (1908) 7 CLR 277 at 308, Isaacs J. While Isaacs J was in dissent on the issue of what constituted membership of the community, he was at one with the majority in holding that the limits of the immigration power were determined by who was, and who was not, a member of the community.
community, so passing beyond the scope of the immigration power.\textsuperscript{34} In response, legislators shifted their attention to the aliens power.\textsuperscript{35} According to the Australian courts, alienage can only be displaced by a formal grant of citizenship, not by gradual absorption. As such it remains more amenable to government control than the status of ‘immigrant’. The move to rely on the aliens power was enabled by national citizenship laws and the related decline of the assumption that a British subject was not an alien.\textsuperscript{36} With the shift to the aliens power the definitional boundary between the ‘in’ and the ‘out’ group became clearer, essentially resting on the statutory concept of citizenship. The existence of a constitutional concept effectively defined by statute raises problems of its own.\textsuperscript{37} Primary among these problems is Parliament’s ability to define a concept that is intended to define its power.

The constitutional limits on legislative power discussed in this chapter arise from the separation of powers. The Constitution makes only limited explicit textual provision for constitutional rights,\textsuperscript{38} and these are not relevant to immigration detention. The statement in s 51 that the listed heads of legislative power are ‘subject to this Constitution’ has served as the textual basis for reading the heads of federal legislative power as subject to separation of powers requirements. The first three chapters of the Constitution are

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\textsuperscript{34} The shift of bureaucratic and legislative focus to the aliens power is usually dated from the High Court’s decision in \textit{R v Director-General of Social Welfare; Ex parte Henry} (1975) 133 CLR 369, in which the majority endorsed the view that view that an individual could cease to be an immigrant on being ‘absorbed’ into the community: see Blackshield and Williams, \textit{supra} note 19 at 939, 946-947.

\textsuperscript{35} See Blackshield and Williams, \textit{supra} note 19 at 974.

\textsuperscript{36} There are, however, conflicting modern High Court decisions on whether alienage and citizenship exhaust the possibilities, or whether there exists a third class of British subjects who are neither aliens nor citizens. The former binary approach appears to have prevailed: see \textit{Singh v Commonwealth} (2004) 222 CLR 322 [Singh].


\textsuperscript{38} These are the civil and political freedoms of the right to vote (s 41); trial by jury (s 80); freedom of religion (s 116); and the rights of out-of-state residents (s 117), and the economic freedoms of interstate trade and commerce (s 92) and acquisition of property on just terms (s 51(xxxi). There is a widespread assumption that the framers of the Australian Constitution expressed a preference for responsible government over express guarantees of rights after giving careful consideration to the U.S. Constitution. For a highly influential expression of this view see Owen Dixon, \textit{Jesting Pilate} (Melbourne: Law Book Company, 1965) at 101-102. For a historical account that takes issue with this view of informed consideration and conscious rejection see John Williams, ‘The Emergence of the Commonwealth Constitution’ in H.P. Lee and George Winterton, \textit{Australian Constitutional Landmarks} (Cambridge: Cambridge University Press, 2003) 1 at 22 – 27.
structured to reflect a tripartite division between Parliament (Chapter I), the Executive (Chapter II) and the Judiciary (Chapter III). However, the strictest separation is that of federal judicial power. Australian judges sometimes refer to the requirements of the separation of federal judicial power as the requirements ‘of Chapter III’.

The nature of the requirements of Chapter III is the central issue in Australian jurisprudence on the constitutionality of the indefinite detention of non-citizens. More particularly, an issue in Australian jurisprudence on immigration detention is whether detention under the aliens power may be held to be invalid for inconsistency with separation of powers constraints on administrative detention. The separation of judicial power has been held to support the implication of a general freedom from administrative detention, subject to certain judicially-recognised exceptions.\(^{39}\) One such exception is for the administrative detention of ‘aliens’ for an ‘immigration’ purpose (i.e. consideration of an application for entry, or effecting removal of an alien who has no right to remain). The Australian jurisprudence asks whether the indefinite detention of non-citizens subject to a removal order falls within this ‘immigration’ exception to the constitutional freedom from administrative detention.

Australian courts claim the right to strike down legislation that is invalid for inconsistency with the Constitution. The supremacy of the Constitution draws on a textual source in covering clause 5, which provides in part ‘This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and every part of the Commonwealth’. As for the proposition that it is for the courts to pronounce on the constitutional validity of legislation, that is treated as axiomatic.\(^{40}\)

\(^{39}\) See the more detailed discussion of the case law in section 2.2 below.

\(^{40}\) The Court here acknowledges the influence of Marbury v Madison 5 U.S. (1 Cranch) 137 (1803). See for example Australian Communist Party v Commonwealth (1951) 83 CLR 1 [Communist Party Case] at 262-263, Fullagar J.
2.1.2 Common law on statutory authority for administrative detention.

It is a fundamental principle of the common law that statutory authority is required for executive detention. This legal principle is a venerable one, dating back to the habeas corpus statutes of the seventeenth century. The remedy of habeas corpus played a key ideological role in the English political and legal struggles of the seventeenth century between Crown and Parliament, serving as a vehicle for discussion of the extent to which the executive could imprison a person without being called to account in the common law courts. The writ was promoted by Parliament and directed at assertions of inherent authority by the Crown. The law of habeas corpus has long been central in immigration jurisprudence. The remedy sought by an alien in some form of immigration detention, from the foundational authorities of the late nineteenth century to the present day in Australia, has been an order in the nature of habeas corpus directing his or her release.

The remedy of habeas corpus both requires legislative authorisation for detention and influences the way any purported legislative authorisation is interpreted. Habeas corpus encapsulates the principle that every imprisonment is prima facie illegal at common law. It makes vivid the principle that the respondent has the burden of justifying the

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41 Lim, supra note 17 at 13, 19 and 63; Re Bolton; Ex parte Beane (1987) 162 CLR 514 [Re Bolton; Ex parte Beane] at 528
44 An interesting indication of the interplay of Parliamentary and judicial attitudes toward the writ is the fact that the 1679 Act made judges personally liable in punitive damages for unduly denying the writ in vacation, suggesting judges could not always be trusted to act according to law: see Habeas Corpus Act 1679, s 9, discussed in Sharpe, ibid. at 19-20.
45 See for example Ex parte Lo Pak (1888) 9 NSWLR 221 and Al-Kateb supra note 1. The phrase an order ‘in the nature of habeas corpus’ avoids some of the legal complications raised in Al-Kateb. For a comment on the phrase see Gleeson CJ in Al-Kateb at para 24.
46 See Liversidge v Anderson [1942] AC 206 at 245, Lord Atkin; R v Home Secretary; Ex parte Khawaja [1984] AC 74 at 110, 112-114 and 122-123.
applicant’s detention. The conflict within the Australian authorities examined in this chapter turns on what is required by way of justification. The degree of substantive justification required affects the construction of the relevant statutory provisions.

The primary way in which the common law impacts on the indefinite detention of non-citizens is by way of a common law presumption in favour of liberty. In Australian law ‘statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.” The High Court’s support for this presumption is traced to *Potter v Minahan*, and it has been affirmed on numerous occasions, including by the majority in *Al-Kateb*. One justification for the presumption is that it makes parliaments accountable for action under statutory authority that infringes fundamental privileges or immunities. Lord Hoffmann’s statement of this justification in *R v Secretary of State for the Home Department; Ex parte Simms* [*Simms*] has been influential in contemporary judgments:

> The principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

It is a fundamental principle of Australian law that there is no power to ‘disapply’

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47 Strictly speaking there is an evidential burden on the applicant at the first *ex parte* stage to cast doubt on the propriety of his or her detention and the legal burden of proof shifts to the respondent at the show cause stage. It is at this second ‘show cause’ stage that the real contest between the applicant and the respondent takes place.

48 *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 [*Daniels*] at para 11, Gleeson CJ, Gaudron, Gummow and Hayne JJ.

49 (1908) 7 CLR 277 at 304, O’Connor J.

50 See e.g. *Coco v R* (1994) 179 CLR 427 [*Coco*]; *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 252, Deane, Dawson, Toohey & Gaudron JJ; *Re Bolton; Ex parte Beane*, supra note 17 at 523; *American Dairy Queen (Q) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682-683; *The Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457 at 464. See also *Koon Wing Lau v Caldwell* (1949) 80 CLR 533 at 581, Dixon J.

51 *Al-Kateb* supra note 1 at para 241, Hayne J; McHugh and Heydon JJ agreeing. See further the discussion in section 2.4.1.

legislation on the ground that it is inconsistent with a fundamental common law right.\textsuperscript{53} Where legislation makes provision for the criteria for exercising a power, as in \textit{Al-Kateb}, the question is whether it is possible to construe the statutory criteria in a way that accommodates the right.

While the common law presumption is traced back to 1908, it became more prominent in the late 1980s. As the Court stated in 2002:

\begin{quote}
It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect. That rule, the expression of which can be traced to \textit{Potter v Minahan} [1908]...is a rule which...has been strictly applied by this Court since the decision in \textit{Re Bolton; Ex parte Beane} [1987].\textsuperscript{54}
\end{quote}

Australian courts’ revival of the presumption in 1987 paralleled English developments. In 1985, in his dissenting judgment in \textit{Wheeler v Leicester City Council},\textsuperscript{55} Browne Wilkinson LJ prominently asserted that there were substantive standards of legality to be applied at common law. This proposal was rejected by the House of Lords on appeal, but the idea slowly gained traction in the English jurisprudence, reaching its high point in \textit{Simms}.\textsuperscript{56} The developed modern English jurisprudence on common law presumptions and the principle of legality has exerted considerable influence on the Australian law of statutory interpretation.

\textsuperscript{53} ‘[T]he existence of the presumption [against legislative abrogation of that fundamental common law right] suggests that the power, against the exercise of which the presumption operates, indeed exists.’: \textit{Durham Holdings Pty Ltd v New South Wales} (2001) 205 CLR 399 at para 7.

\textsuperscript{54} Daniels, supra note 48 at para 11. \textit{Re Bolton; Ex parte Douglas Beane}, supra note 17 was also a case of statutory authority to detain.

\textsuperscript{55} [1985] AC 1054 [\textit{Wheeler}]. In \textit{Coco}, supra note 50, 4 members of the High Court endorsed \textit{Wheeler}: see \textit{Coco}, supra note 50 at 437-438, Mason CJ, Brennan, Gaudron and McHugh JJ.

\textsuperscript{56} \textit{Simms}, supra note 52. See also Lord Brown Wilkinson’s reprise of the idea in \textit{R v Secretary of State for the Home Department; ex parte Pierson} [1998] AC 539 [\textit{SSHD v Pierson}], twelve years later. On the latter occasion he returned to the idea better armed with legal and academic authority, drawing the following conclusion at 575: ‘I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.’. See Tom Hickman, \textit{Public Law after the Human Rights Act} (Oxford: Hart Publishing, forthcoming 2010).
2.2 **Lim.**

Prior to *Al-Kateb*, the leading High Court authority on the constitutionality of immigration detention was *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [*Lim*].

Lim’s discussion of the constitutional separation of powers doctrine is important for subsequent case law. *Lim* is authority that the substantive implications of the separation doctrine impose constitutional limits on the duration of immigration detention. In *Lim*, these constitutional limits were formulated in terms of a proportionality test directed at the linkage between detention and the relevant immigration purpose (removal or admissions ‘processing’). *Lim* posed a reasonable necessity test of the legality of immigration detention: was detention ‘reasonably capable of being seen as necessary for the purposes of deportation or to enable an entry application to be made and considered’ [reasonable necessity test]? 

The plaintiffs in *Lim* were Cambodian nationals who had arrived by boat on Australian shores in late 1989 and early 1990 without government authorisation and applied for refugee status. They were detained on arrival by the government. The detention

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57 See *supra* note 17.
58 *Lim*, *supra* note 17 at 10, Mason CJ; 33, Brennan, Deane and Dawson JJ; 58, Gaudron J; 65-66, 71, McHugh J.
60 For authority to detain, the government initially relied on *Migration Act*, s 88 which provided that a person could be held in detention until the vessel on which they arrived left its last Australian port. This was a ‘turn-around’ provision that assumed that an ‘illegal entrant’ would leave Australia on the vessel in which he or she had arrived, and in any case could not be kept in detention after that particular vessel had left its last port of call in Australia. The period of detention was limited to the duration of the ship’s stay in Australia. The section was not well suited to the circumstances of the plaintiffs in *Lim*. There was no prospect of the plaintiffs returning in the vessels in which they had arrived. Furthermore, the usual timing involved in the turn-around approach was not consistent with any tenable assessment time for a claim for refugee status. Nonetheless the government’s actions followed the assumption initially developed in the context of this ‘turn-around’ scenario, namely that the plaintiffs would remain in detention until removed, or formally processed and admitted. Australian immigration law still contains many other provisions, policies and practices which effectively provide for an initial screening and ‘turnaround’: see e.g. Savitri Taylor, ‘Sovereign Power at the Border’ (2005) 16 PLR 55 at 69-71.
regime at issue in *Lim*, unlike the other decisions considered in this thesis, was detention during admissions processing, not ‘pending deportation’.

The statutory provisions at issue in *Lim* had been passed in response to applications for release from custody brought by the plaintiffs. The amending legislation had been given royal assent the day before the Federal Court of Australia was due to hear argument on those applications for release.\(^{61}\) It inserted a new ‘Division 4B’ into the *Migration Act* which established a class of ‘designated persons’ whose definition encompassed the Cambodian plaintiffs. Those in the class of ‘designated persons’ were to remain or be placed into custody until either removed from Australia or granted an entry permit. Div 4B introduced mandatory immigration detention into the Australian legal system. Critically, it also contained some limits on detention. It placed a fixed temporal limit of 273 days (9 months) on immigration detention.\(^{62}\) It also contained a provision, s 54P(1), which provided that an officer must remove a detainee from Australia as soon as practicable if the detainee asked the Minister, in writing, to be removed.\(^{63}\) The Federal Court proceedings were adjourned *sine die* and the plaintiffs brought a constitutional challenge to the validity of the amending legislation in the High Court. It is that challenge with which I am concerned.

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\(^{61}\) The Federal Court had adjourned the hearing of their application for release to 7 May 1992. Two days prior to the plaintiffs’ scheduled court appearance, on 5 May 1992, the Federal Parliament passed the Migration Amendment Act 1992. The legislation passed both Houses of Parliament in less than an hour and received royal assent the following day.

\(^{62}\) The practical effect of the 273 day limit was effectively gutted by the stipulation that time did not run where matters beyond the control of the Department impacted on the processing of the application, such as delays in the provision of information or, critically, court proceedings. In September 1993, some nine months after the High Court delivered judgment in *Lim*, many of the plaintiffs’ remained in detention under Division 4B. The stated temporal limit of 273 days had yet to expire because their cases had been before the courts and were thus held to be out of the control of the Department. The idea that the clock should stop while a matter is before the courts is in tension with the idea that a person is asserting his or her legal rights before the court.

\(^{63}\) Further, it contained requirements that a non-citizen be removed from Australia ‘as soon as practicable’ if he or she either failed to apply for an entry permit within two months, or had had such application refused and exhausted appeals and reviews of that decision: subsections 54Q and 54P(2) and (3) of the *Migration Act*, respectively.
In *Lim*, the High Court held that the amendments introduced as Div 4B authorised the plaintiffs’ detention. In the following discussion I focus on the joint judgment of Brennan, Deane and Dawson JJ [the joint judgment], which supplied the ratio of the case.

2.2.1 The separation of judicial power and non-citizens.

The substantive reasons in the *Lim* joint judgment commenced with the following observation:

Under the common law of Australia and subject to qualification of an enemy alien in time of war, an alien who is within this country, whether lawfully or unlawfully, is not an outlaw. Neither public official nor private person can lawfully detain him or her or deal with his or her property except under or in accordance with some positive authority conferred by law.

While this is in terms directed to the common law position on the need for statutory authority to detain a non-citizen, the comment is indicative of an approach to adjudication on the lawfulness of the detention of non-citizens that draws on generally applicable constitutional norms.

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64 Insofar as it wanted to insulate the plaintiffs’ detention from legal challenge, the government was well advised to rush Div 4B through Parliament. The High Court held that the provision relied on to that point, s 88 (see *supra* note 60), did not authorise long-term detention. In the absence of any other statutory authority, ‘the continued detention of each plaintiff in custody…was unlawful.’: *Lim, supra* note 17 at 22, Brennan, Deane and Dawson JJ; at 64, McHugh J. However, the ruling that the plaintiffs had been held for years without legal authority had no practical consequences for them as the option of compensation was effectively foreclosed by further legislation. In response to the High Court’s ruling on the illegality of their original detention, the plaintiffs’ issued writs seeking damages for the tort of false imprisonment. In response special legislation was passed setting the rate of damages payable for the wrongful detention at a dollar a day: See *Migration Amendment Act (No 4) (1992)* (Cth).

65 For subsequent judicial recognition that the joint judgment supplies the ratio of the decision see *Al Masri, supra* note 9 at para 53 -63; *Al-Kateb supra* note 1 for example at para 127-133, 139, Gummow J; 251-252, Hayne J.

66 *Lim, supra* note 17 at 19 [footnotes omitted]. For a contemporary discussion that takes ‘outlaw’ seriously as a legal concept (in its applicability to enemy aliens, and its non-applicability to non-enemy aliens) see Karen Knop ‘Citizenship, Public & Private’ (2008) 71 Law & Contemp. Probs 309.

67 See the discussion of competing versions of common law constitutionalism in Chapter 6, section 6.5.
The *Lim* plurality held that the legislation fell within the scope of the aliens power. If the plurality had stopped there, the legislature would have been left with the ability to confer effectively unlimited immigration powers over aliens on the government. However, the ‘bare characterization’ of the head of power was only the first step in the reasoning. The judges then turned to restraints on legislative power within ‘our system of government’, namely the separation of federal powers.

A separation of powers analysis turns on the content given to the concepts of ‘judicial’, ‘legislative’ and ‘executive’ power. The *Lim* plurality defined judicial power with reference to past practice. It drew on historical instances that were presented as either clearly in or out of the category of judicial power. The most important historical exemplar of a judicial function was held to be the ‘essentially and exclusively judicial’ function of ‘the adjudgment and punishment of criminal guilt’. Administrative detention for the purposes of punishment would usurp an exclusively judicial power. Here the joint judgment emphasised that ‘the Constitution’s concern is with substance and not mere form’:

> [I]t would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred

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68 *Lim*, supra note 17 at 25. The definition of ‘aliens’ in 51(xix) of the Constitution relied upon by the High Court in *Lim* was established in the 1988 case of *Nolan*, which treated alien in s 51(xix) of the Constitution as “synonymous with ‘non-citizen’”: see the joint judgment in *Lim* at 25-26, referring to *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183. This binary opposition was reaffirmed, after a number of twists and turns in the High Court jurisprudence, in *Singh*, supra note 36.

69 While Gaudron J formed part of the majority, she diverged from the other judgments on the question of the scope of aliens power. Gaudron J argued that the aliens power should not be read as conferring unlimited legislative power over aliens. She argued that the heads of legislative power defined with reference to persons ‘falling within a particular class or answering a particular description,’ such as the aliens power under s 51(xix) or the race power under s 51(xxvi) called for an analysis distinct from that applied to powers ‘to legislate for a stated topic or for a stated purpose’; for example bankruptcy, marriage or immigration. She came to the same result as the joint judgment, and gave the aliens power an operation equivalent to that which emerges from the joint judgment’s separation of powers analysis. While Gaudron J’s approach has not been taken up by the High Court, it is of interest as an express rejection of a source of unfettered legislative power over a class defined with reference to legal status or race: see *Lim*, supra note 17 at 54-58.


71 *Lim*, supra note 17 at 27.
in terms which sought to divorce such detention in custody from both punishment and criminal
guilt.\textsuperscript{72}

The Court’s concern was with arbitrary executive power. The sense of ‘arbitrary’
employed was linked to the idea of the legislature inflicting punishment without any
conviction in the ordinary sense of judicial proceedings, in other words a Bill of Pains
and Penalties.\textsuperscript{73} A Bill of Pains and Penalties would infringe the separation of powers by
substituting a legislative judgment of guilt for the judgment of the courts exercising
federal legislative power.\textsuperscript{74} This would offend against the rule of law requirements that
offences are to be framed generally and anyone accused of an offence is to be tried in a
court of law. The quote’s concern with substance expressed a functional approach to
detention. The joint judgment treated a power of detention as \textit{prima facie} subject to
constitutional limitations placed on analogous government control of individual
behaviour. The onus was placed on the government to provide a justification of the
detention that did not implicate punishment or criminal guilt.\textsuperscript{75}

The Australian discussion of immigration detention often focuses on the character of the
purpose of the detention – is it punitive or non-punitive. This reaches its high point in the
argument that as long as the purpose can be characterised as non-punitive, separation of
powers considerations do not apply.\textsuperscript{76} An analysis structured in this fashion prevents a
court from examining the specifics of a law, and ignores any functional equivalence for
the detainee between administrative detention and imprisonment.\textsuperscript{77} The approach
adopted by the joint judgment in \textit{Lim}, whereby it was assumed that detention is
punishment, unless it can be shown to be a reasonable means to a legitimate end, better
preserves the judicial function of watching over the liberty of those within the
jurisdiction.

\textsuperscript{72} \textit{Ibid.}

\textsuperscript{73} See the judgment of McHugh J: see \textit{Lim, ibid.} at 69-71. He defines the elements of such a Bill as “(1)
directed to an individual or particular group of individuals (2) which punishes that individual or individuals
(3) without the procedural safeguards involved in a judicial trial” \textit{ibid.} at 70.

\textsuperscript{74} \textit{Ibid.} at 70.

\textsuperscript{75} For a supporting reading of \textit{Lim} see Stephen McDonald, ‘Involuntary Detention and the Separation of

\textsuperscript{76} See e.g. \textit{Al-Kateb, supra} note 1 at paras 45-46, McHugh J; 261 and 264-268, Hayne J. See also \textit{Re
Woolley, supra} note 33 at paras 71-78, McHugh J. See further discussion in section 2.4.2.

\textsuperscript{77} See Glass, supra note 3.
2.2.2 Non-citizens’ vulnerability to removal and the separation of powers.

(a) Recognition of an immigration exception.

The joint judgment concluded that, certain exceptions aside, Australian citizens, at least in times of peace, enjoyed ‘a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth’. Attention then turned to the exceptions. In considering the application of the constitutional immunity to aliens, the joint judgment stated that ‘[w]hile an alien who is actually within this country enjoys the protection of our law, his or her status, rights and immunities under that law differ from the status, rights and immunities of an Australian citizen in a variety of important respects.’ The most important difference ‘lies in the vulnerability of the alien to exclusion or deportation’. The judgment stated that the effect of the alien’s vulnerabilities ‘is significantly to diminish the protection which Chapter III of the Constitution provides…against imprisonment otherwise than pursuant to judicial process.’ These vulnerabilities were taken to be a matter of international law, ‘an incident of sovereignty over territory.’ The authority cited for this proposition was the 1906 Privy Council decision of Attorney-General (Canada) v Cain. The joint judgment extracted from that 1906 decision the proposition that, ‘the power to expel or deport a particular alien, and the associated power to confine under restraint to the extent necessary to make expulsion

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78 The judgment footnotes the case of Little v The Commonwealth (1947) 75 CLR 64 to this caveat. For a brief discussion of Little’s case that relates it to other cases discussed in this chapter see: David Dyzenhaus, ‘Cycles of Legality in Emergency Times’ (2007) 18 PLR 165 [Dyzenhaus, ‘Cycles of Legality’] at 181.
79 Lim, supra note 17 at 28-29.
80 These exceptions included committal to custody pending trial (but allowing for bail) and involuntary detention on grounds of mental illness or infectious disease. The justification for detention in these cases was practical and direct, involving an assessment of flight risk, self-harm, or the need for quarantine. Other exceptions to the constitutional immunity applicable to citizens rested primarily on tradition: the powers of Parliament to punish for contempt, and of military tribunals to punish for breach of military discipline.
81 Lim, supra note 17 at 29.
82 Ibid.
83 Ibid.
84 Ibid.
85 [1906] A.C. 542, quoting at 546, Vattel Law of Nations, book 1, s 231, book 2, s 125, and quoted in Lim, ibid. at 29-30. The quote from Attorney-General for Canada v Cain is a recurring reference in the common law jurisprudence and commentary on immigration detention. The quote, and the understanding of the powers of expulsion and exclusion for which it is said to supply a foundation are discussed further in Chapter 6, section 6.5.
or deportation effective, were seen as *prima facie* executive in character. The idea that ‘an alien is not an outlaw’ with which the judgment opened, and the constitutional immunity derived from the separation of powers, were confronted with a countervailing common law tradition of executive control over immigration.

**(b) Scope of the immigration exception - detention to be proportionate to legitimate immigration purposes.**

The joint judgment held that the separation of powers placed limits on the duration of immigration detention. There was a general constitutional immunity from administrative detention, and a permitted exception to it in the form of immigration detention. The question for resolution was whether the detention provisions fell under the constitutional immunity, or under a permitted exception. As stated by Brennan J in the contemporaneous case of *Cunliffe v Commonwealth*, ‘[t]he cases in this category arise because legislative power is restricted by a limitation, the law in its effect and operation infringes on the limitation and it is necessary to ascertain whether the purpose or object of the law nevertheless falls within the power.’ Critically, the question of whether the detention provisions fell within the immigration exception was assessed with reference to the connection between detention and legitimate immigration purposes. These purposes were facilitating deportation and considering an entry application (the latter sometimes referred to as ‘processing’). The joint judgment elaborated on the connection between detention and these purposes in terms of the reasonable necessity test introduced earlier. The detention provisions would be valid if they were ‘reasonably capable of being seen as necessary for the purposes of deportation or to enable an entry application to be made and considered.’ No strong sense of ‘necessity’ was intended. In the Australian constitutional jurisprudence ‘necessary’ can be paraphrased as ‘reasonably appropriate and adapted’. In this context talk of ‘necessity’ conveyed the ‘notion of sufficient connection between the desired end and the means proposed for its attainment.’

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86 Lim, supra note 17 at 30.
88 *Ibid.* at 33
a measure authorising immigration detention overreached itself as a disproportionate means to otherwise legitimate ends.

(c) Application of the proportionality test.

The content of the test is best ascertained through its application to the facts of the case. In its reliance on what was ‘reasonably capable of being seen as necessary’, the test was, on its face, a highly deferential one.\(^90\) And indeed, in *Lim* the High Court applied it in a highly deferential fashion, holding that the system of mandatory detention introduced by Div 4B met its requirements.\(^91\) The joint judgment allowed for extended detention based on the ‘reasonable suspicion’ of a government officer that a person fell within the category of aliens designated by the legislation.\(^92\) This decision was not required to be subject to any form of periodic review.

The conclusion that the mandatory detention regime was constitutional rested on various limitations contained in the scheme. The decision did not leave a clear message on the outer temporal limit of immigration detention, as the time limit was treated as a part of a package of limitations. The joint judgment’s statement on constitutionality took the form of a counterfactual. It held that a limit of 273 days, following a period of unlawful detention, *would not* have been sufficient without the request for release provision. It was not clear whether *with* the request for removal provision (and without a prior period in unlawful detention) detention in excess of 273 days would be constitutional.\(^93\) What was clear was that the request for removal provision was critical to the constitutionality of the detention regime.\(^94\)

\(^90\) The submissions of the Human Rights and Equal Opportunity Commission, intervening in *Al-Kateb* stated that this test from *Lim* ‘accords too much deference to Parliament’: *Al-Kateb* supra note 1 at page 570.

\(^91\) A provision of the scheme was struck down, but it was ‘clearly severable’ from the scheme as a whole and did not affect the validity of any other provision, or undermine the scheme’s operation: *Lim*, supra note 17 at 37. See the discussion of s 54R, the provision struck down, in the text accompanying note 100, *infra*.

\(^92\) *Migration Act*, s 189.

\(^93\) *Lim*, supra note 17 at 32-35

\(^94\) The joint judgment held that the 273 day limit and the requirements that a person be removed from Australia as soon as practicable after refusal of an entry application ‘would not…have gone far enough were it not for the provision of s 54P(1).’: *Ibid.*, at 33.
The request for removal section provided that an officer must remove a detainee from Australia as soon as practicable if the detainee asked the Minister, in writing, to be removed. It was held to ‘set…the context in which the other provisions’ of the mandatory detention regime operated, transforming what would otherwise be involuntary detention into a species of ‘voluntary’ detention, since it was within the power of a detainee ‘to bring his or her detention in custody under Div 4B to an end at any time.’ The moment the detainees relinquished the attempt to enter Australia and requested removal, their continued detention was only authorized ‘for the limited period involved, in the circumstances of the particular case, in complying with the statutory requirement of removal “as soon as practicable”’. The reasoning in Lim was predicated on the assumption that the detainees, by way of the request for removal provision, had it within their power to bring their detention to an end. It was in essence a ‘prison with three walls’ argument. While the plaintiffs’ were presently barred from release into Australia, the ‘fourth wall’ remained open. They were always free to leave.

The judge most expansive in his explanation of why the request for removal provision was critical to the constitutionality of the detention regime was McHugh J. He was emphatic in stressing the provision’s importance, stating that the ability to request removal, and so release, was ‘vital’ to the constitutionality of the scheme. He conceded that, given the plaintiffs’ application for refugee status, voluntary removal was not a ‘real choice’, but continued:

But for the purpose of the doctrine of the separation of powers, the difference between involuntary detention and detention with the concurrence or acquiescence of the ‘detainee’ is vital. A person is not punished if, after entering Australia without permission, he or she chooses to be detained in custody pending the determination of an application for entry rather than to leave the country during the period of determination.

In Lim, McHugh J held that it was imperative that the detention was in some sense ‘chosen’ by the detainee. For him, the constitutional permissibility of immigration

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95 Ibid.
96 Ibid. at 34.
97 Ibid.
98 At the time of hearing and judgment, the plaintiffs had yet to have their applications for refugee status determined by a delegate of the Minister responsible for the Migration Act.
99 Lim, supra note 17 at 72.
detention relied on an understanding that those coming to Australia had chosen to submit themselves to state control, and that authority for their ongoing detention was connected with the detainees ‘decision’ to remain, as deduced from the absence of a request for removal. The request for removal provision was central to the Court’s separation of powers analysis because it preserved some vestige of agency on the part of those detained.

(d) Judicial review of proportionality of detention of non-citizens.

The majority in Lim did strike down one provision of Div 4B as contravening the separation of powers. Section 54R provided that a court was not ‘to order the release from custody of a designated person’. The majority in Lim held that a law that purported to direct a court, in unqualified terms, that any person whom the Commonwealth executive had imprisoned could not be released was invalid. As s 54R was such a law it constituted ‘an impermissible intrusion into the judicial power’ and was struck down.\(^{100}\)

The reasoning of the joint judgment on s 54R further emphasised the centrality of the request for removal provision to the separation of powers analysis. As an example of a situation in which legal authority to detain would be spent (but s 54R still directed the Court not to order release), reference was made to a situation in which a detainee was held in custody ‘in disregard’ of a request for removal.\(^{101}\) Again, this judicial comment was premised on a request for removal being an effective means of securing release from detention.

2.2.3 Conclusion on Lim.

Lim was clear authority that immigration detention was subject to a proportionality requirement. A non-citizen could be detained for purposes incidental to his or her

\(^{100}\) A minority, comprising Mason CJ, Toohey and McHugh JJ held that s 54R could be read down to avoid the reading on the basis of which the majority struck down the provision. The minority agreed that the majority’s reading of the provision, if unavoidable, was such as to render the provision in contravention of the separation of powers.

\(^{101}\) Lim, supra note 17 at 36
immigration processing and/or removal. The purposive link between detention and removal was to be assessed by means of a test, namely were the detention provisions ‘reasonably capable of being seen as necessary for the purposes of deportation’.  

There are two important features of *Lim*. First, in arriving at the reasonable necessity test the *Lim* plurality adopted the starting assumption that detention other than by court order contravened the separation of powers unless it could be shown to be a reasonable means to a legitimate end. In their reasoning on what constituted a reasonable means they were informed by the understanding that non-citizens remained under the full protection of the law, as given content by the separation of powers. Non-citizens had a liberty interest that could only be infringed to the extent necessary for admission requirements or removal.

The other key feature of the *Lim* decision was the legal significance attached to the request for removal provision. As stated in the joint judgment, it set the context for the detention regime. By providing that it always lay within a detainee’s power to secure his or her own removal, the request for removal provision enabled a characterization of detention as ‘with the concurrence or acquiescence’ of the detainee. It was ‘vital’ to the separation of powers that a detainee be able to secure his or her own release.

2.3 *Al Masri*.

Starting in 2002, there were a series of challenges to indefinite immigration detention brought in the Federal Court of Australia. The challenges were brought by non-citizens who did not have a legal right to be in Australia and had formally requested removal but whose removal could not be effected because no other State had agreed to receive them. The government maintained that its authority to continue to hold these individuals in immigration detention, for an indefinite period, was not impugned by the fact that there were difficulties in effecting their removal.

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102 Ibid. at 10, Mason CJ; 33, Brennan, Deane and Dawson JJ; 58, Gaudron J; 65-66, 71, McHugh J.
103 Ibid. at 33, Brennan, Deane and Dawson JJ.
104 Ibid. at 72, McHugh J; see also 34, Brennan, Deane and Dawson JJ.
105 Ibid. at 72, McHugh J.
The question arose whether the ‘reasonable necessity’ test from *Lim* was satisfied where there was no real likelihood of the request being fulfilled by the government. Was the request for removal provision to be understood as necessarily directed in a ‘genuine, and realistic, sense towards removal’ from Australia?\(^{106}\) It would seem that any argument that the request for removal provision served to preserve the agency of the detainee, giving them a choice as to whether to remain in detention, was predicated on that request having practical effect.

There was a divergence of opinion in the Federal Court on the legality of indefinite detention of the non-citizens.\(^{107}\) A temporary resolution was reached when the Full Court of the Federal Court handed down judgment in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [*Al Masri*].\(^{108}\) Applying *Lim*, the Full Court reasoned in accordance with the rights-protecting model of immigration detention. The Court’s decision was framed as an exercise in statutory interpretation, based on a common law presumption against the abrogation of liberty, informed by the need for detention to have a temporal limit if it was to meet the requirements of the separation of powers, and buttressed by international human rights law. The Court determined that where there was no real prospect of removal in the reasonably foreseeable future, the rationale of detention was frustrated and accordingly, authority to detain suspended.

The Court’s judgment in *Al Masri* represented the Australian legal position for less than sixteen months. The High Court of Australia handed down judgment in *Al-Kateb* in August 2004. In that case the High Court majority held that the statute authorised detention for as long as the government held the intention of removing the detainees, even if removal was not practicable for an indefinite period. While the majority did not openly distinguish *Lim*, they undermined the constitutional limits outlined in that case, holding that even if the separation of powers did supply a constitutional immunity from executive detention, its impact on immigration detention was precluded by the operation

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\(^{106}\) *Al Masri*, supra note 9 at para 79.


\(^{108}\) *Al Masri*, supra note 9.
of the aliens power. The majority’s interpretation of the statute and the Constitution constituted a clear example of a rights-precluding approach to detention of non-citizens subject to removal. When the Al-Kateb majority’s decision to uphold indefinite detention is set alongside the three dissents and the contrary decision in Al Masri, a fuller picture of the resources available to protect rights in Australian law comes into view. The Australian material attests to how diametrically opposed results on the legality of indefinite immigration detention can be arrived at within the same statutory and constitutional framework.

2.3.1 Statutory provisions considered in Al Masri.

The statutory scheme for removal of non-citizens, the subject of Al Masri and Al-Kateb, centred on ss 196 and 198 of the Migration Act. Section 196 provided in part:

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

Section 198 provided in part:

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

The central issue in both cases was whether the above provisions of the Migration Act providing for mandatory detention, authorized the indefinite, possibly permanent, administrative detention of a person who had requested removal, where there was no real prospect that that request could be effected in the reasonably foreseeable future. I now leave the commonalities between the two cases to discuss each in turn.

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109 See Al Masri, supra note 9 at para 2.

110 See Al Masri, supra note 9 at para 2.
2.3.2 *Al Masri* at first instance.

The reasoning in the first instance decision highlights the factual and evidential issues in the Australian case law on the indefinite administrative detention of non-citizens. Mr Al Masri, a Palestinian from the Gaza Strip, arrived in Australia without a visa in June 2001 and was placed in immigration detention. His application for refugee status was not granted and he made a written request to be returned to Gaza in early December 2001. The Australian government was unable to secure his entry into the Gaza Strip transiting via Israel, Egypt or Jordan. On being approached, Syria refused his removal to that country. Mr Al Masri commenced a proceeding against the Minister, seeking an order in the nature of habeas corpus for release from detention. It is stated in the judgment of the Full Court that ‘[t]he delay and uncertainty about [his]…removal caused him to suffer anxiety and depression and also led to self-harm, resulting in him being admitted to hospital’.

Although it was not a national security case, government claims of confidentiality and attendant understandings of what was required by way of government justification for detention informed the litigation in *Al Masri*. The government acknowledged that there was nothing in the evidence expressing a view as to the likelihood of Mr Al Masri’s removal, but submitted that active efforts were being made to secure his removal and he was not being ‘left to languish’ in detention. The trial judge, Merkel J, noted that the Minister had suggested that revealing the ‘full details’ of factual information as to the prospects of Mr Al Masri’s removal would be likely to prejudice that removal. He commented that ‘[n]o basis was put forward for that view. In any event, something less than the “full details” of the relevant communications may well have sufficed’. In the absence of any evidence as to the present prospects of the applicant’s removal, Merkel J

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111 For an account of the facts see *Al Masri*, supra note 9 at para 3-9.
112 He was unsuccessful before the delegate of the Minister charged with making a decision whether to grant a protection visa recognising refugee status and on review before the Refugee Review Tribunal [RRT]. He did not challenge the decision of the RRT. His written request to be returned to Gaza was made on the day of the RRT’s decision, 5 December 2001.
113 *Al Masri*, supra note 9 at para 8.
114 *Al Masri*, first instance, supra note 107 at para 48. I was Associate to Justice Merkel during hearing and judgment.
115 Ibid. at para 51.
held that the Minister had failed to discharge the burden on him to prove that the Mr Al Masri’s continued detention was lawful. In particular, the judge held that as the Minister had not led information available to him, it was open to the judge to infer that that information would not assist the Minister’s case.116 This inference effectively required the Minister to provide reasons justifying the continued authority to detain.

Merkel J made a factual finding that Mr Al Masri’s removal from Australia was ‘not reasonably practicable at the present time as there is no real likelihood or prospect of removal in the reasonably foreseeable future’. He held that the better reading of s 196, supported by s 198, was that detention was authorised only where the Minister was taking steps to secure removal, and there was a real likelihood or prospect of removal in the reasonably foreseeable future.117 In arriving at this reading, he drew on comparative authorities favouring an implied limitation on immigration detention of this form. Two authorities he relied on recur repeatedly in the jurisprudence, the decision of the Queen’s Bench in Hardial Singh,118 and that of the U.S. Supreme Court in Zadvydas.119 He ordered Mr Al Masri’s immediate release from detention, subject to reporting conditions and a duty to comply with arrangements to facilitate his removal. Some two weeks after the decision, Mr Al Masri was taken back into immigration detention on the basis that the Minister was now in a position to secure his removal. Mr Al Masri was removed from Australia several days later.120 It was only after he had left Australia that the first instance decision was upheld on appeal in the unanimous decision of the Full Court discussed below.121

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116 Ibid. at para 52. In Australia this is known as a Jones v Dunkel point after the decision of the same name, (1959) 101 CLR 298.
117 Al Masri first instance, supra note 106 at para 38.
118 R v Governor of Durham Prison, ex parte Singh [1984] 1 All ER 983 [Hardial Singh]. I discuss this decision in chapter 3, section 3.3.
119 Zadvydas v Davis 533 US 678 (2001) [Zadvydas]. Although I refer to this decision at a number of points, I discuss it most fully in relation to the Canadian jurisprudence in chapter 4, section 4.4.4, and in the Conclusion, chapter 6, section 6.4.1. The judge also discussed the Privy Council’s endorsement of the ‘Hardial Singh principles’ in Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97. For the purposes of the constitutional context, he discussed the High Court’s decision in Lim, discussed in the text above.
120 Such developments were provided for in Al Masri, first instance, supra note 107. Merkel J held that the Minister was not precluded from taking Mr Al Masri back into detention when his removal was imminent (Ibid. at para 24).
121 Al Masri, supra note 9. The bench of the Full Court of the Federal Court was comprised of Black CJ, Sundberg and Weinberg JJ. As noted in the text, the appeal to the Federal Court was heard after Mr
2.3.3 *Al Masri* in the Full Court of the Federal Court.

The joint reasons of the Full Court of the Federal Court in *Al Masri* are remarkable for their intertwining of constitutional, common law, comparative and international law on the legality of indefinite administrative detention. The decision was grounded in principles of statutory interpretation. However, the reasoning was elaborated in the shadow of constitutional invalidity. The initial thirty-two paragraphs of the reasons were devoted to considering the constitutional constraints on immigration detention, with pride of place accorded to *Lim*. These constitutional considerations were held to ‘point very strongly to the need and foundation for a limitation’ on the power to detain in the form of a requirement that there be a ‘real likelihood or prospect of removal in the reasonably foreseeable future’. However, the operation of the ‘presumption of constitutionality’ was not relied on. The Court concluded that the central issue in the appeal could be determined on the basis of common law presumptions concerning fundamental rights and freedoms.

The Court began its elaboration of the common law presumption by engaging extensively with comparative common law authority on immigration detention. These comparative authorities were discussed over the course of eighteen paragraphs ‘as indicative of the approach taken by courts in the common law tradition to the construction of statutes providing for administrative detention’. It is only having discussed these comparative authorities that the judgment moved on to its conclusions on construction of the statutory provisions (discussed below). *After* it had stated its conclusions on construction on the basis of the common law presumption (as informed by comparative authority), the Court

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*Al Masri* had already been removed from Australia. The Minister appealed the decision to the Full Court on the basis that there was an adverse costs order against him and no way to resolve the controversy over costs other than by determining the merits of the appeal. A motion to dismiss the appeal on discretionary grounds on the basis that determination of the appeal was of no practical significance to Mr *Al Masri* was refused on the basis of the costs argument conjoined with the ‘convenience’ of determining the present appeal given that the orders of the trial judge had been relied on in applications for release in other proceedings.


123 *Ibid.* at para 96. While the quoted phrase is attributed to the trial judge, it is clearly the view of the Full Court.
then turned to consider Australia’s international obligations. These obligations were introduced as fortifying the Court’s conclusions on statutory interpretation.

In what follows I sketch the strands of the Court’s reasoning, introduced above, with particular attention to their mutual influence.

(a) Presumption in favour of constitutional validity.

The Court began its reasoning with reference to the presumption in favour of constitutionality. Central to the Court’s reading of *Lim* was the understanding that the request for removal provision had to be directed in ‘a genuine and realistic sense towards removal’ from Australia if it was to serve its constitutional function. The Court stated that the request for removal provision in *Lim* ‘tilted’ ‘the scales…in favour of validity’ because of its presumed ‘practical effect’. It held that for the request for removal provision to do the constitutional work assigned to it by the reasoning in *Lim*, it must be true that ‘it always lies within the power of a designated person to bring his or her custody to an end’. The Court pointed out that, on the government’s reading of the legislation, this was no longer the case.

(b) Presumption against legislative abrogation of fundamental common law rights.

In considering the second, common law, presumption, the Court adopted the formulation of Gleeson CJ in *Plaintiff S157*:

> [C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.

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125 *Ibid.* at para 63 and 61 respectively.
126 *Ibid.* at 61, quoting *Lim*, supra note 17 at 34.
127 *Plaintiff S157/2002*, supra note 52 at para 30. *Plaintiff S157/2002* was a decision on a privative clause that sought to abolish judicial review of migration decisions as far as that was constitutionally possible. While the High Court upheld the constitutional validity of the privative clause, it held that it was not effective to protect decisions involving ‘jurisdictional error’ from judicial review. The Court pointed out that decisions effected by this error are not recognized in law as decisions at all, rather they are ‘purported decisions’. Accordingly they were not decisions ‘made under the Act’ and were not caught by the privative clause. The decision effectively neutralized the government’s attempt to end judicial review of
As in the reasoning in *Lim*, the discussion of immigration detention was framed with reference to common law authorities protective of liberty. However, in *Al Masri*, in the context of the common law presumption, the discussion of these authorities was focused directly on the alien’s liberty interest at common law, rather than (as in *Lim*) refracted through constitutional jurisprudence on the nature of judicial power.

The Court was confident of the presumption’s place in the law. The section of the Court’s judgment entitled ‘liberty and the common law’ began:

> The principle against the imputation of an intention to curtail fundamental rights is sometimes criticized on account of uncertainty about the rights to which it applies. This may be so at the margins, but there can be no question that the right to personal liberty is among the most fundamental of all common law rights.  

The Court added ‘It is also among the most fundamental of the universally recognised human rights’. The status of the right at international law (with particular emphasis on its universality) was led in support of its legitimacy as a common law right.

Much of the discussion of the right to liberty at common law was dedicated to showing, by way of common law precedent, that ‘the common law’s concern for the liberty of individuals extends to those who are within Australia unlawfully’. A large part of the Court’s development of the common law presumption was by way of comparative authority, where this included the decisions of *Hardial Singh* and *Zadvydas*. In concluding an extended review of these comparative authorities, the Court stated, with reference to the presumption against the curtailment of fundamental freedoms:

> There can …be no doubt that [this] principle of construction…is applicable to the construction of provisions that provide for mandatory detention. Since aliens who are unlawfully within Australia

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immigration decisions. In *Plaintiff S157*, as in *Al-Kateb* (see below), Gleeson CJ wrote a separate judgment relying on the principle of legality, and avoiding constitutional reasoning.  

128 *Al Masri*, supra note 9 at para 86.  
130 There are quotations to this effect from *Kioa v West*, supra note 12, the joint judgment in *Lim*, and Lord Scarman’s judgment in *R v Home Secretary: Ex parte Khawaja* [1984] AC 74: see *Al Masri*, supra note 9 at para 114.
are not outlaws but enjoy, in common with every other person in Australia, the equal protection of Australia’s laws, the principle of construction to which we have referred is not to be excluded simply because the subject matter of a statute is the detention of aliens. It is a principle of universal application…There is equally no doubt that courts of the highest authority have applied that principle, or similar principles, to read into legislation providing for detention implied limitations upon the power.131

Immigration detention was treated as just another regulatory power, operating in the same common law environment as other government regulatory powers. The starting presumption was not that the government must have the power to detain a non-citizen who has no right to remain. It was that such detention infringes a non-citizen’s liberty right, where the extent of that infringement called for justification. Further, the relevant common law context was seen as shared between the jurisdictions, a repository of principle that each could draw on.

(c) Conclusions on statutory interpretation.

Having outlined the case for strong constitutional and common law presumptions against indefinite detention, the Court’s attention shifted to the question of whether those presumptions were rebutted. Here the question the Court asked, dictated by the principle of legality, was ‘had the legislature directed its attention to the possibility of indefinite detention?’132 Section 196 provided that an unlawful non-citizen was to be kept in detention ‘until’ he or she was removed under ss 198 or 199, deported under s 200,133 or granted a visa.134 The Court asked how much weight this word ‘until’ could bear. Had Parliament directed its attention to the possibility that none of the three listed events might occur?135 The possibility that detention might be ‘for the rest of a person’s life’ needed to be ‘squarely confronted’.136 In construing the statute, the Court acknowledged textual features that militated for the proposition that the Parliament had directed its attention to the possibility of indefinite detention, and textual features that indicated it

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131 Ibid. at para 114.
132 The formulation of the presumption the Court adopts, taken from Plaintiff S157, supra note 52 contains two requirements: (i) has the legislature directed its attention to the rights or freedoms in question and (ii) has it consciously decided on abrogation or curtailment: see the text above accompanying note 127. The Court’s reasoning focused on the first requirement.
133 The distinction in statutory terminology was between the ‘removal’ of ‘unlawful’ non-citizens and the ‘deportation’ of non-citizens convicted of serious crimes.
134 See the provision, quoted in the text accompanying note 109 above.
135 Al Masri, supra note 9 at para 119.
136 Ibid. at para 117.
had not. The Court held that the better reading was that Parliament had not attended to such a possibility.\textsuperscript{137} The Court’s resolution of these conflicting statutory signals was informed by its view that ‘when the demands of certainty and liberty come into conflict, the tradition of the common law is to lean towards liberty.’\textsuperscript{138}

The government argued that an implied temporal limitation would result in the release of those ‘who had no right to be…in Australia’.\textsuperscript{139} The Court agreed it would be releasing those with no right to remain, but did not accept that this involved a contradiction. It rejected the equivalence at the heart of the government’s case between the absence of a right to remain and the absence of a right to liberty. An unlawful non-citizen released from detention remained vulnerable to deportation. This was demonstrated by Mr Al Masri’s circumstances. He was re-detained a fortnight after his release by order of the trial judge and shortly thereafter removed from Australia. His earlier release from detention did not confer a right to remain.\textsuperscript{140}

The government proceeded to raise a number of policy issues. It focused on the uncertainty that court-ordered release could introduce into its management of immigration. Here the Court relied on the comparative authorities to demonstrate the practicality of a temporal limitation. The decades of governmental practice in other jurisdictions suggested that such difficulties are ‘likely to be more apparent than real’.\textsuperscript{141} More fundamentally, it was in response to this line of argument that the Court stated its preference for liberty over (administrative) certainty.

The final government objection was pernicious. It argued that court ordered release raised the prospect of ‘release into the community of persons who might pose a threat to the safety of others, or to national security’.\textsuperscript{142} The Court resisted this unsubstantiated attempt to inject national security concerns into the debate. It pointed out that such persons would comprise only an exceptional subset of those to whom the limitations on

\textsuperscript{137} Ibid. at para 119-132.
\textsuperscript{138} Ibid. at para 129.
\textsuperscript{139} Ibid. at para 125-128.
\textsuperscript{140} The trial judge sanctioned his re-detention prior to removal as consistent with the purpose of the power: see Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1099.
\textsuperscript{141} Al Masri, supra note 9 at para 129.
\textsuperscript{142} Ibid. at para 131.
detention might ever apply. The Court observed that this was only a problem if the person could not otherwise be detained. The judges noted that the criminal law, both of Australia and of other countries to which the individual might be extradited, provided for detention. And they noted that the legislature could enact specific provisions to address security concerns.

(d) Use of international law in statutory interpretation.

It was only after it had reached its conclusions on the construction of the statute that the Court turned to consider Australia’s international obligations, arguing that these obligations supported their conclusions on other grounds. The Court focused on the international jurisprudence on Article 9 of the International Covenant on Civil and Political Rights [ICCPR].\textsuperscript{143} Article 9(1) provides: ‘[e]veryone has the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’ The Court went beyond the treaty provisions to discuss commentary on the provision and the views of the United Nations Human Rights Committee, stating that ‘Although the views of the Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects’.\textsuperscript{144} The influence accorded to the non-binding views of international bodies suggested a commitment to the promotion of coherence in the interpretation of domestic and international law.

The central theme of the international law discussion was the requirement that a deprivation of liberty not only be prescribed by law, but the law and its application in a given case must not be arbitrary. The notion of ‘arbitrariness’ found in the international materials included detention which was in the individual case ‘unproportional’ or ‘unjust’.\textsuperscript{145} The Court also had recourse to jurisprudence on Art 5 of the European Convention on Human Rights [ECHR]\textsuperscript{146} that supported its conclusions on Art 9 of the

\textsuperscript{143} 19 December 1966, 999 U.N.T.S. 171.
\textsuperscript{144} Al Masri, supra note 9 at para 148.
\textsuperscript{145} Ibid. at para 152.
ICCPR. Australia is not a party to the ECHR, and the jurisprudence under it was effectively treated as comparative law. The Court concluded its review of international law by saying:

To read s 196 conformably with Australia’s obligations under Art 9(1) of the ICCPR, it would be necessary to read it as subject, at the very least, to an implied limitation that the period of mandatory detention does not extend to a time when there is no real likelihood or prospect in the reasonably foreseeable future of a detained person being removed and thus released from detention.147

International human rights jurisprudence was held to ‘fortify’ the conclusion arrived at by means of the common law presumption and the presumption of constitutionality, namely that the general words should be read as subject to an implied temporal limitation.

The Al Masri decision of the Full Court of the Federal Court had no practical effect on Mr Al Masri’s circumstances. As noted above, he had already been removed from Australia.148 It did, however, lead to the release of about twelve others. Amongst them was a Mr Al-Kateb, who was apparently driven from the immigration detention centre into the regional South Australian town of Port Augusta, where he and some others were left, without money, in the town square.149

2.3.4 Conclusions on Al Masri.

The Full Court in Al Masri relied on a common law presumption against the curtailment of fundamental freedoms. This was woven together with an argument that the provisions should be read as subject to an unexpressed exception so as to avoid contravening the separation of powers. These readings were supported by a presumption of compliance with international law. Further, the elaboration of the common law presumption made extensive use of comparative common law authority. The reasoning from these various

147 Al Masri, supra note 9 at para 155.
sources all pulled in the same direction. They required that the duration of immigration detention be proportionate to the legitimate immigration purpose of facilitating removal.

Despite the mutually reinforcing nature of these sources of law there was a clear hierarchy between them. While any ruling on constitutional invalidity was effectively kept in reserve, the prospect of such invalidity shadowed the reasoning as a whole. At the other end of the continuum, the presumption in favour of conformity with international law was reduced to a supporting role, brought in after the heavy lifting had been done by constitutional and common law considerations.

The judges situated the law’s antipathy to indefinite administrative detention in the overlap between these sources of interpretive influence. What did the common law and international law arguments add to the constitutional argument (drawn most immediately from Lim)? Perhaps most importantly, in their focus on the nature of the harm, the common law and international law jurisprudence drew attention to what the constitutional separation of powers analysis was for - the protection of the legal subject. In addition, these sources reaffirmed the commitment to extend the law’s protection to all within the jurisdiction, whether lawfully or unlawfully. This framed immigration detention as a limited exception to constitutional norms, not a distinct domain in which such norms did not apply. Finally, the understanding of arbitrariness contained in the international human rights jurisprudence, carrying with it a requirement of proportionality, echoed and augmented the constitutional exercise of determining whether a given instance of executive detention fell within the constitutional immunity from executive detention, or a purposive exception to it.  

In binding together these different strands, the judgment of the Court in Al Masri brought to the surface the way in which the separation of powers arguments in Lim were motivated by a concern to protect the liberty of the legal subject.

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2.4 *Al-Kateb*.

In *Al-Kateb*, the statutory provisions discussed in *Al Masri* came before the High Court. Mr Al-Kateb was a Palestinian who had been born and resided most of his life in Kuwait. Long-term residence in Kuwait does not guarantee citizenship or permanent residence there, and it was not contested that he was a stateless person. He requested removal to Kuwait or failing that to Gaza. The Immigration Department was unable to secure his removal to either of those locations or to any third country, and continued to hold him in detention. Mr Al-Kateb brought an application for habeas corpus to the Federal Court.

On 3 April 2003, twelve days before the Full Court’s decision in *Al Masri*, the trial judge in Mr Al-Kateb’s proceeding, von Doussa J dismissed Mr Al-Kateb’s application for release. Von Doussa J found that Mr Al-Kateb’s removal from Australia was ‘not reasonably practicable at the present time as there is no real likelihood or prospect of removal in the reasonably foreseeable future’. But he declined to follow Merkel J’s holding at first instance in *Al Masri* that the legislation was subject to an implied temporal limitation. Von Doussa J held that, as long as the government was making all reasonable efforts to secure Mr Al-Kateb’s removal, his detention met both the legislative and constitutional requirements. On the basis that authority to detain hinged on governmental intention, the prospects for removal were held to be legally irrelevant. The appeal from von Doussa J was removed directly to the High Court.

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151 *Al-Kateb* was in effect, if not in fact (an application for special leave to appeal *Al Masri* to the High Court was refused on 14 August 2003), an appeal from *Al Masri*. The provisions, the legal issues, and the class of persons affected were the same.


156 This occurred on an application by the Commonwealth Attorney-General under *Judiciary Act* 1903 (Cth), s 40. This s 40 removal to the High Court was accompanied by the removal of another case *Minister for Immigration and Multicultural and Indigenous Affairs v Al Kafaji* [2002] FCA 1369, which resulted in the High Court decision of *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664. *Al Khafaji* was handed down the same day as *Al-Kateb*. The reasoning in *Al-Kateb* was applied to Mr Al Khafaji’s circumstances.
The High Court heard the submissions from the parties over two days in November 2003, however, it was almost ten months before it delivered its verdict. In August 2004, the High Court held, by a majority of four of seven judges, that s 196 of the *Migration Act* required the indefinite detention of Mr Al-Kateb until such time as he could be removed or was granted a visa. The majority was composed of McHugh, Hayne, Callinan and Heydon JJ, the minority of Gleeson CJ, Gummow and Kirby JJ. With the exception of Heydon J all the judges delivered independent reasons.\(^{157}\)

The judgments were all based on statutory interpretation. Considerable space was devoted to constitutional reasoning, but that reasoning either concluded that there was no constitutional objection to a statutory power of indefinite immigration detention (the majority), or that an implied temporal limitation could be read into the statute so as to avoid ‘serious constitutional problems’ (Gummow and Kirby JJ, in dissent). I will start by considering the majority reasoning on statutory interpretation, then its discussion of the constitutional issues.

### 2.4.1 The *Al-Kateb* majority on statutory interpretation.

To reiterate, the relevant provisions of the *Migration Act* were first, s 196:

\[196\] Period of detention

(1) An unlawful non-citizen detained under section 189\(^{158}\) must be kept in immigration detention until he or she is:

(a) removed from Australia under section 198 or 199; or

(b) deported under section 200; or

(c) granted a visa.

Next, s 198 provided in part:

\[198\] Removal from Australia of unlawful non-citizens

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

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\(^{157}\) Heydon J agreed with the reasons, and orders of Hayne J. Heydon J did enter a reservation as to any decision on whether s 196 is to be interpreted consistently with treaties that have not been incorporated into domestic law, presumably to object to Hayne J’s acceptance of the rule that, in cases of ambiguity, statutory provisions should be read consistently with Australia’s obligations under international law: see *Al-Kateb*, supra note 1 at para 303.

\(^{158}\) For the text of s 189, see *supra* note 109.
The Act provided that a person was to be held in detention ‘until’ one of three specified events occurred: removal, deportation or the grant of a visa (s 196). A person in Mr Al-Kateb’s position, who had requested removal, was to be removed ‘as soon as reasonably practicable’ (s 198).

(a) The majority position.

The reasoning in the judgments is complex, and it is useful to sketch where we are headed, by way of an overall characterization of the majority and minority positions. The majority held that the legislation made comprehensive provision for the termination of administrative detention. The failure to make statutory provision for release in cases where none of the three events nominated as terminating detention occurred was held to amount to an exclusion, by necessary implication, of any presumption against indefinite detention. The minority, to the contrary, held that there was a ‘gap’ in the legislation. That is, the legislation did not make provision for a case where there was no reasonable prospect that one of the three events terminating detention would occur. The legislation did not clearly exclude some form of presumption against indefinite detention.

The majority took the phrase ‘reasonably practicable’ in s 198 to blunt any argument that the purpose of removal could be frustrated, so suspending authority to detain. They held that what mattered was for the executive to keep trying to carry out its duty to remove a non-citizen, by taking such reasonable steps as it could to achieve what was not, presently, reasonably practicable. The majority had no objection to the indefinite administrative detention of non-citizens, as long as the Minister could still be said to be making bona fide efforts to remove the detainee. As expressed at the hearing:

**McHugh J:** Ultimately, you have to go so far as to contend that, in a particular case, you may be able to keep a person in immigration detention for the rest of that person’s life, so long as you have the purpose of preventing the person moving into the Australian community and for the purpose of deporting the person.
The majority endorsed the above government position. Hayne J gave the leading majority judgment on statutory construction. Hayne J stated:

the most that could ever be said in a particular case where it is not now, and has not been, reasonably practicable to effect removal, is that there is now no country which will receive a particular non-citizen whom Australia seeks to remove, and it cannot now be predicted when that will happen… That is not to say that it will never happen.\(^\text{160}\)

The majority position was that authority to detain rested on the government’s intention to remove the non-citizen.\(^\text{161}\) This evidently leaves much less scope for judicial scrutiny than an approach that goes behind that intention to examine the appropriateness of the measures adopted in the light of the ends to which they are directed.\(^\text{162}\) In setting such store by the government’s good faith efforts to remove the detainee, even where such efforts were best assessed as futile, the majority treated the time the detainee spent in detention as legally irrelevant to the interpretation of the statute.

\((b)\) A purposive interpretation of the statute.

The difference between the majority and minority positions on statutory interpretation is best approached by looking at the majority position on the common law presumption against abrogation of liberty. The statute did not make express provision for indefinite detention. The majority held that the general words of the statute, providing for detention until one of the three nominated events occurred, made it ‘unmistakeably clear’ that indefinite detention was provided for. The possible operation of any common law presumption in favour of liberty was not considered until a conclusion had already been


\(^{160}\) Al-Kateb supra note 1 para 229. Italics in original.

\(^{161}\) Hayne J allowed that the relevant purpose would be spent where it was ‘reasonably practicable’ to remove a non-citizen, but the government did not do so: see Al-Kateb supra note 1 at para 251. There are clearly evidential difficulties associated with such a requirement. Callinan J appeared to go further: ‘[i]t would only be if the respondents [the government] formally and unequivocally abandoned that purpose that the detention could be regarded as being no longer for that purpose’: ibid. at para 299.

\(^{162}\) See Glass, supra note 3.
reached on the statutory meaning. At that point it was held that no time limit could be read into the statute by resort to a presumption against the abrogation of fundamental rights.

As outlined, this reasoning suggests a general interpretive approach that denies that common law rights form part of the context in which statutory meaning is determined. On this view, recourse to common law rights would only be legitimate where there was a lack of clarity in the statutory language. In this section, I argue that such a general interpretive approach does not supply the best explanation of the majority’s statutory reasoning. Such an approach would be inconsistent with the position on common law presumptions in Australian law. A better explanation sees the interpretation as driven by substantive considerations particular to immigration. It was in the light of understandings particular to immigration detention that indefinite detention was seen to be a necessary implication of the general words, precluding the operation of any common law presumption.

I first examine the majority’s purposive interpretation of the provisions, before turning to consider their insistence that there was no lack of clarity in the statutory language that needed to be resolved by reference to common law presumptions. The majority clearly held that the very fact that they were dealing with immigration legislation itself counselled against robust judicial review. Hayne J began his judgment with an examination of ‘the history of the regulation of immigration to Australia’. The authorities that he cited and quoted from were taken from the first half of the twentieth century. Amongst these, Hayne J quoted, and endorsed, the following passage from *Robtelmes v Brenan*:

The power to make such laws as Parliament may think fit with respect to aliens must surely, if it includes anything, include the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it. I cannot, therefore, doubt that the Commonwealth Parliament has under that delegation of power authority to make any laws that it
may think fit for that purpose; and it is not for the judicial branch of the Government to review their actions, or to consider whether the means that they have adopted are wise or unwise."

Reflecting a compartmentalised view of the functions of the executive and the judiciary, immigration was clearly seen as a matter entrusted to the former, with close scrutiny by the latter deemed inappropriate. Before engaging with the statutory wording Hayne J looked at the legislative evolution of the mandatory detention regime and the current scheme of the Act. From this survey he concluded that a principal feature of the legislative regime was that a non-citizen without permission to remain in Australia must be detained. Read against this understanding of the immigration context and the overall scheme of the legislation, the general words of the statute were said to be ‘intractable’ in providing for indefinite detention. Release was conditional on one of the three nominated events occurring. And where there was a request for removal, the duty of the government did not extend beyond exerting itself to secure the detainee’s removal. The Act precluded release into the community of a non-citizen who had no permission to remain.

(c) *Common law presumption against legislative abrogation of rights.*

The majority in *Al-Kateb* accepted that it was a rule of Australian statutory interpretation that provisions were not to be construed as abrogating important common law rights in the absence of clear words or necessary implication. In a judgment handed down two years before *Al-Kateb*, *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* [*Daniels*], Hayne J joined in a majority judgment that stated:

It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect. That rule, the expression of which can be traced to *Potter v Minahan*

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163 Robtelmes, *supra* note 10 at 404. This passage from 1906 can usefully be set alongside the quote from McHugh J’s judgment in *Al-Kateb* with which I opened the chapter, suggesting that McHugh J was reasserting an approach first clearly established close to a hundred years earlier, long prior to the development of a human rights jurisprudence.

164 *Al-Kateb supra* note 1 at para 210-211.
[1908]...is a rule which...has been strictly applied by this Court since the decision in Re Bolton; Ex parte Beane [1987].

At the beginning of the single paragraph Hayne J allocated to common law presumptions in Al-Kateb, Hayne J cited the passage from Daniels quoted above. Further in the course of rejecting the application of presumptions against the abrogation of fundamental rights, Hayne J also cited the High Court decision in Coco v R [Coco]. The leading judgment in Coco, to which another member of the Al-Kateb majority, McHugh J, was a signatory, held that the presumption of legality would only be overridden by express words or necessary implication. In expanding on the latter phrase, the High Court held that a presumption would be overridden by necessary implication where ‘necessary to prevent the statutory provisions from becoming inoperative or meaningless’.

Further, in Daniels, the Court had held that in order to apply common law rights it was not necessary to first find a lack of clarity in the statutory words themselves. Here, the common law presumption formed part of the context in which the Court decided on the meaning of the relevant provision. Daniels was a decision on legal professional privilege. The statutory provisions at issue clearly covered documents in relation to which legal professional privilege could be claimed. Nevertheless, the provisions were

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165 Daniels, supra note 48 at para 11, Gleeson CJ, Gaudron, Gummow and Hayne JJ. Re Bolton; Ex parte Beane, supra note 17 was also a case of statutory authority to detain. In Re Bolton a former US serviceman had been arrested in Australia under purported statutory authority to arrest deserters from foreign forces. He was granted habeas corpus, in part on the grounds that the legislation was to be read in light of the common law presumption in favour of fundamental freedoms and that when so read, it did not authorise his detention. The resurgence of common law presumptions in favour of fundamental freedoms in the late 1980s is consistent in its timing with a range of other changes to Australian administrative law in the 1980s that can broadly be characterized as reflecting a rights orientation: Kioa v West, supra note 12.

166 Al-Kateb, supra note 1 at para 241.

167 Coco, supra note 50. The case concerned the statutory authority to enter premises to install a listening device. The relevant fundamental common law right was the right of a person in possession of premises to exclude others from those premises. The lead judgment was that of Mason CJ, Brennan, Gaudron and McHugh JJ.

168 The lead judgment was signed by Gleeson CJ, Gaudron, Gummow and Hayne JJ. On the comparison between Al-Kateb and Daniels see Rose, supra note 3.

170 Daniels, supra note 48. The lead judgment was signed by Gleeson CJ, Gaudron, Gummow and Hayne JJ. On the comparison between Al-Kateb and Daniels see Rose, supra note 3.

171 Another decision in which presumptions in favour of fundamental rights were relied upon by a member of the majority in Al-Kateb was Coleman v Power (2004) 220 CLR 1 (here with reference to freedom of speech), in which Hayne J made use of the principle (see at para 188). It is, however, a less provoking comparator with Al-Kateb than Daniels, supra note 48, in that in Coleman the principle was relied upon to give a narrow construction to a broad and imprecise public order offence, rather than to ground an unexpressed exception.
held not to apply to those documents in the absence of clear and unambiguous words to
the contrary. In other words, in that decision, the legislative provisions were held to be
subject to an unexpressed exception to preserve the privilege.

Nonetheless, in Al-Kateb, Hayne J spoke for the majority when he stated that ‘the words
[of ss 196 and 198] are…intractable’, and that the general principle that statutory
provisions should not be construed as interfering with fundamental rights was here
displaced. There was no ambiguity in the statutory language warranting recourse to
common law presumptions.

When Al-Kateb is viewed in the context of the unexpressed exception read into the statute
in Daniels, the majority’s requirement that there be an ambiguity in the statutory
language does not look like the simple unfolding of a general interpretive approach that
keeps common law presumptions out of sight until the meaning of the statute is
determined. Instead, it looks like the exercise of a judicial discretion to apply the
ambiguity requirement. The question raised by Daniels is why did the Court not follow a
similar course in Al-Kateb? Why did the Court not read an unexpressed exception into
the statute, on the basis of common law presumptions, in the latter case?

The best answer is that the Al-Kateb majority interpreted the statute in the light of a
particular understanding of immigration detention that overrode common law rights.

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172 There may be other aspects of the lack of fit between Daniels and in Al-Kateb not explored in my thesis. The claim in Daniels, in relation to which the common law presumption was successfully invoked, trenched on the Australian Competition and Consumer Commission’s investigatory powers in relation to a possible contravention of the Trade Practices Act 1974 (Cth). Daniels related to an incidental or procedural aspect of the Trade Practices Act, the conduct of investigations, rather than a central policy purpose, such as the removal of unauthorised aliens from Australia under the Migration Act. The Court may be more confident impugning its understanding of the policy preferences of the legislature where those preferences are understood as ancillary questions of process. Of course, this may simply relocate the dispute as the issue of whether detention was an incidental or primary aspect of immigration regulation was in contention in Al-Kateb. Alternatively, it is arguable that Daniels can be distinguished from Al-Kateb on the basis that in Daniels the presumption was invoked to resolve the yes or no question of whether there was a rights infringement, but in Al-Kateb the presumption was invoked to determine the extent of a rights infringement. The latter exercise, in Al-Kateb, involves the Court weighing a policy objective, government control over aliens, against the harm suffered by the individual. This is different from the more categorical task of simply determining whether or not a right applies. It is easier to portray categorisation, as opposed to a weighing process, as the application of determinate legal rules, and determinate legal rules better accord with the judicial preferences of the majority in Al-Kateb.
They adopted a purposive interpretation of the statute that saw a power of indefinite immigration detention as a ‘necessary implication’ of the general words. The crucial premise in the majority’s statutory reasoning was the adoption of an expansive understanding of the purposes of immigration detention. Read in the light of that statutory purpose, the general words were understood to point irresistibly to the conclusion that indefinite detention was intended. Reading an implied temporal limitation into the statute would have frustrated this purpose and so the limitation was rejected. The general words of the statute were read as ‘intractable’ in providing for indefinite detention, and the common law presumption rejected on that basis.\textsuperscript{173}

What becomes apparent in considering the reasoning of the majority in \textit{Al-Kateb} is that what they regarded as a ‘necessary implication’ depended not only on the words used in their context, but also on whether there was a right. The weight accorded to the statutory purposes in the majority reasoning was inseparable from their view that there was no right to liberty that might qualify such purposes. What was implicit in the statutory reasoning, in the breadth of the concept of immigration detention employed, became explicit in the constitutional reasoning. In the constitutional reasoning it was bluntly stated that a non-citizen against whom a deportation order had been issued had no right to liberty. Reading the statutory reasoning in light of the constitutional discussion that followed, it is apparent that a non-citizen facing deportation was understood to have no right calling for the application of the common law presumption.

\textbf{2.4.2 The Al-Kateb majority on the constitutionality of indefinite detention.}

\textit{(a) Introduction.}

The majority’s argument for the constitutionality of indefinite immigration detention in \textit{Al-Kateb} was framed in response to \textit{Lim}. Without expressly overruling \textit{Lim}, the majority undermined the substantive limits on immigration detention found in that decision. The very existence of a constitutional immunity from executive detention was questioned, and the scope of the immigration exception was expanded. The shift from \textit{Lim} to \textit{Al-Kateb}

\textsuperscript{173} \textit{Al-Kateb}, supra note 1 at para 241, Hayne J.
constituted the unambiguous adoption of a rights-precluding approach to immigration detention. In what follows, I trace how this shift was effected in the reasoning.

In *Lim*, the primary purposes of immigration detention were understood to be facilitating consideration of an application for admission and removal. Executive detention was *prima facie* precluded by a constitutional immunity derived from the separation of powers. An exception to this constitutional immunity was allowed on the basis that detention could legitimately be employed to facilitate the primary purposes of processing and removal. The detention provisions under consideration in *Lim* were ‘saved’ by the request for removal provision. This provision was held to transform the nature of detention. The fact that a non-citizen detainee could always request removal was held to mean that continued detention was a matter of his or her ‘concurrence or acquiescence’.  

This position was accompanied by the presumption that a request for removal would lead to removal, and so release from detention. As put by the Full Court of the Federal Court in *Al Masri*, the request for removal provision ‘tilted’ ‘the scales…in favour of [constitutional] validity’ because of its presumed ‘practical effect’. Once a request for removal was made, the question was whether continuing detention was reasonably necessary to effect that request.

As detailed above, the majority’s interpretation of the statute in *Al-Kateb* drained the request for removal provision of such practical effect. The provision’s role in enabling a detainee to secure his or her own release from detention became contingent on the conditions for removal, outside the detainee’s control, lining up in an auspicious fashion. The question is how the majority arrived at the conclusion that the statute, so read, was constitutional.

(b) Treatment of *Lim*.

In assessing the key precedent before him, *Lim*, Hayne J expressed doubt about the existence of any constitutional immunity, on the basis that, given that the class of

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174 *Lim*, supra note 17 at 72, McHugh J.
175 *Al Masri*, supra note 1 at para 61.
exceptions was not closed, it was difficult to identify when and where it operated. This scepticism about the existence of the constitutional immunity seemed to trade on the idea that the constitutional immunity was a rule, weakened by exceptions, rather than a principle, which might be outweighed in certain circumstances, but which still informed judicial attitudes to executive detention.

But the general scepticism expressed as to the existence of any constitutional immunity was not decisive. At the core of the majority’s constitutional reasoning in Al-Kateb was the view that the aliens power precluded any such constitutional immunity. The aliens power was taken to define a zone of legislative and executive power unaffected by constraints on executive detention applicable elsewhere in the law. Hayne J held that detention pursuant to the aliens and immigration powers in their ‘exclusionary’ operation did ‘not infringe the limitations on power which follow from the separation of judicial powers from legislative or other powers’. This amounted to a qualitative shift from Lim.

The reasonable necessity test in Lim was a means of assessing whether immigration detention was sufficiently connected to the core powers of processing and/or deportation. This was an application of the more general understanding that administrative detention was contrary to the separation of powers, unless it could be shown to be a reasonable means to a legitimate end. One started from the assumption that detention was not authorised, and then sought to establish a sufficient connection with the head of power. In Al-Kateb, the majority starts from the contrary assumption, that the aliens power authorizes detention of aliens in its ‘exclusionary’ operation. The aliens power was held, either literally or effectively, to directly authorise the detention of non-citizens who did not have permission to remain. This was to radicalise the nature of the exceptional

176 Al-Kateb supra note 1 at para 258.
177 Ibid. at para 260.
178 Ibid. at para 42, McHugh J; see also at para 255-256, Hayne J. Hayne J did not claim that detention was directly authorised by the aliens power, as did McHugh J. But he effectively reproduced the same position by holding that segregation from the community was one of the purposes of immigration detention, so obviating any need to determine whether the detention of a non-citizen who had no right to remain was ‘reasonably necessary’. This purpose of segregation from the community is discussed further in the text below.
legal circumstances of immigration detention. Immigration detention was no longer an exception to a constitutional immunity, to be justified by its role in facilitating certain activities, namely processing and removal. It was a distinct regime of legislative and executive power that was effectively independent of the normal operation of the separation of powers principles.

The independence of immigration detention from considerations derived from the separation of judicial power was closely aligned with attitudes toward personal liberty. As stated earlier, what was implicit in the statutory reasoning, in the scope given to the purposes of immigration detention, became explicit in the constitutional reasoning. Hayne J stated ‘[n]or is there any judgment made against a person otherwise entitled to be at liberty in the Australian community. The premise for the debate is that the non-citizen does not have permission to be at liberty in the community.’

(c) Segregation as an independent rationale for immigration detention.

In *Al-Kateb*, the majority held that the aliens power was not to be read ‘in quite so confined a manner as is implicit in the joint reasons in [Lim]’. Hayne J held that there was a third purpose that should be added to the list of primary purposes under the aliens power, namely ‘segregation’ of non-citizens from the ‘Australian community’:

> The power with respect to both heads [aliens and immigration] extends to preventing aliens entering or remaining in Australia except by executive permission. But if the heads of power extend so far, they extend to permitting exclusion from the Australian community – by prevention of entry, by removal from Australia, and by segregation from the community by detention in the meantime.

Hayne J provided no authority for what amounted to a jurisprudential shift of wide-ranging significance. The new purpose of ‘segregation from the community’ was simply

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180 *Ibid.* at para 255. See also at para 227-228.
181 *Ibid.* at para 255, emphasis in original. See also at para 247, Heydon J agreeing. At para 45 McHugh J also expressly endorses separation from the Australian community. ‘As long as the purpose of detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive’ (emphasis added). The fourth member of the majority, Callinan J, held at para 289 that he did not need to decide whether there was a rationale for detention distinct from facilitating deportation. This has the result that *Al-Kateb* did not supply a clear High Court majority that the aliens power supports legislation for the purpose of segregation of non-citizens from the Australian community.
seen as the unfolding of the exclusionary logic of the authorities. He slid from exclusion and removal from Australian territory to exclusion and removal from the Australian community. This was a remarkable hardening of the jurisprudence whereby the absence of a right to remain was converted into the absence of a right to liberty.\textsuperscript{182}

Hayne J’s reasoning here was indicative of patterns of reasoning in support of a rights-precluding approach to immigration detention more generally. One begins with the power to exclude and deport. One then generalises from these powers to a far more sweeping power to exclude from the ‘Australian community’. The legal questions are then approached in the light of this more general power, licensing expansive and exclusionary readings of the powers of immigration detention. The power to segregate from the community obviated any need to assess detention for proportionality with the purposes of processing or removal. It applied to any non-citizen in the relevant statutory class simply by virtue of the fact that they were here (and had no permission to be).

\textit{(d) Prudential justifications for a power of indefinite detention.}

The majority also advanced prudential justifications for its position. One theme strongly urged by the majority for seeing immigration detention as an absolute barrier to entry into the ‘Australian community’ was that if the Court were to allow release, this would ‘thwart the operation of the \textit{Migration Act}', as it ‘would mean that such persons, by their illegal and unwanted entry, could become \textit{de facto} Australian citizens’.\textsuperscript{183} Release was portrayed as conferring on unauthorised non-citizens an undeserved reward for wilfully flouting the nation’s ability to determine its own membership.\textsuperscript{184} This language of fault jarred in the context of a case concerned with a person who ‘through no fault of his own or of the authorities…cannot be removed.’\textsuperscript{185} The spectre of ‘\textit{de facto} citizenship’ overlooked, amongst other things, an alien’s continuing vulnerability to deportation. As

\textsuperscript{182} Gummow J’s objections to this shift are discussed in the text below in section 2.4.4.

\textsuperscript{183} \textit{Ibid.}, at para 46, McHugh J. Recall the response of the Full Court in \textit{Al Masri} to the suggestion that release would amount to \textit{de facto} citizenship. They rejected the suggestion that release into the community, while still remaining liable to removal, was equivalent to having a right to remain: see \textit{supra} text accompanying note 139.

\textsuperscript{184} See also \textit{ibid.}, at para 262, Hayne J; at para 299, Callinan J.

\textsuperscript{185} \textit{Ibid.} at para 21, Gleeson CJ.
we saw, Mr Al Masri was released and then subsequently re-detained shortly prior to his removal from Australia. This furnished a contemporaneous practical example of the distinction between a right to release and a right to remain. The power to detain for the purpose of removal was only suspended when there was no real prospect of removal. Should the government subsequently establish that there was a real prospect of removal in the reasonably foreseeable future, use of detention to ensure the non-citizen’s availability for removal would again be justified. Further, the references to such non-citizens acquiring ‘de facto citizenship’ inadvertently demeaned citizenship, treating it as having no content beyond being ‘at large’ in the community.  

(e) McHugh J’s shift.

McHugh J was the only judge to sit on both Lim and Al-Kateb, forming part of the majority in both cases. As correctly registered by Gummow J, and discussed earlier, in Lim McHugh J had held that the detention regime did not contravene the separation of powers because the non-citizen always had it within his or her power to effect release from detention by requesting removal from Australia. In essence, in Lim, McHugh J relied on the ‘prison with three walls’ argument to square immigration detention with the requirements of the separation of powers (as did the joint judgment). He held that the fact that the detainee had not exercised his or her statutory right to request removal meant that he or she had ‘chosen’ to remain in detention, at least as a matter of legal fiction. McHugh J’s reasoning in Lim held that in the absence of any such capacity for purposeful action on the part of the detainee, as provided by a request for removal provision, the detention would be involuntary in a sense that was contrary to the separation of powers.

The fact that McHugh J had held that this ability to effect release by requesting removal was ‘vital’ to the constitutionality of the detention power in Lim, was not even mentioned by him in Al-Kateb. In Lim, he had suggested that: ‘[i]f a law authorising the detention of an alien went beyond what was reasonably necessary to effect the

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186 For the purposes of discussion I have adopted Hayne J’s assumption that the only alternative to detention is an alien being ‘at large’.
187 In his dissent Gummow J made use of the reasoning of McHugh J in Lim: Al-Kateb supra note 1 at para 129, Gummow J.
188 Lim, supra note 17 at 72.
deportation of that person, the law might be invalid because it infringed Ch. III of the Constitution’. A few months after Al-Kateb, in the judgment of Re Woolley, McHugh J suggested that the majority in Al-Kateb had signalled the end of the ‘reasonably necessary’ test. What mattered was the character of a law’s purpose. If the purpose of a law could be characterized as non-punitive, then it did not infringe the separation of powers. Where a non-punitive purpose was identified, one would never proceed to single out features of a law for challenge on the grounds that they were not necessary in the light of the ends of the law.

There was a shift between Lim and Al-Kateb in McHugh J’s understanding of the constitutional constraints that the separation of powers imposed on immigration detention. This shift occurred against the background of strong tensions between the Australian government and judiciary in the immigration area. These tensions have been extensively canvassed in the literature. Here, I reference these tensions by way of extra-judicial statements by McHugh J, delivered two or so years prior to Al-Kateb:

I do not share the belief that tension between the judiciary and Executive is a public good and indicative of healthy, well-oiled government. No doubt the doctrine of separation of powers makes conflict between these two arms of government inevitable. Occasional conflict may do no harm. But if tension persists, as it has done in the migration area in recent years, it damages the public interest. If the executive government is continually criticising the judiciary, the authority of the courts of justice is likely to be undermined and public confidence in the integrity and impartiality of the judges is likely to be diminished. Continuing conflict is also likely to induce the government to prevail on the legislature to take the extreme step of abolishing judicial review with the result that the rule of law is undermined.

To put these statements in context, the article as a whole was a sober defence of the judicial role in the face of executive attack. The last sentence of the quote needs to be read against the fact that the preceding year a privative clause had been inserted into the Migration Act that sought to ‘restrict access to judicial review in all but exceptional

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189 Ibid., at 65.
190 Re Woolley, supra note 33 at para 71.
circumstances’, to use the words of the Explanatory Memorandum.¹⁹³ By way of even more immediate context, in the weeks before McHugh J gave his talk, the Minister for Immigration had criticised the Federal Court on television, in essence for not interpreting the privative clause as a complete barrier to judicial review. These criticisms were made pending judgment on key decisions on the privative clause and the Chief Justice of the Federal Court called on the Minister to apologise. The Minister sent the Solicitor General to court, who offered an expression of regret that the comments had been misconstrued as an attack on the Federal Court.¹⁹⁴

There was no trace of any loss of resolve to ‘do the right thing’ in McHugh J’s statements; quite the contrary. McHugh J’s account contained several themes salient to our discussion, including his evident concern that the government would seek to abolish judicial review, over a wider or narrower area. He also emphasised the distinction between the government’s ability to alter the substantive law on the one hand, and doubts as to the constitutionality of preventing courts from examining the legality of its conduct on the other. He affirmed a view that the rule of law demands access to the courts, but does not demand that public power be substantively justified with reference to any particular values or principles. As is usual in judicial speeches counselling restraint by all the parties, there was an emphasis on the need to avoid judicial overreach.

2.4.3 The Al-Kateb minority - Gleeson CJ.

Gleeson CJ, alone among the judges on the bench, confined his reasoning to statutory interpretation and the common law presumption in favour of fundamental freedoms. He held that the statute did not, in express terms, address the ‘exceptional’ circumstances before the Court. Indefinite detention was qualitatively different from finite detention and the Migration Act made no provision for it. Mr Al-Kateb had requested removal, but ‘removal is not possible in the circumstances which prevail at the time and which are

¹⁹³ Commonwealth, House of Representatives, Migration Legislation Amendment (Judicial Review) Bill 2001, Revised Explanatory Memorandum, p 6. This was the privative clause subsequently substantially eviscerated by the High Court’s decision in Plaintiff S157/2002, supra note 52.
¹⁹⁴ In his speech McHugh J simply records ‘Regrettably, in recent weeks, the tension between the executive government and the Federal Court has accelerated.’
likely to prevail in the foreseeable future. What happens then?" He held that the statute was ‘silent’ in these circumstances.

The reading of the statute contended for by the Australian government (and accepted by a majority of the Court) was that ‘the terms of the statute are general, but tolerably clear, and if there is silence on the particular problem raised by the case of the appellant, that is only because it is sufficiently covered by the general words.’ Gleeson CJ’s response to the government’s submission was:

> the possibility that a person, regardless of personal circumstances, regardless of whether he or she is a danger to the community, and regardless of whether he or she might abscond, can be subjected to indefinite, and perhaps permanent, administrative detention is not one to be dealt with by implication.

Such an egregious infringement of a fundamental right could only be provided for by express words. In setting out his interpretive approach, he referred both to the Australian lineage of the presumption against abrogation of ‘certain human rights or freedoms (of which personal liberty is the most basic)’, and to well-known contemporary expressions of the ‘principle of legality’ and its rationale in contemporary British jurisprudence.

Gleeson CJ and the majority shared the same rule of statutory interpretation, namely that fundamental common law rights were not to be abrogated in the absence of express words or necessary implication. As outlined earlier, on the majority’s understanding of immigration detention, indefinite detention was a necessary implication of the statutory language. Gleeson CJ held that the power of indefinite detention proposed was too grave a violation of personal liberty to be provided for other than by express words. He read the statute as subject to an unexpressed exception to the effect that where removal was not reasonably practicable, then authority to detain for the purposes of removal was suspended.

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195 Al-Kateb supra note 1 at para 1. See also para 13, 14 and 21.
196 Ibid. at para 18.
197 Ibid. at para 21.
198 Ibid.
199 Ibid., at para 19. He cited passages from Lord Hoffmann in Simms, quoted supra note 52, and from Lord Steyn in SSHD v Pierson, supra note 56.
The above account implemented his understanding of the legitimate purposes of immigration detention. While his reasoning was conducted entirely on the basis of common law presumptions of statutory interpretation, his presentation of the purpose of the power of immigration detention took the constitutional discussion in Lim as its starting point. He held, with reference to Lim, that the Migration Act’s ‘scheme of mandatory immigration detention is a valid law with respect to aliens on the basis … that a limited authority to detain an alien in custody is conferred as an incident of the executive powers of excluding and removing aliens’.200 Gleeson CJ clearly reaffirmed the view expressed by the joint judgment in Lim that immigration detention was an incidental or secondary power, justified by its role in facilitating removal.201 If events precluded removal, then detention was deprived of its rationale, and the power to detain lapsed. And, as was done in Lim, Gleeson CJ explained the need to justify immigration detention with reference to the fact that the law’s protection extends to all within the jurisdiction: ‘So characterized, the power…does not involve an invalid attempt to confer on the Executive a power to punish people who, being in Australia, are subject to, and entitled to the protection of, the law.’202

The majority viewed immigration regulation as a context in which the normal presumptions of statutory interpretation did not apply. Gleeson CJ held that the continued robust application of those presumptions was warranted in the context. The question is, what accounts for these different positions? The basic difference is that the majority thought that common law presumptions did not apply where the subject matter was the detention of non-citizens, while Gleeson CJ held that such presumptions were principles of universal application. Underlying this difference were contrasting views on whether a non-citizen who did not have permission to remain retained a right to liberty.

The distinction between the interpretive approach of the majority and that of Gleeson CJ was illustrated by their divergent responses to the fact that the detention in question was

200 Al-Kateb, supra note 1 at para 4.
201 Contrast McHugh J’s statement: ‘The power to detain aliens is not an incidental power…Such laws…deal with the very subject of aliens. They are at the centre of the power, not at its circumference or outside the power but directly operating on the subject matter of the power’: ibid., at para 39.
202 Ibid., at para 4.
mandatory, not discretionary. The majority read the mandatory nature of detention as confirmation of a general legislative intent that a non-citizen in Australia without permission must be detained. The concern was with discerning what the members of the legislature were most likely to have intended in enacting the statute. Gleeson CJ focussed on the fact that mandatory detention was blind to context. The arbitrariness of the detention measures, their lack of attention to whether, in any given case, detention was a reasonable means of securing the nominated ends, made any claim that indefinite detention was ‘necessary’ harder to sustain. Mr Al-Kateb’s circumstances raised the prospect that an individual ‘regardless of personal circumstances, regardless of whether he or she is a danger to the Australian community, and regardless of whether he or she might abscond’ could be subjected to indefinite detention. Gleeson CJ stated:

In a case of uncertainty, I would find it easier to discern a legislative intention to confer a power of indefinite administrative detention if the power were coupled with a discretion enabling its operation to be related to the circumstances of individual cases, including, in particular, danger to the community and likelihood of absconding.

As noted by Ben Saul, Gleeson CJ’s suggestion here effectively replicates a human rights analysis of the problem, in requiring that detention be capable of being justified as necessary, and a proportionate means of ensuring a legitimate aim (community protection or preventing absconding). In summary, the majority assessed the mandatory nature of detention with reference to certain assumptions about what Parliament was likely to have intended, while Gleeson CJ held that the legislation fell to be interpreted in the light of the fundamental principles governing the relations between Parliament, the executive and the courts.

For Gleeson CJ, the role of a court in statutory interpretation was that of construing the legislation in its best light with reference to these shared commitments:

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203 Ibid., at para 21.
204 Ibid., at para 22. Gleeson CJ, at para 29, deferred the issue of the power of the courts to impose conditions or restraints on a non-citizen who posed a danger to the community, or who could not be removed because her country of nationality or other potential receiving countries regarded her as a dangerous person. I return to this deferral in the concluding chapter, Chapter 6, section 6.4.1.
A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.206

This passage succinctly expresses the distance between Gleeson CJ’s understanding of law and the judicial role, and that of the majority. The judicial role was not simply that of sovereign agent dedicated to furthering the intention of Parliament, understood in authorial terms. The judiciary was understood to have an obligation to protect certain fundamental legal values. The protection of these fundamental values was understood to be a collaborative project as between Parliament and the courts. Where the Parliament wanted to depart from these values, the principle of legality required that it direct its attention to the freedom in question, here the freedom from indefinite detention, and consciously decide to abrogate that freedom by express words. On Gleeson CJ’s account there was nothing to stop the legislature rejecting the ‘working hypothesis’ that it intended to respect fundamental freedoms.207 It was open to Parliament to explicitly authorize the indefinite detention of those in Mr Al-Kateb’s situation. But it was incumbent on the courts to ensure that Parliament unequivocally took responsibility for such a measure, and to draw public attention to any such departure.

This can be contrasted with the position adopted by Hayne J. In the last paragraph of his reasons, Hayne J quoted the following passage from a dissenting judgment in the United States Supreme Court:

Think what one may of a statute…when passed by a society which professes to put its faith in [freedom], a court has no warrant for refusing to enforce it. If that society chooses to flinch when its principles are put to the test, courts are not set up to give it derring-do.208

206 Al-Kateb supra note 1 at para 20.
207 See also Electrolux Home Products v Australian Workers Union (2004) 221 CLR 309 at para 21, Gleeson CJ: ‘The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known to both Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.’
208 United States v Shaughnessy, 195 F 2d 964 (2nd Cir 1952) at 971, quoted in Al-Kateb supra note 1 at para 269, Hayne J. Substitution in square brackets inserted by Hayne J. As noted by Hayne J, ‘the decision of the Second Circuit Court of Appeals, from which Judge Hand dissented, was reversed by the Supreme Court of the United States in Shaughnessy v United States; ex rel Mezei (1953) 345 US 206. Mr Ignatz Mezei was the husband of a U.S. citizen and had resided in the U.S. for 25 years. He returned to visit his mother in Romania, spending time in Hungary. On his return to the United States, the U.S. Attorney
This runs directly counter to the democratic rationale for the principle of legality which, to use Learned Hand J’s words, views the judicial function as giving society ‘derring-do’. Either the Parliament expressly ‘flinches’, or the society’s principles continue to form the working assumption on which its enactments are interpreted. The principle of legality gives expression to the idea that constitutionalism should help to restrain our excesses.

Gleeson CJ rejected the idea that authority to detain could rest on the government’s intention to remove the relevant non-citizen. He stated that the primary purpose of detention, namely facilitating removal, was ‘objective. What is in question is the purpose of detention, not the motives or intention of the Minister, or the officers referred to in s 198’. Purpose was ‘objective’ in the sense that it was a judicially ascertainable fact independent of the executive’s intention. It was ultimately for the judiciary to determine whether removal was reasonably practicable, and if it was not, to order release until such time as it was. Such release could be on conditions, including to notify the department of any change of address, and reporting conditions such as had been ordered by the trial judge in *Al Masri*.

### 2.4.4 The *Al-Kateb* minority - Gummow and Kirby JJ.

Gummow J arrived at the same legal position as Gleeson CJ, but via a presumption in favour of constitutional validity rather than by way of a common law presumption against the abrogation of fundamental freedoms. As with Gleeson CJ’s common law

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*General ordered that Mr. Mezei be excluded without a hearing, based on confidential information. He tried repeatedly to leave the United States, but because no country would take him he remained in detention in the New York City Harbour. For subsequent historical evidence that the U.S. Attorney-General’s suspicions about Mr Mezei were misguided, and based on what was suspected to be weak and questionable evidence at the time: see Charles D. Weisselberg ‘The Exclusion and Detention of Aliens: Lessons from the lives of Ellen Knauff and Ignatz Mezei’ (1995) 143 U. Pa. L. Rev. 933.*

209 *Al-Kateb supra* note 1 para 17.

210 This contrast between the purpose of detention as judicially ascertainable fact, and as a matter of government intention is further developed in Gummow J’s dissent though in the context of Australian constitutional doctrine (see further discussion in the text below).

211 The power of a court to impose conditions on release was a central issue of contention between the dissents and the majority. Gleeson CJ held that a remedy of the nature of habeas corpus was inherently adaptable, and the imposition of conditions was not antithetical to the remedy: *Al-Kateb, supra* note 1 at para 23-28. Hayne J was troubled by the lack of any statutory basis for the imposition of such conditions: *ibid.* at para 242-244.
analysis, Gummow J’s constitutional analysis (adopted by Kirby J)\textsuperscript{212} was centrally concerned with the need for court-determined limits on the authority to detain, defined with reference to the purpose of detention \textit{and distinct} from government statements of intention.

On Gummow and Kirby JJ’s view, as interpreted by the government, the statute encountered a ‘serious constitutional problem’.\textsuperscript{213} Gummow J cited \textit{Lim} as authority for the proposition that the aliens power was subject to separation of powers considerations,\textsuperscript{214} and that accordingly ‘the power of the Parliament to authorise the administrative detention of aliens is not at large…the power does not extend to authorise detention for any purpose selected by the Parliament’.\textsuperscript{215} The separation of powers set limits on the legally permissible purposes of immigration detention, and the legislative powers took their character from these purposes.

The central target of Gummow J’s reasoning was the majority view that authority to detain rested on ‘an executive opinion as to the continued viability of a purpose of deportation’.\textsuperscript{216} He concluded his reasoning on statutory construction with a caustic rejoinder to the majority, stating:

\begin{quote}
The point of present importance for the appellant is that the continued detention of this stateless person is not mandated by the hope of the Minister, triumphing over present experience, that at some future time some other State may be prepared to receive the appellant.\textsuperscript{217}
\end{quote}

\textbf{(a) The ‘constitutional fact’ doctrine.}

Gummow J introduced an additional element into the constitutional reasoning, the ‘constitutional fact’ doctrine from \textit{Australian Communist Party v Commonwealth

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\textsuperscript{212} Kirby J held that the constitutional reasoning of Gummow J was ‘further supported…by considerations of international law and the common law presumption in favour of personal liberty.’: \textit{Ibid.}, at para 150.
\textsuperscript{213} This was an explicit adoption of the approach taken by a majority of the United States Supreme Court in \textit{Zadvydas v Davis}, 533 US 678 (2001) at 690: \textit{ibid.} at paras 159, 193, Kirby J; see also para 118, Gummow J.
\textsuperscript{214} \textit{Al-Kateb}, \textit{ibid.} at para 110.
\textsuperscript{215} \textit{Ibid.} at para 131.
\textsuperscript{216} \textit{Ibid.} at para 88.
\textsuperscript{217} \textit{Ibid.} at para 125.
}
[Communist Party Case].\textsuperscript{218} The introduction of this additional element develops the objection to authority to detain resting on the executive’s intention to remove the non-citizen. Further, the majority’s indifference to this argument serves to clarify the nature of its legal position.

In the \textit{Communist Party Case}, the Australian High Court invalidated the \textit{Communist Party Dissolution Act 1950} (Cth). The decision is almost universally regarded as one of Australian constitutionalism’s ‘greatest triumphs’.\textsuperscript{219} Amongst other matters, the legislation banned the Communist Party and allowed an individual to be ‘declared’ by the executive if a ‘communist’ and ‘engaged’ or ‘likely to engage’ it activities prejudicial to the security and defence of Australia. Declared persons could not be employed by the Commonwealth or by a Commonwealth authority. They could not hold office in a union in an industry declared by the executive to be ‘vital to the security and defence of Australia’. As noted earlier in the chapter, the Australian federal government is one of limited powers. It can only exercise those powers explicitly or impliedly conferred by the \textit{Constitution}. The central issue in the \textit{Communist Party Case} was who gets to decide the scope of those powers?

The operative provisions of the \textit{Communist Party Dissolution Act} (1950) were preceded by a long preamble containing nine ‘recitals’. These recitals stated the powers principally relied upon: the defence power, the express incidental power, and the executive power.\textsuperscript{220} They went on to summarise the case against the Communist Party and, most importantly, asserted that the measures taken in the Act were necessary for Australia’s defence and security and the execution and maintenance of its \textit{Constitution} and laws, thereby seeking to ground the Act’s operative provisions in the heads of power listed above.

\textsuperscript{218} \textit{Australian Communist Party v Commonwealth} (1951) 83 CLR 1 [Communist Party Case].
\textsuperscript{220} The \textit{Constitution}, supra note 16 at s 51(vi), 51(xxxix) and 61 respectively.
The majority of the Australian High Court held that the Parliament could not recite itself into power.\textsuperscript{221} The judiciary had the final word on whether legislation was within power, and the Parliament could not validly base legislation on its own declaration (or that of an executive official) that a fact that was a precondition to its power to legislate existed. The judiciary had to establish that the necessary ‘constitutional fact’ actually existed.\textsuperscript{222} It was for the judiciary to determine whether there was any factual connection between the declared bodies and persons, and subversion (as needed to bring the legislation under the defence power).

Returning to Gummow J’s dissent in \textit{Al-Kateb}, he adopted the proposition (from \textit{Lim}) that the constitutional validity of immigration detention, under separation of powers principles grounded in Chapter III of the \textit{Constitution}, depended on the ‘continued viability of the purpose of deportation or expulsion’. As he made clear, ‘the continued viability of the purpose of deportation’ was the ‘constitutional fact’ necessary to establish constitutional authority to detain Mr \textit{Al-Kateb}. Gummow J summed up his reasoning in the following statement:

\begin{quote}
The continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government. The reason is that it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III. The location of that boundary line itself is a question arising under the \textit{Constitution} or involving its interpretation, hence the present significance of the \textit{Communist Party Case}. Nor can there be sustained laws for the segregation by incarceration of aliens without their commission of any offence requiring adjudication, and for a purpose unconnected with the entry, investigation, admission and deportation of aliens.\textsuperscript{223}
\end{quote}

\textsuperscript{221} \textit{Communist Party Case}, \textit{supra} note 218 at 206, McTiernan; at 263, 265, Fullagar J.
\textsuperscript{222} \textit{Ibid.}, at 193, Dixon J; at 206, McTiernan J; 222, 225, 226, Williams J; 258, 263, Fullagar J; 272-275, Kitto J.
\textsuperscript{223} \textit{Al-Kateb}, \textit{supra} note 1 at para 140. Gummow J went on to enter a caveat to the proceeding proposition on the ‘segregation by incarceration of aliens…’ with reference to the defence power. This suggests the possibility of an exception to his position analogous to the ‘terrorism exception’ in \textit{Zadvydas}, \textit{supra} note 119 (discussed in Chapter 6, section 6.4.1), or the wartime detention of enemy aliens (for use of this as an analogy see the judgment of Brooke LJ in \textit{A v Secretary of State for the Home Department} [2004] QB 335, discussed in Chapter 3, section 3.11 below).
Kirby J supported the above reasoning, stating: ‘[i]t remains for the judiciary in each contested case to interpret the applicable law…this requirement has proved an important, even vital, protection for individual liberty.’

The majority largely ignored Gummow J’s analysis. McHugh J stated that the *Communist Party Case*, central to the reasoning of Gummow and Kirby JJ, did not assist Mr Al-Kateb. This was despite the fact that McHugh J fully agreed with the statement of the constitutional fact doctrine provided above, and had extolled the merits and importance of the *Communist Party Case* in extrajudicial speeches. As with the difference between the majority and Gleeson CJ on the legal relevance of common law presumptions, both the majority and the dissents understood themselves to be bound by the same general rule. The difference between them rested on different understandings of immigration detention. The difference can be highlighted when Gummow J’s reasoning is represented as a syllogism:

1. Any finding of fact necessary for the constitutional validity of a law or executive act is to be made by a court (‘the constitutional fact’ point); and
2. The constitutional validity of detention for the purpose of removal relies on removal remaining a viable option (the ‘Lim’ point); therefore
3. It is for the courts to determine whether removal remains a viable option.

The majority accepted the first point. But they did not agree with the second point. They held that the viability of removal was irrelevant to the constitutionality of detention for the purposes of deportation. As discussed above, they held when detention was authorized under the aliens power, separation of powers concerns were effectively precluded. The constitutionality of detention rested on the facts that a non-citizen had no

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224 *Al-Kateb supra* note 1 at para 155. Kirby J makes the *Communist Party Case* central to his statement.
226 ‘Even a law whose object is purely protective will infringe Ch III if it prevents Ch III courts from determining some matter that is a condition precedent to authorising detention’: *Ibid.*, at para 44, McHugh J.
227 McHugh J’s praise for the *Communist Party Case* was noted by Kirby J in his dissent in *Al-Kateb, ibid.*, at para 149. For example McHugh J had stated ‘[i]t is difficult to believe that Australia would have been as politically free a country as it is today if the High Court had upheld the validity of the legislation challenged in the *Communist Party Case*. If that legislation had survived, its legacy must have influenced the way that we give effect to political rights and freedoms.’: from McHugh J, ‘The Strengths of the Weakest Arm’ paper delivered at the Australian Bar Association Conference, Florence, 2 July 2004.
permission to be here, and the government had the intention of removing him or her from Australia.

The majority would respond to Gummow J that, to use his words, they had determined ‘the placing…of that boundary line which marks off a category of liberty from the reach of Ch III’. It was simply that the boundary line marked off a much larger area, defined by the presence of a non-citizen who had no permission to be in Australia. Thus, the majority saw no tension between the position they adopted and the requirements of the Communist Party Case. On their view, it was only if the legislation barred the courts from determining whether a person was a non-citizen in Australia without permission that the Communist Party Case would have had legal relevance for them.

Gummow J’s analysis accurately targets what was wrong with the attempt to justify indefinite detention with reference to the government’s intention to remove an individual. Where authority to detain rests on the intentions of the executive, the executive is left to determine the limits of its own authority. The limits set by the majority were so widely drawn as to effectively leave non-citizens subject to a removal order in a legal black hole.

(b) Exclusion from the ‘Australian Community’?

In his dissent in Al-Kateb, and then again in a judgment delivered two months later, Re Woolley, Gummow J criticised Hayne J’s use of the phrase ‘exclusion from the Australian community’ in Al-Kateb. Gummow J’s comments on the phrase illustrate his objections to the idea that ‘segregation from the community’ could constitute a legitimate purpose of immigration detention. What he centrally objected to was the shift from the idea that a non-citizen was excluded from membership in the Australian community (as attested to by the fact that he or she had no right to remain) to the idea that a non-citizen

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228 Al-Kateb supra note 1 at para 140, see text at supra note 223.
229 Further the legal requirement that the alien have ‘no permission to be here’ was not a constitutional matter. The only such ‘right’ they could have would be one conferred by statute.
230 Hayne J referred to the aliens and immigration power not infringing the separation of powers in their ‘exclusionary’ operation: Al-Kateb supra note 1 at para 260. It was not clear if this was an additional constitutional constraint, and if so on what basis.
231 Re Woolley, supra note 33.
had no right to be *in* the Australian community, that is ‘at large’. In *Al-Kateb*, he objected that statements in the case law to the effect that a non-citizen in Australia without permission could not become a member of the community could not be understood to ‘support a system of segregation by incarceration without trial for any offence and with no limit of time or a limit fixed only by an executive opinion as to the ultimate possibility of their removal from Australia’.*232 That is, one should not treat judicial statements on who was and was not a member of the community as addressed to who could and could not be detained. The fact that Gummow J was troubled by the authoritarian implications of a rule that a non-citizen without a right to remain thereby had no right to liberty was confirmed when he revisited the issue in *Re Woolley*: ‘[t]he reference to ‘exclusion’ [in the phrase ‘exclusion from the “Australian community”’] may also be an Orwellian euphemism’.*233

In addition, he was troubled by the use of a term, ‘community’, that had been central in defining the scope of the immigration power in the days of the White Australia policy, before the rise of national citizenship. With reference to historical considerations that overlapped with the discussion of ‘community’ earlier in this chapter, Gummow J concluded his review of the term in constitutional discourse with the statement: ‘Here is a political idea whose time has come and gone. Still less is it a sound constitutional doctrine to construe the aliens power by reference to notions of “protection” of the “Australian community” by excluding aliens from “membership” of that community.’*234

In *Re Woolley* Hayne J was moved to respond to Gummow J’s criticism, but he did so in a way that is deaf to its import.*235 He objected that he did not mean to invoke the separate communities that evolved in the British Empire in the late nineteenth and early twentieth centuries. He had simply meant to describe the operation of the legislation. The detention powers served to segregate non-citizens who did not have permission to remain in Australia from the Australian community. It was the fact that they applied to

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232 *Al-Kateb supra* note 1 at para 92.
233 *Re Woolley, supra* note 33 at para 137.
aliens that supplied the connection with the head of legislative power. He did not address Gummow J’s underlying concern that he had confused questions of who is a member of the community with who can be physically present in the community. Gummow J’s underlying objection was to the assumption that the absence of a right to remain equated to the absence of a right to liberty.

2.4.5 Judicial exchange on the relevance of international law.

McHugh J was clearly perturbed by the prospect of indefinite detention and aware that it contravened Australia’s commitments under international human rights instruments. But he held that he could not, in his judicial capacity, do anything about it. The quote from McHugh J to that effect which opened the chapter followed an extended exchange with Kirby J on the proper influence of international law, in particular international human rights law, on constitutional interpretation. That debate develops McHugh J’s view that human rights considerations were only legally relevant if expressly endorsed by the legislature, or included in the Constitution by way of amendment.

To begin with the positive case, Kirby J argued that it was time for Australian law to move on from the position, usually attributed to a judgment of Dixon CJ in 1945, that international law was not a proper influence on constitutional interpretation. Kirby J argued that there should be an interpretive principle favouring consistency with international law, and particularly the international law of human rights and fundamental freedoms. He indicated his understanding of the limits on the interpretive principle:

Where the Constitution or a valid national law are clear, the duty of a court, which derives its power and authority from the Constitution, is to give effect to the law’s requirements. As such, international law is not part of, nor superior to, our constitutional or statute law. Unless incorporated it is not part of our municipal law.

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236 And see McHugh J’s comments in the decision Re Woolley two months after Al-Kateb, concerning the holding of children in immigration detention. McHugh J concluded that the Australian mandatory immigration detention regime was probably ‘arbitrary’ and suggesting that ‘periodic judicial review of the need for detention, some kind of defined period of detention and the absence of less restrictive means of achieving the purpose served by detention of unlawful non-citizens’ might be required if the regime was to avoid breaching ‘the Refugees Convention, the ICCPR or the Convention on the Rights of the Child’: Re Woolley, supra note 33 at para 114 and more generally para 107-116.

237 Polites v The Commonwealth (1945) 70 CLR 60 at 78, Dixon J.

238 Al-Kateb supra note 1 at para 179.
However, these limits were held to be consistent with an interpretive function for international law, and in particular international human rights law, ‘it is incorrect, with respect, to say that Australian courts, including this Court, have no function in finding ‘rights’ in the text of the Constitution. Some of this Court’s decisions, declaring what are in effect ‘rights’, would have been regarded as astonishing’. 239

Kirby J put his position as simply an argument for broadening the contextual and historical materials essential to develop an evolving understanding of what the Constitution means and how it operates to, ‘add a reference to one of the most important legal developments that is occurring and to which national constitutions must adapt, namely the growing role of international law, including the law relating to human rights and fundamental freedoms.’ 240

Kirby J’s view was that the principles supplied by the interpretive context play a critical role in how statutory and constitutional text is read, and that an unavoidable, and valuable, part of the contemporary legal context was international human rights jurisprudence. In arguing for a shift from the orthodox view set down in a 1945 judgment that international law was not an influence on constitutional interpretation, Kirby J raised what has been dubbed the question of ‘judicial innocence’. 241 A judge in 1945 might have conceived of international law as having no bearing on the legality of the indefinite administrative detention of non-citizens. Kirby J’s point was that this was not a tenable position to adopt in 2004. 242

McHugh J, to the contrary, held that held that his judicial role demanded that he treat international human rights jurisprudence as irrelevant to the case. McHugh J’s opposition to interpretation shaped by the demands of conformity with international law ran deep. He rejected the development of constitutional interpretation so as to encompass the influence of international law. But further, he only grudgingly accepted, as ‘too well

239 Ibid. at para 180.
240 Ibid., at para 183.
242 Al-Kateb supra note 1 at para 172: ‘[Dixon J, author of the 1945 judgment] and our other predecessors are excused for not foreseeing these developments [the development and influence of international human rights treaties and jurisprudence]. Contemporary judges are not excused for ignoring them’.
established to be repealed now by judicial decision’, the orthodox position that a statute should, so far as is possible, be construed to conform with international law. The source of his disquiet with the place of international law in the interpretive framework lay in his perception that it introduced a divergence between the way the text was understood by the parliamentarians enacting the legislation, and the judiciary charged with interpreting it. He expressed concern about the position of legislators who ‘would be surprised to find that an enactment had a meaning inconsistent with a meaning they thought it had because of a rule of international law which they did not know and could not find without the assistance of a lawyer specialising in international law.’

Saddled by precedent and practice with the rule that statutes should, so far as is possible, be read consistently with international law, McHugh J tried to make the most of a bad situation by only allowing international law a role where there was evident ambiguity on the face of the statute. His opposition to the place of international law in constitutional interpretation simply replicated his doubts about statutory interpretation, uncomplicated by contrary precedents.

McHugh J held an originalist position on constitutional interpretation. This approach was seen to best implement the understanding that judges have no power to place substantive limits on the government, except where the Parliament has conferred such power on the judiciary. In McHugh J’s view, by remaining faithful to the original ambition for the constitutional document, judicial neutrality was preserved. Accordingly, he responded to Kirby J that:

courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw some light on the meaning of a constitutional provision... But rules of international law that have come into existence since 1900 are in a different category.

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243 Heydon J expressly reserved his position on whether the statutory provisions in question should be interpreted consistently with treaties to which Australia is a party: see ibid., at para 303.
244 Ibid., at para 65.
245 For expressions of McHugh J’s originalism see: Eastman v The Queen (2000) 203 CLR 1 at 44-51 and Re Wakim; Ex parte McNally (1999) 198 CLR 511 at 549, 552-553.
246 Al-Kateb supra note 1 at para 62. It bears emphasising that McHugh J’s originalist methodology is not necessarily inconsistent with what I take to be a ‘progressive’ outcome. See his dissent in Singh, supra note 36, delivered less than a month after Al-Kateb, in which, on the basis of understandings of alienage in 1900,
McHugh J’s concern about an expanded interpretive framework resulting in a divergence between the understanding of the statutory text held by the enacting parliament, and by the interpreting court, noted above, was repeated with reference to constitutional interpretation: ‘[i]t is…difficult to accept that the Constitution’s meaning is affected by rules created by the agreements and practices of other countries. If that were the case, judges would have to have a “loose-leaf” copy of the Constitution.’ Kirby J’s response was that the horse has already bolted. Judges do have loose-leaf copies of the Constitution in which the text is elaborated by reference to decisions of the High Court of Australia and other courts, and ‘which refer to contextual, historical and other materials essential to the evolving understanding of what the Constitution means and how it operates.’

As noted in the introduction to this chapter, in Al-Kateb McHugh J made an open appeal for an Australian bill of rights. Consistent with the view that judicial interpretation was confined to uncovering the original intent, his position was that normative change had to be introduced via the legislature (augmented by Constitutional convention in the case of Constitutional amendment under the amending procedure):

Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring – and many would say just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights. But, desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international agreements that are not even part of the law of this country.

The nub of McHugh J’s objection was the idea that interpreting constitutional provisions so far as possible in conformity with international human rights amounts to judicial ‘insertion’ of a bill of rights into the Constitution, outflanking the democratic

he read the Constitution as placing constraints on the ability of the executive to unilaterally determine that an Australian-born individual was not a citizen. In this context, it is noted that the ellipse in the quoted text was for the sentence ‘Interpretation of the term “aliens” by reference to the jus soli or jus sanguinis is an example’.

247 Al-Kateb supra note 1 at para 73.
248 Ibid., at para 183. Kirby J’s criticism at para 181 is sharper, in that he holds that to complain that added reference to international human rights law would necessitate a ‘loose-leaf Constitution’ ‘trivialises a serious question’.
249 Ibid., at para 73.
requirements for constitutional amendment. McHugh J expressed a compartmentalisation of functions between legislature and judiciary, the former making law and the latter applying it. Normative change was a matter for the legislature or formal constitutional amendment. Kirby J’s response was that ‘[t]he Constitution provides for both formal amendment and judicial reinterpretation…It is idle to suggest otherwise’.250

Underpinning this difference of opinion was a difference as to the way in which international human rights feature in judicial reasoning and law. McHugh J allowed that ‘political, social and economic developments since 1900’ could be taken into account in construing constitutional provisions. However, he held that international human rights treaties supply ‘rules’ of international law and that ‘[r]ules are too specific to do no more than provide insight into the meanings of the constitutional provisions. Either the rule is already inherent in the meaning of the provision or taking it into account alters the meaning of the provision.’251 He held that the meaning of a provision was fixed with reference to the understanding of those who enacted it to a degree resistant to any but a minimal degree of ‘reinterpretation’ with reference to international human rights jurisprudence.252 Kirby J responded that:

International law, including as it declares human rights and fundamental freedoms, exists in the form of “rules” and discourse. This is the tangible manifestation. “Political, social and economic developments”, which McHugh J accepts can throw light on the meaning of the Constitution, generally appear in other forms. But if they can have their influence in the form in which they exist, so can the “rules” of international law in the form in which they manifest themselves. They do not bind as other “rules” do. But the principles they express can influence legal understanding.253

At bottom, the issue was how knowledge of international human rights law was to influence the judicial role. McHugh J saw little opening for such influence. The legislature, or constitutional convention, was the source of normativity in the legal system, with the judiciary’s role being to implement rules emanating from those sources. ‘Political, economic and social developments’ remained firmly background, and so were

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250 Ibid., at para 178.
251 Ibid., at para 71.
252 ‘No doubt from time to time the making or existence of (say) a Convention or its consequences may constitute a general political, social or economic development that helps to elucidate the meaning of a constitutional head of power. But that is different from using the rules in that Convention to control the meanings of a constitutional head of power.’: ibid., at para 71.
253 Ibid., at para 173.
accommodated. The use of provisions of a human rights treaty was seen on the model of legislative provisions. They constituted, at least potentially, a cross-current of normativity from a source without the necessary democratic grounding, and so were rejected. Kirby J was clearly of the view that international human rights law should be accorded greater weight in domestic law. In his view legal values were a legitimate part of the interpretive context, and international human rights law was a valuable reference point for those values.

An examination of their responses to the past use of wartime internment powers directed at non-citizens highlights the practical significance of their different approaches to international law. McHugh J stated that ‘[i]t is not true, as Kirby J asserts, that “indefinite detention at the will of the executive, and according to its opinions, actions and judgments, is alien to Australia’s constitutional arrangements”’. By way of debunking Kirby J’s confidence in constitutional antipathy to indefinite detention, McHugh J elaborated on detention under the National Security Regulations in World War I and World War II. The detention authorised by these regulations appeared to allow for ‘indefinite detention at the will of the executive, and according to its opinions’. McHugh J emphasized that the response to these regulations, by both the judiciary and executive, did not suggest that such ‘protective’ detention contravened the separation of powers, and he could see no reason why the High Court would strike down similar regulations should Australia again find itself at war.

Kirby J responded that while he accepted that Australian cases existed that supported arbitrary and unrestricted detention by the executive in time of war, these cases were the Australian equivalent of Korematsu, ‘we should be no less embarrassed by the local equivalents’. Kirby J continued:

I do not doubt that if Australia were faced with challenges of war today, this Court, strengthened by the post-War decision in the Communist Party Case, and other cases since, would approach the matter differently than it did in the decisions which McHugh J has cited with apparent approval.

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254 Ibid. at para 55. McHugh J was quoting para 146, Kirby J.
255 Ibid., at para 61.
256 Ibid., at para 163. The decision referred to was Korematsu v United States, 323 U.S. 214 (1944). In that decision the Supreme Court deferred to the military’s assessment that the wartime internment of the entire Japanese West Coast population was required on the basis that ethnicity raised suspicions of disloyalty. We will encounter another invocation of the embarrassment of Korematsu in the indefinite detention jurisprudence in the leading judgment of Lord Bingham in the House of Lords Belmarsh decision: see Chapter 3, section 3.11.
Respectfully, I regard them as doubtful authority in the light of legal developments that occurred after they were written.\footnote{Al-Kateb supra note 1 at para 165.}

In the opening paragraph of his judgment, McHugh J stated ‘tragic as the position of the appellant certainly is, his appeal must be sustained’.\footnote{Ibid. at para 31. Beatty’s observation is apt: ‘The distinction that originalists draw between judges doing politics and enforcing the law is always sharp and often very painful to apply’: see David M. Beatty, The Ultimate Rule of Law (Oxford: Oxford University Press, 2004) at 7.} Kirby J countered that “Tragic” outcomes are best repaired before they become a settled rule of the Constitution’.\footnote{Ibid. at para 149.} Picking up on a recent extra-judicial statement by McHugh J, praising the beneficial legacy of the Communist Party Case for political rights and freedoms in Australia,\footnote{See supra note 227.} Kirby J stated ‘[w]e should be no less vigilant than our predecessors were. As they did in the Communist Party Case, we also should reject Executive assertions of self-defining and self-fulfilling powers.’\footnote{Al-Kateb supra note 1 at para 149.}

Mr Al-Kateb had been released from detention following the Full Court’s Al Masri decision, and had sat through the hearings on his case in November 2003.\footnote{Marr, supra note 149.} Following the High Court’s decision, he was not taken back into detention, but remained ‘free’ subject to onerous conditions under a bridging visa granted by the Immigration Minister, in the exercise of her discretion.\footnote{Ibid.} Subsequently, the government announced the creation of a new temporary visa class, the ‘Removal Pending Bridging Visa’ which would enable the release of asylum seekers in long-term detention who had been refused refugee status but could not return to their country of origin.\footnote{Migration Regulations 1994, Sch 2 [Visa] subclass 070.} The conditions on Mr Al-Kateb’s bridging visa were relaxed in 2005 and in late 2007, Mr Al-Kateb was granted leave to remain in Australia indefinitely. He is apparently now working with a firm of environmental designers in Canberra, and trying to come to terms with his experiences.\footnote{Marr, supra note 149.}

Mr Al-Kateb’s presence in the Australian ‘community’, before, during and after the verdict authorising his indefinite detention, strongly suggests that the power was not
actually needed in the case for which it was argued. The concerns about infiltration or de facto citizenship were not, as a matter of government policy, determinative in Mr Al-Kateb’s case. What appeared to be crucial from the government perspective was that it possess the power to hold a non-citizen in such detention, should it wish to do so. This suggests a situation whereby a government identifies its ability to respond effectively to immigration with the absence of legal restrictions, so that the absence of legal restrictions becomes a goal in itself, leading to legal confrontations that are not driven by the needs of the case.

2.5 Conclusions on Al-Kateb.

2.5.1 Statutory interpretation.

In the conclusion to the chapter I offer an initial outline of the different judgments in Al-Kateb, with the central themes further developed in the concluding chapter of the thesis. To begin with the differences on statutory interpretation, the decision in Daniels,266 delivered two years before Al-Kateb, confirmed that common law presumptions against the abrogation of fundamental rights and freedoms were an accepted part of Australian law. Daniels further showed that there was no need for an ambiguity before recourse could be had to such presumptions. Common law presumptions formed part of the context in which the meaning of the provisions was to be determined. In Daniels, a common law presumption was used to read an unexpressed exception into the statute. Why did the majority not follow this approach in Al-Kateb?

I argued that the best explanation was that the majority read the statute in the light of an expansive conception of the purposes of immigration detention. Where a statutory duty to remove a non-citizen from Australia was activated, in this case by the non-citizen’s own request, the purpose of immigration detention was to keep that non-citizen apart from the community until such time as he or she could be removed. The general words of the statute were read as providing for indefinite, possibly permanent, detention ‘until’

266 Daniels, supra note 48.
one of the three nominated statutory events occurred. This was understood to be a ‘necessary implication’ of a purposive interpretation of the statute, operating to exclude common law presumptions. What was implicit in the breadth of the concept of immigration detention employed in the statutory reasoning became explicit in the constitutional reasoning of the majority; the majority bluntly stated that the starting premise was that the non-citizen to be removed had no right to liberty in these circumstances.

The Al-Kateb majority viewed themselves as following the rule that a statute can only abrogate fundamental common law rights by express words or necessary implication. But reading the statute against an expansive understanding of the purposes of immigration detention, they held that it was a necessary implication of the provisions that they overrode common law rights. This position was rendered tenable by the view that, in the absence of a right to remain, a non-citizen facing removal had no right to liberty. The resulting interpretation was indistinguishable from that which would have been developed under an interpretive approach that treated common law presumptions as generally illegitimate and expressed itself exclusively in the fictitious language of discovering the actual intention of Parliament. However, the better reading of the reasoning of the Al-Kateb majority is that the adoption of this approach was driven by substantive considerations particular to immigration detention.

Gleeson CJ applied the same rule, that fundamental common law rights were not to be abrogated in the absence of express words or necessary implication. However, he proceeded on the basis that the ‘most basic’ of common law rights, personal liberty,\(^{267}\) was clearly infringed by the detention provisions. If indefinite detention was what the legislature intended, it would have to make that explicit. Such a result was not to be provided for by implication from general words. His position was informed by a view of the purposes of immigration detention consistent with that adopted in Lim and implemented in Al Masri. In the removal context, detention was for the purposes of

\(^{267}\) Al-Kateb supra note 1 at para 19.
facilitating removal. If there was no real prospect of removal then this purpose was no longer operative and authority to detain was suspended.

### 2.5.2 Constitutional reasoning.

The form of the constitutional discussion in *Al-Kateb* was shaped by *Lim*. An incident of the separation of powers was a general immunity from administrative detention. Immigration detention constituted an exception to that general immunity. The issue was whether the administrative detention of non-citizens subject to a removal order, where there was no real prospect of removal in the reasonably foreseeable future, could be justified as ‘immigration’ detention. If it could be so characterized, it would fall within the exception to the constitutional immunity. If it could not be, it would be subject to the constitutional immunity, and so invalid as contrary to the separation of powers. On this point, Gummow and Kirby JJ in dissent ruled that the indefinite detention power claimed by the government was not for the purposes of deportation, or any other valid immigration purpose, and so was in contravention of the constitutional immunity. In accordance with the presumption that legislation be read compatibly with the *Constitution*, they read the provisions subject to an implied temporal limitation. Detention was only authorised for as long as it was ‘reasonably capable of being seen as necessary for the purposes of deportation’, as ascertained by a court. As noted above in relation to the statutory reasoning, the majority adopted an expanded conception of the purposes of immigration detention. Detention where there was no real prospect of removal fell within the requisite constitutional exception.

An additional strand in the constitutional reasoning of Gummow and Kirby JJ centred on the ‘constitutional fact’ doctrine. The reasoning on this point illustrated well the different conceptions of the rule of law employed by the majority and the minority. The Australian federal government can only exercise those powers explicitly or impliedly conferred by the *Constitution*. The central question on which Gummow J focussed was ‘Who gets to decide on the scope of those powers?’ In developing this issue, Gummow J had recourse to the idea of a ‘constitutional fact’, that is, a fact on which the
constitutionality of legislation or executive action depended. As discussed, the *Communist Party Case* was invoked for the proposition that, having conceded that it is the judiciary that determines whether legislation is within power, it follows that Parliament cannot base its jurisdiction on its own declaration (or that of an executive official) that a constitutional fact exists.\(^{268}\) It was clear that both the majority and the dissents fully agreed with this proposition. In a manner analogous to the situation regarding common law presumptions the majority and the dissents both understood themselves to be applying the same rule. However, Gummow J thought the constitutional fact doctrine was a fatal objection to the government’s case, while McHugh J stated that it ‘did not assist’ Mr Al-Kateb.\(^{269}\) What explains the radically different understandings of the rule’s relevance?

The divergence rested on different views as to what constituted the relevant constitutional fact. Gummow J, following *Lim*, held that the constitutionality of detention rested on ‘the continued viability of the purpose of deportation or expulsion’.\(^{270}\) The government’s argument was that detention was authorised for as long as it continued to make *bona fide* efforts to remove the relevant non-citizen. On Gummow J’s understanding that the continued viability of deportation was a precondition of the power to detain, this meant that the government determined the limits of its own power.\(^{271}\) The government officials determined the scope of their own authority to detain by determining whether the ‘constitutional fact’ relevant to the power’s lawful exercise existed.

Why, as stated by McHugh J, did the above reasoning ‘not assist’ Mr Al-Kateb? As detailed in the chapter, the majority accepted the constitutional fact doctrine, but rejected the proposition that the viability of deportation or expulsion was a ‘constitutional fact’. For the majority, detention was constitutional as long as it was applied to a non-citizen subject to a lawful power or duty to remove. They allowed that a non-citizen could

\(^{268}\) *Communist Party Case, supra* note 218 at 193, Dixon J; 206, McTiernan J; 222, 225, 226, Williams J; 258, 263, Fullagar J; 272-275, Kitto J.

\(^{269}\) *Al-Kateb supra* note 1 at para 50.

\(^{270}\) *Ibid.*, at para 140.

\(^{271}\) ‘it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Chapter III’: *ibid.*, at para 140, Gummow J.
always challenge their detention indirectly, on the basis that he or she was not subject to a lawful power of removal. As long as this remained the case, the courts were still determining the facts that were the precondition for the lawful exercise of the power. The difference between Gummow and Kirby JJ and the majority over the relevance of the Communist Party Case reduced to different understandings of the legitimate purposes and scope of immigration detention.

What the contrast makes clear is the very different versions of constitutionalism appropriate to the immigration context as espoused by Gummow and Kirby JJ in dissent and the majority. For Gummow J, constitutionalism required that a court determine whether there was authority to detain with reference to the prospects for removal. Applying the test from Lim, a court was to determine whether detention was proportionate to the purpose of facilitating removal. For the majority, this level of judicial supervision was unwarranted in the immigration context. Once it had been determined that a non-citizen has no lawful right to remain, any judicial role of watching over his or her liberty was effectively at an end. A non-citizen facing removal was effectively outside the scope of judicial protection. The majority viewed immigration as an area in which the legislature could grant broad powers to the executive, and the executive could exercise those powers subject to only marginal judicial supervision.

2.5.3 The influence of international law.

The exchange between Kirby and McHugh JJ on the influence of international law on constitutional interpretation highlighted their underlying judicial dispositions. McHugh J’s position on the illegitimate influence of international law was the context for his view that ‘tragic’ though Mr Al-Kateb’s situation was, nothing could be done in the absence of a bill of rights. He held that the judicial function was to implement determinate rules, whose meaning was fixed at the time of their enactment. As noted

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272 As noted above, the discussion spilled over from a focus on constitutional interpretation to extend to McHugh J’s dissatisfaction with the current rule governing the role of international law in statutory interpretation.

273 Al-Kateb supra note 1 at para 31.

274 Ibid., at para 73 and 31.
above, he grudgingly acknowledged the place of international law in statutory interpretation. The use of international law in interpretation was at odds with his understanding of the appropriate division of constitutional responsibilities between courts and legislatures. For him, the main significance of the separation of powers in the present case was as a restraint on the judiciary, and he cautioned against amending the Constitution ‘in the guise of interpretation’. ²⁷⁵

By contrast, Kirby J’s invocation of international law as a source of ‘principles’ exerting a legitimate influence on interpretation, both statutory and constitutional, was in effect an endorsement of a rights-protecting common law constitutionalism. The law was to be interpreted so far as possible in the light of principles protective of the legal subject. This understanding of his position was reinforced by the way in which he wove common law presumptions, the constitutional argument and international law into a single argument supportive of an implied temporal limitation. ²⁷⁶ The exchange expressed two very different views of the extent to which the judiciary can give effect to normative change, independent of any command of the legislature. Kirby J held that indefinite detention at the will of the executive was alien to Australia’s constitutional arrangements, while McHugh J denied this with reference to wartime internment authorities from the Second World War.

More generally, together the three dissenting judges in Al-Kateb (and the Full Court of the Federal Court in Al Masri) showed how the ‘general belief that human rights and fundamental freedoms should ultimately be protected’ was registered in the Australian legal system, at the level of the common law, constitutional and international law. ²⁷⁷ The approach adopted by the majority ran counter to any notion that constitutionalism helps to restrain our excesses. ²⁷⁸

²⁷⁵ Ibid., at para 74.
²⁷⁶ As did the Federal Court in Al Masri, supra note 9.
²⁷⁷ Basten, supra note 8 at 938.
²⁷⁸ Glass, supra note 3. See in particular the contrast drawn by Gleeson CJ’s use of the principle of legality, and Hayne J’s quote from Learned Hand J, discussed in section 2.4.3.
CHAPTER 3:
THE UNITED KINGDOM.

The House of Lords decision in Belmarsh lies at the centre of this chapter.¹ By a majority of eight of nine judges, the House of Lords quashed an order that sought to derogate from the right to liberty under Art 5(1) of the European Convention on Human Rights [ECHR],² and declared a statutory provision authorising indefinite immigration detention to be incompatible with both Art 5(1) and the prohibition against discrimination under Art 14.

Probably the most famous decision decided under the Human Rights Act (U.K.), 1998 [HRA] to date,³ Belmarsh was hailed as a historic beacon in the judicial defence of liberty, both on the national,⁴ and international stage.⁵ It has been received as a vindication of the HRA, and commentators have gone so far as to call it: ‘the most powerful judicial defence of liberty since Leach v Money (1765) 3 Burr. 1692 and Somersett v Stewart (1772) 20 St. Tr. 1’.⁶ Even those sceptical about the HRA and concerned that fundamental rights provide a cover for judicial aggrandisement have received it as a remarkable instance of courts rising to the challenge of protecting individual liberty in the face of competing government claims.⁷ A leading text on human

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¹ A v Secretary of State for the Home Department [2005] 2 A.C. 68 (‘Belmarsh’). Belmarsh was the name of the prison where the detainees were held.
³ Human Rights Act 1998 (U.K.), c.42 [HRA].
⁶ Feldman, supra note 4 at 273. For another invocation of 18th century comparators see Keith Ewing who described Belmarsh as ‘perhaps the most important decision since Entick v Carrington (1765) [19 St Tr 1030], in part because ‘the House of Lords stood up so convincingly to the Executive’: Ewing, ‘a long footnote’, supra note 4 at 42. Entick v Carrington is also taken as the appropriate reference point for Belmarsh’s achievement by Conor Gearty in ‘Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?’ (2005) 58 CLP 25 at 37.
rights in the United Kingdom refers to it in sixty numbered paragraphs, more than any other decision. Internationally, it is held up as the leading exemplar of a new assertion of judicial competence and legitimacy to review security measures post 9/11, on the part of national courts from prominent democratic states. Where there is criticism of the decision, much of it has the characteristic of being indirect, arguing for the decision’s futility in the light of what followed rather than criticising the reasoning itself.

The decision’s prominence rests first and foremost on the view that it was a striking assertion of judicial legitimacy to review national security measures, a bold departure from an Anglo-American tradition of giving decisive weight to the government position in reviewing matters of national security. I share this view of the decision. The decision was one on the interaction between immigration and national security, and my study emphasises the first member of the pair, placing the decision in the context of domestic, European and comparative common law on the indefinite administrative detention of non-citizens. The aspect of Belmarsh on which I focus is the majority’s readiness to scrutinise the executive’s assertion that the differential treatment of non-citizens was ‘reasonable’.

The events on which the chapter centres are the United Kingdom’s anticipatory derogation from Art 5(1) of the ECHR, providing for liberty and security of the person,

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9 Benvenisti, ‘United We Stand’ supra note 5.
12 The closest equivalent is John Finnis’ article ‘Nationality, Alienage and Constitutional Principle’, see Finnis, supra note 10. Finnis’ position directly contradicts my own, and I engage with this article in my concluding chapter: see Chapter 6, sections 6.5 and 6.6.
and the subsequent enactment of legislation providing for the indefinite administrative
detention of non-citizens pursuant to powers of immigration detention. These actions
were justified with reference to the threat posed by Al Qaeda terrorists, as manifest in the

The chapter is divided into two parts. Part I sets out the legal context for the derogation
from the ECHR. Part II details the domestic Belmarsh litigation, charting the shifting
interaction between deference to the government, the standard of review and its
application, at each level of the litigation (the Special Immigration Appeals Commission,
the Court of Appeal and the House of Lords).

PART I – THE BACKGROUND TO THE DEROGATION, AND DETENTION
MEASURES

3.1 Introduction to Part I.

In Part I, I set out the background to the derogation and the introduction of provisions for
the indefinite detention of non-citizens in the Anti-Terrorism, Crime and Security Act
2001 [ATCSA]. Central to the legal developments narrated in this chapter is the
interaction between two distinct legal orders, that of the United Kingdom and the Council
of Europe. The intervention of the European Court of Human Rights [ECtHR] has been a
driving force in domestic legal developments. In Part I, this role is performed by the
ECtHR’s decision in Chahal v United Kingdom [Chahal].

I begin Part I with the two authorities that are the starting points for a discussion of
detention for the purposes of deportation in the United Kingdom. I introduce R v
Governor of Durham Prison, ex parte Singh [Hardial Singh], the emblematic English
common law authority for a rights-protecting approach, and Chahal. In Chahal, the
ECtHR set the legal parameters for deportation and immigration detention that govern the
rest of the jurisprudence, European and English, discussed in this chapter. The ECtHR
confirmed the existence of a prohibition on deportation to torture under the ECHR, and

13 Anti-Terrorism, Crime and Security Act (U.K.), 2001 c. 24 [ATCSA].
15 R v Governor of Durham Prison, ex parte Singh [1984] 1 All ER 983 [Hardial Singh].
set legal limits on the duration of immigration detention under that treaty. *Chahal* also transformed the domestic institutional landscape for review of national security decisions, serving as the spur for the development of the Special Immigration Appeals Commission [SIAC].

The procedural innovations introduced with the creation of SIAC, notably the role of special advocate, have continued to be central to legal debates over review of national security, both in the United Kingdom and beyond. The final pieces of the puzzle to be put in place before considering the Belmarsh litigation are the introduction of the HRA, and the House of Lords decision in *Secretary of State for the Home Department v Rehman* [*Rehman*],\(^\text{17}\) delivered a month after September 11 2001. In *Rehman* the House of Lords read down SIAC’s role and function, with implications for the reasoning in the Belmarsh litigation.

### 3.2 Hardial Singh.

It is accepted that detention of a non-citizen against whom a deportation order has been issued must be ancillary to deportation. The issue is how that relationship, between detention and deportation, is understood. When is detention ‘reasonably necessary for deportation purposes’? The starting point for English discussions of this issue is the decision of *Hardial Singh*. *Hardial Singh* is a short judgment of a single judge in the Queens Bench Division from 1984, taking up only six pages in the reports. The principles governing the limits of authority to hold an individual in detention pending deportation are commonly referred to as the *Hardial Singh* principles in English\(^\text{18}\) and other Commonwealth authorities. \(^\text{19}\)

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\(^\text{16}\) Centrally in Canada, as discussed in chapters 4 and 5.

\(^\text{17}\) *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 [*Rehman*].

\(^\text{18}\) The principles established in this case have been approved by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111-112 and by the House of Lords in *R v Secretary of State for the Home Department; ex parte Saadi* [2002] 4 All ER 785 at 793 [*Saadi* (2002) House of Lords].

\(^\text{19}\) See for example the endorsement of the *Hardial Singh* principles in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54 (Full Court of the Federal Court of Australia), discussed in Chapter 2, and that judgment’s extended discussion of common law authorities discussing those principles.
Mr Singh was an Indian national who was granted indefinite leave to remain in the United Kingdom, and subsequently convicted in relation to two burglary offences. A deportation order was issued against him on the grounds that this was conducive to the public good. He was detained under the Immigration Act,\textsuperscript{20} pursuant to a power to detain a non-citizen against whom a deportation order had been issued, pending his or her deportation. The legislative provisions for detention considered in the Hardial Singh case contained no express limitation of time. At the time of judgment, Mr Singh had been detained under the immigration power for nearly five months. The United Kingdom government had not obtained the necessary travel documents from India and led no evidence that Mr Singh’s removal was imminent.

The judge, Woolf J, found an implied temporal limitation on authority to detain with reference to the purpose of that detention. He held that authority to detain was limited to the period reasonably necessary to facilitate deportation. He went on to state that if there was a ‘situation’ whereby it was apparent that the government ‘was not going to be able to operate the machinery provided in the Act’ for removal within a reasonable period, it should not exercise its power of detention.\textsuperscript{21} The judge put the onus on the government to provide evidence that there was a real prospect of removal within a reasonable time. It was clear that in the absence of such evidence, his view was that a judge should order release. If removal was not a real prospect, the purpose of detention no longer obtained and so could not be used to justify that detention.\textsuperscript{22}

The limit on the duration of detention was expressed in terms of ‘reasonableness’ in Hardial Singh. This placed the decision within a traditional framework in which ‘reasonableness’ was the primary standard applied in judicial review. The focus was on the need for an official invested with statutory authority to not misuse that authority.

\textsuperscript{20} Immigration Act 1971 (U.K.) c. 77.
\textsuperscript{21} Hardial Singh, supra note 15 at 985.
\textsuperscript{22} Woolf J granted a limited adjournment of three days, on the grounds that the government had only received the applicant’s affidavit the previous day and that ‘a very short period of additional detention’ was not such an injustice as to deny the government the opportunity to file further evidence: Hardial Singh, supra note 15 at 988.
3.3 **Chahal.**

The legal framework that most overtly shaped the *Belmarsh* litigation was that of the ECHR as viewed through the lens of the HRA. There is necessarily a supra-national aspect to jurisprudence under the HRA. As detailed below, the rights in the HRA are drawn from the ECHR. Section 2 of the HRA provides in part that a court determining a question which has arisen in connection with a right under the HRA ‘must take into account’ any judgment of the ECtHR relevant to the proceedings. The European case that firmly established the relevance of the ECHR to circumstances where the deportee faced a real risk of torture or ill treatment on return was *Chahal*.

3.3.1 **Factual background to Chahal.**

In August 1990, the Home Secretary served notice of an intention to deport Mr Chahal on the basis that his continued presence was unconducive to the public good for reasons of national security. Mr Chahal was alleged to be involved with Sikh extremist groups. He was detained for deportation purposes under the *Immigration Act*, where he remained up to the time of judgment of the ECtHR on 15 November 1996. On the same day that Mr Chahal was served with a notice of an intention to deport, he applied for political asylum in the United Kingdom on the basis that he faced torture and persecution if returned to India.

The national security elements in his case had the consequence that Mr Chahal had no right of appeal from the deportation decision. The decision was instead subject to a non-statutory advisory procedure – the ‘three wise men’. Under this procedure Mr Chahal was:

- given an opportunity to make written and/or oral representations to an advisory panel, to call witnesses on his behalf, and to be assisted by a friend, but he is not permitted to have legal representation before the panel. The Home Secretary decides how much information about the case against him may be communicated to the person concerned. The panel’s advice to the Home Secretary is not disclosed, and the latter is not obliged to follow it.  

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23 *Supra* note 20.


25 *Chahal, supra* note 14 at para 60.
Following review by the panel, the Home Secretary signed an order for Mr Chahal’s deportation. Mr Chahal challenged, unsuccessfully, the decisions to refuse asylum and to deport before the High Court and the Court of Appeal.  

At that time the ECHR provided for a two-tiered system of rights protection, with applicants first going to a body called the European Commission, and if the matter was not resolved at that stage, on to the ECtHR. In the event that the Commission could not settle a matter it had determined to be admissible, it was charged with issuing a report on the established facts, and an opinion on whether there had been a violation of the ECHR. In a report of June 1995, the Commission expressed the opinion that Mr Chahal’s return to India would constitute a violation of the ECHR, that the power of review of the United Kingdom courts in relation to the decision to deport was too restrictive to meet the requirements of an ‘effective remedy’ under the ECHR, and that the proceedings against Mr Chahal were not pursued with requisite speed to justify his continued detention.

Armed with the report of the European Commission, Mr Chahal brought an application in the domestic courts for temporary release pending the decision of the ECtHR, by way of habeas corpus and judicial review. In reviewing the decision to detain, the Divisional Court judge stated:

> I have to look at the decision of the Secretary of State and judge whether, in all the circumstances, upon the information available, he has acted unlawfully, or with procedural impropriety, or perversely to the point of irrationality. I am wholly unable to say that there is a case for such a decision, particularly bearing in mind that I do not know the full material on which the decisions have been made...[I]t is obvious and right that in circumstances the Executive must be able to keep secret matters which they deem necessary to keep secret...There are no grounds, in my judgment,

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26 *Chahal, supra* note 14 at para 40–42. Leave to appeal to the House of Lords was refused.
27 The European Commission was abolished by Protocol 11 to the European Convention on Human Rights, which entered into force on 1 November 1998.
28 The Opinion of the Commission is reproduced in *Chahal, supra* note 14 at 437 – 454.
29 Under Art. 3 of the ECHR: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. ‘The report of the Commission in *Chahal* marked a departure from the Commission’s earlier approach to the government’s assessment of the situation in the country of destination. The Commission was impressed by the evidence submitted by the applicants as to the situation in India’: Nuala Mole, *Asylum and the European Convention on Human Rights*, 4th ed, (Strasbourg: Council of Europe Publishers, 2007) at 40.
30 Under Art. 13 of the ECHR.
31 Under Art. 5(1) of the ECHR.
for saying or even suspecting that there are not matters which are present in the Secretary of State’s mind of that kind upon which he was entitled to act.\(^{32}\)

The above statement was quoted in full in the ECtHR’s judgment in *Chahal*. It is a remarkable statement of a ‘traditional’ approach to judicial review in the area of national security, characterized by a trust in the executive that is not tempered by any requirement of verification. It will serve as a useful benchmark of the distance travelled by the English courts in national security matters between the mid-1990s and the *Belmarsh* litigation of 2002-2004, a change effected in no small part by the *Chahal* decision itself.

### 3.3.2 *Chahal*.

The importance of the *Chahal* decision for ECHR jurisprudence is twofold. It clearly established that the ECHR imposes an absolute prohibition on deportation to torture. And it established limits on the duration of immigration detention. The decision was given by a bench of 19 judges of the ECtHR.

**\(a\)** *Chahal on deportation.*

The relevant provision of the ECHR in relation to torture or ill-treatment is Art 3, which provides that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. This provision was held to place an implied obligation on a Contracting State not to deport an individual when there were substantial grounds for believing that there was a real risk of torture or other treatment contrary to Art 3 by the receiving country.\(^{33}\) The United Kingdom government accepted this implied obligation in its pleadings before the ECtHR.\(^{34}\)

The bulk of the ECtHR’s reasoning on deportation was addressed to the effect of national security concerns on this implied obligation not to deport. At each point in the argument, the United Kingdom argued that national security concerns counselled against an

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\(^{32}\) *R v Secretary of State for the Home Department; ex parte Chahal* (10 November 1995), McPherson J, quoted in *Chahal*, supra note 14 at para 43.


\(^{34}\) Though it had contested it before the European Commission.
absolute prohibition on deportation to torture. It was consistently unsuccessful on this score. The United Kingdom argued that, in expulsion cases involving national security, an absolute approach to Art 3 was inappropriate. It contended first, that there was an implied limitation on Art 3, allowing for deportation even where there was a real risk of treatment contrary to Art 3 by the receiving state, if such removal was required on national security grounds. In the alternative, the United Kingdom argued for a ‘balancing approach’ whereby various factors had to be taken into account in considering whether to deport, including the threat to the security of the United Kingdom. In relation to this second submission, the government argued for a sliding scale. The greater the doubt about a risk of ill-treatment, the more weight should be given to national security.

The majority of the ECtHR rejected these submissions.\(^{35}\) They made clear that Art 3 was expressed in absolute terms irrespective of the victim’s conduct. In emphasising the absolute nature of Art 3, the ECtHR contrasted it with other provisions of the ECHR, stressing that Art 3 contained no exceptions and was non-derogable in the event of a public emergency. It stated, ‘the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.’\(^{36}\) The ECtHR then engaged in an extended consideration of the risk of ill-treatment in Mr Chahal’s case, the majority concluding that ‘the order for his deportation to India, if executed, would constitute a violation of Article 3.’\(^{37}\)

Later in the judgment, the ECtHR came to consider whether the applicants had been provided with the ‘effective remedy’ required by Art 13, which states: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed

\(^{35}\) More recently, the United Kingdom advanced these same submissions in *Saadi v Italy*, where they met with unanimous rejection by the ECtHR: see *Saadi v Italy* (2009) 49 E.H.R.R. 30, 730 [*Saadi v Italy* ECtHR].

\(^{36}\) *Chahal*, supra note 14 at para 80. See also the view of the Commission at para 104 ‘While it is accepted that this may result in undesirable individuals finding a safe haven in a Contracting State, the Commission observes that the State is not without means of dealing with any threats posed thereby, the individual being subject to the ordinary criminal laws of the country concerned’, quoted in *Chahal*, supra note 14 at para 70.

\(^{37}\) This holding was adopted by twelve votes to seven. The seven in dissent on this point adopted the United Kingdom’s argument for a ‘fair balance’ between risk of torture for the applicant, and the risk to national security posed by the applicant: see *Chahal*, supra note 14 at p 481-485.
by persons acting in an official capacity.’ The United Kingdom argued that in the past where national security had been at issue the ECtHR had read the requirement that there be an ‘effective remedy’ as requiring ‘a remedy that is as effective as can be’, given the need to rely on secret information.\(^{38}\) The Court responded that those earlier cases were concerned with the qualified rights contained in Art 8 and 10 of the ECHR, where the Court was obliged to have regard to the national security claims advanced by the government.\(^{39}\) The ECtHR stated that in relation to Art 3, Art 13 required that there be independent scrutiny of whether there were substantial grounds to believe the applicant faced a real risk of torture in the receiving country.\(^{40}\) It reiterated that: ‘[t]his scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling state’.\(^{41}\) It held that the English courts had not carried out such scrutiny. Rather, they had balanced the risk to Mr Chahal against the danger to national security. The ECtHR held that, as currently practiced in the United Kingdom, judicial review of the decision to deport was not an effective remedy in respect of his complaint under Art 3,\(^{42}\) and that accordingly there was a violation of Art 13 in conjunction with Art 3.\(^{43}\)

In a passage that has achieved a small measure of fame through its influence on subsequent legal developments, the ECtHR noted the interveners’ submission that Art. 13 ‘required at least that some independent body should be appraised of all the facts and evidence and entitled to reach a decision that would be binding on the Secretary of

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\(^{38}\) The cases in question were Klass and Others v Germany (1979) 2 E.H.R.R. 214 and Leander v Sweden (1987) 9 E.H.R.R. 433.

\(^{39}\) Chahal, supra note 14 at para 150. The rights in Arts 8-11 are subject to similar exceptions e.g. Art 8 (Right to respect for private and family life), at 8 (2) reads: ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

\(^{40}\) The ECtHR clarified that such independent scrutiny did not have to be provided by a court, the effectiveness of the remedy depending on the powers and guarantees afforded by the reviewing body: Chahal, supra note 14 at para 152.

\(^{41}\) Ibid. at para 151.

\(^{42}\) Chahal, supra note 14 at para 153. The ECtHR listed additional criticisms of the advisory panel procedure: the lack of entitlement to legal representation; the provision of only an outline of the grounds for the deportation decision; the fact that the panel had no power of decision, that its advice was not binding on the Home Secretary, and was not disclosed: see Ibid. at para 154.

\(^{43}\) This holding was unanimous.
In this connection the Court noted a Canadian approach whereby the confidentiality of national security material was maintained by allowing for a security-cleared counsel to act in the interests of the applicant, instructed by the court rather than the applicant him or herself. This security-cleared counsel was allowed to cross-examine witnesses and generally test the strength of the state’s case. The ECtHR referred to the possibility of employing such a Canadian approach to counterbalance the procedural unfairness caused by a lack of full disclosure in national security cases. In a point of some importance for later jurisprudence, the Court did not, however, express any opinion on whether the procedures central to the ‘Canadian approach’, notably the security cleared counsel, would in themselves satisfy the requirements of the ECHR.

(b) Chahal on detention.

The right to liberty is contained in Art 5(1) of the ECHR, which states: ‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law’. Article 5 then sets out an exhaustive list of exceptional circumstances in which an individual may be deprived of their liberty, including at 5(1)(f): ‘the lawful arrest or detention of a person…against whom action is being taken with a view to deportation or extradition.’

As noted above, the European Commission had concluded that the proceedings against Mr Chahal had not been pursued with the requisite speed and that accordingly his detention had ceased to be justified. The ECtHR did not follow the Commission’s lead on this question. In view of the critical place that the ECtHR’s reading of Art 5(1)(f) had

44 Chahal, supra note 14 at para 144.
45 Ibid. at para 144. As has been recorded since, the Court wrongly attributed this procedure to the Federal Court of Canada, when it was in fact a self-generated procedure of the Security Intelligence Review Committee: see Rayner Thwaites, Deportation on National Security Grounds, LLM Thesis, University of Toronto (2004), Appendix 1; John Ip, ‘The Rise and Spread of the Special Advocate’ [2008] PL 717 at 719; Audrey Macklin, ‘Transjudicial Conversations about Security and Human Rights’ in Mark Salter, ed, Mapping Transatlantic Security Relations: The EU, Canada and the War on Terror (Routledge, forthcoming 2010). At the time of the Chahal hearing and judgment the SIRC procedure was only employed where the non-citizen to be deported from Canada was a permanent resident. The Canadian SIRC procedure for review of decisions to deport on grounds of national security, praised in Chahal, ceased to be employed in relation to any such decisions in 2002.
46 See the discussion of the jurisprudence on the fairness of the procedures under the control order regime in Chapter 5, section 5.2.3.
in the United Kingdom’s decision to derogate from the ECHR, challenged in the
Belmarsh litigation, its comments need to be considered with care. The ECtHR made
clear that there was nothing in Art. 5(1)(f) itself that required a connection between
detention and the detainee’s conduct, detention did not have to be ‘reasonably considered
necessary’ to prevent the non-citizen from committing an offence or fleeing. Further,
the Court held that it was immaterial whether the underlying decision to deport could be
justified under Convention law.

The ECtHR held that the sole requirement contained in Art. 5(1)(f) was that ‘action is
being taken with a view to deportation’. This requirement was interpreted in the
following, critical passage:

any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation
proceedings are in progress. If such proceedings are not prosecuted with due diligence, the
detention will cease to be permissible under Article 5(1)(f).

It is thus necessary to determine whether the duration of the deportation proceedings was
excessive.

The ECtHR’s reading of Art 5(1)(f) invited independent review of whether deportation
proceedings were in progress, whether there were being pursued with due diligence, and
whether the overall period of detention had become excessive in duration. This ruled out

47 A contrast was drawn with the wording of Art 5(1)(c) which provides that detention in cases of bail
pending charge is only authorised where ‘reasonably considered necessary’ to prevent the commission of
an offence or fleeing: Chahal, supra note 14 at para 112. Chahal’s reading of Art 5(1)(f) was affirmed in A
v United Kingdom (2009) 49 E.H.R.R. 29, 625 [A v United Kingdom] at para 164, as discussed in Chapter
5, section 5.2.

The ECtHR’s reading of Art 5(1)(f) is in marked contrast with the jurisprudence of the Human Rights
Committee on the analogous provision of the International Covenant on Civil and Political Rights, 19
December 1966, 999 U.N.T.S. 171 [ICCPR], Art 9. Detention will be considered ‘arbitrary’, contrary to
Art 9, ‘if it is not necessary in all the circumstances of the case, for example to prevent flight or
interference with evidence: the element of proportionality becomes relevant in this context.’: A v Australia
897 at 906. Contrary to the case law on Art 5(1)(f) of the ECHR, the House of Lords has also assessed the
need for detention for immigration purposes against an overall proportionality requirement: Saadi
(2002) House of Lords, supra note 18. Such proportionality is also at the heart of the Hardial Singh
principles.

48 Chahal, supra note 14 at para 112.
49 Chahal, supra note 14 at para 113.
a state treating the mere formal issuance of a deportation order as a sufficient basis for immigration detention.  

The ECtHR went on to consider what was required for the detention to be ‘lawful’. Art 5(1)(f) allows for the ‘lawful arrest or detention…of a person against whom action is being taken with a view to deportation’. The ECtHR ruled that ‘lawfulness’ required not only that detention be prescribed by law, but also that arbitrary detention must be avoided.  

The following passage from Chahal has been a regular reference point for such a reading:

Where the “lawfulness” of detention is in issue, including the question of whether “a procedure prescribed by law” has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.

In Chahal, the ECtHR effectively held that the requirement that detention not be arbitrary imported a proportionality analysis of sorts. Continuing detention in circumstances where there is no real prospect of removal in the reasonably foreseeable future clearly eviscerates the connection between means and ends and is arbitrary on that basis.

Turning to how Art 5(1)(f) was applied to the facts before it, the ECtHR discounted the period during which Mr Chahal was being held in compliance with a request from the European Commission that he not be deported. Accordingly, in assessing the length of his detention it only considered a period of some three and a half years from August 1990 to March 1994, during which domestic proceedings were on foot. Stressing the applicant’s interest in careful consideration of his case by the courts, the ECtHR

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50 This is what the United Kingdom did with the relevant statutory provision under challenge in Belmarsh, thus the need for the derogation.
51 This drew on Convention jurisprudence on what was required for a measure to be ‘lawful’. See more recently A v United Kingdom, supra note 47 at para 164 and Saadi v United Kingdom (2008) 47 E.H.R.R. 17 at para 67 and 67-74.
52 Chahal, supra note 14 at para 118.
53 Chahal, supra note 14 at para 129-132.
54 The preceding quote from Chahal was quoted by the Full Court of the Federal Court of Australia in Minister for Immigration & Multicultural & Indigenous Affairs v Al-Masri (2003) 126 FCR 54 at para 151 in support of the implied temporal limitation it had arrived at in reliance on the common law presumption against abrogation of rights.
concluded that this period of three and a half years was not excessive and that there was no violation of Art 5(1) on account of any lack of diligence by the national authorities. The ECtHR went on to consider whether Mr Chahal’s detention was ‘arbitrary’. It held that ‘in the context of Art 5(1)’ the advisory panel procedure sufficed to meet any charge of arbitrariness rendering his detention unlawful. As a result of the above rulings, the ECtHR held that Mr Chahal’s detention did not violate s 5(1) of the ECHR.  

The ECtHR also considered the procedural requirements attending Mr Chahal’s detention in relation to Art 5(4) of the ECHR, which states: ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’ In an uncomfortable fit with its ruling that there was no violation of Art 5(1), the ECtHR concluded that there was a violation of the procedural requirements of Art 5(4) in conjunction with 5(1). It was uncomfortable in that the conjunction of its rulings on Art 5(1) and 5(4) was that Mr Chahal’s detention was not arbitrary by reason of the procedures, but that the procedures to determine whether his detention was justified were inadequate. On the review procedures, the ECtHR reasoned that: ‘the domestic courts were not in a position to review whether the decisions to detain Mr Chahal and to keep him in detention were justified on national security grounds’, and that the advisory panel was not a ‘court’ for the purposes of s 5(4).  

The ECtHR continued:

The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by domestic courts whenever they choose to assert that national security and terrorism are involved.

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55 By thirteen votes to six.
56 The ECtHR held that the complaint that national security grounds had prevented the domestic courts from considering whether detention was lawful and ‘appropriate’ should be considered under Art 5(4) rather than under Art 13, on the basis that Art 5(4) was a more specialized instance of the general requirements of Art 13: see Chahal, supra note 14 at para 124-126.
57 See also, in a partial dissent going to the ECtHR’s finding of no violation of Article 5(1), judges Martens and Palm statement that ‘the Court finds that this procedure [the advisory panel procedure] does not meet the requirements of Article 5(4) and of Article 13. We find it difficult to understand why it did not draw the same conclusion in the context of Article 5(1)(f).’
58 Chahal, supra note 14 at para 130.
59 Ibid. at para 131.
In comments that paralleled those already discussed above in relation to Art 13 and review of the decision to deport, the ECtHR went on to state that it ‘attached significance’ to the development of ‘a more effective form of judicial control…in cases of this type’ in Canada. The ECtHR stated that the Canadian example ‘illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and source of intelligence information and yet accord the individual a substantial measure of procedural justice.’ It concluded that there had been a violation of Art 5(4).

3.4 Legislative response to Chahal: SIAC.

In Chahal, the ECtHR rejected the proposition that ‘national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved.’ The ECtHR’s position was given content by pointing out the deficiencies of the United Kingdom procedures, and positively, by the alternative example of the Canadian procedure. Under the Canadian arrangement, the evidence was examined in the absence of the affected individual or his or her legal representative. Counsel with a security-clearance was charged with representing the affected individual’s interests, and was able to cross-examine any witness for the government and generally assist to test the strength of the government case.

In response to Chahal, the United Kingdom Parliament enacted The Special Immigration Appeals Commission Act (U.K.), 1997. Those promoting the bill presented SIAC as addressing the ECtHR’s concerns over procedural fairness, while utilising the means suggested by the Court, most concretely with reference to Canadian procedures, to

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60 Chahal, supra note 14 at para 131.
61 This holding was unanimous.
62 Chahal, supra note 14 at para 131 (in the discussion of authority to detain); see also at para 151 – 155 (re decision to deport).
64 The Special Immigration Appeals Commission Act (U.K.) 1997, c.68 [SIAC Act]. ‘It is a simple but fundamental point that this legislation would not be before us now were it not for the European Court’s decision in the Chahal case.’ U.K., H.C., Standing Committee D (11 Nov. 1997), Mr John Greenway.
preserve confidentiality. SIAC was presented as the ‘independent body…appraised of all the facts and evidence and entitled to reach a decision which would be binding on the Secretary of State’ demanded by the ECtHR in *Chahal*.  

SIAC was and is composed of panels of three, appointed by the Lord Chancellor, consisting of a High Court judge, a judge with experience in immigration matters, and a layperson possessing a high level security clearance who has experience in analyzing intelligence. The members sitting as SIAC are able to consider both ‘open’ and ‘closed’ material, though neither those subject to its ruling, nor their legal representatives can see the closed material. Instead, this closed material is disclosed to one or more ‘special advocates’. A ‘special advocate’ is appointed to represent the interests of a certified individual in any hearing from which he and his legal representatives are excluded. In a critical limitation on his or her role, a special advocate can meet with the certified individual he or she is charged with representing before receiving the government evidence, but thereafter any communication from the special advocate to the certified individual has to be authorized by SIAC. A ‘special advocate’ does not act on the instructions of the certified individual and cannot seek his explanation of the government evidence. The functions of the special advocate are to test whether greater disclosure is warranted, and to challenge the government’s case as best they can in the absence of instructions from the certified individual. SIAC is only bound to communicate its reasons for decision to the parties ‘if and to the extent that it is possible to do so without disclosing information contrary to the public interest’. In practice, SIAC issues both an ‘open’ and a ‘closed’ judgment in respect of each of its decisions.

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65 See *Chahal*, supra note 14 at para 144.
66 SIAC Act, supra note 64, Schedule 1, Article 1.
67 The requirement that members meeting the first two requirements listed be on the panel is contained in the SIAC Act, supra note 64, Schedule 1, Article 5.
68 See SIAC Act, supra note 64, s 6. Most of the substantive detail about SIAC’s operation was left to the rules of procedure: see The Special Immigration Appeals Commission (Procedure) Rules, S.I. 2003/1034 (U.K.) [SIAC Rules].
69 SIAC Rules, *ibid.* r 36. On being notified of any such request for communication, SIAC has to notify the Secretary of State, who then has a period of time to make an objection, which is to be considered by SIAC. If SIAC rules for disclosure, the government is not bound to disclose if it elects not to rely on the material that is the subject of the ruling. On an identical procedural point in the context of the control order regime see the discussion of the control order procedures in Chapter 5.
70 SIAC Rules, *ibid.* r 47.
Both parties, the government or the certified individual, can appeal SIAC’s determinations to the Court of Appeal, but only on a question of law.\textsuperscript{71}

The creation of such a body marked a fundamental shift from the situation that had previously obtained in the United Kingdom. As noted above, prior to \textit{Chahal} the Secretary of State’s decision to deport a non-citizen on grounds of national security was not subject to independent scrutiny leading to a binding decision.\textsuperscript{72} Those promoting the SIAC Bill understood it to be an essential part of complying with the \textit{Chahal} judgment that SIAC was able to make decisions binding on the Secretary of State.\textsuperscript{73} They presented the subjection of the Secretary of State to binding review as a significant advance in human rights terms.\textsuperscript{74}

3.5 The HRA.

On 2 October 2000, between the enactment of the SIAC Act and the \textit{Belmarsh} litigation, the HRA entered into force.\textsuperscript{75} Under the HRA, the United Kingdom Parliament created a new and general ground of illegality by making it unlawful for any public authority to act

\textsuperscript{71} There was more parliamentary debate on the provision of appeal from SIAC than on any other aspect of the legislation. The debate on this issue provides a snapshot of the then prevalent expectations of the courts in the national security field. The legislation as initially introduced made no provision for any appeal, with the Labour government portraying the corresponding conclusiveness of a decision by SIAC as expressive of the rule of law. The opposition Conservatives, worried that SIAC would not give appropriate weight to government security concerns, pushed for the Minister, and not the certified individual, to have a broad right of appeal to the courts. It was assumed that the courts would ‘correct’ any lack of deference on the part of SIAC. The opposition view of the courts response to SIAC was substantially vindicated by the \textit{Rehman} decision, discussed in the text below. The eventual position whereby both parties could appeal on an issue of law was a compromise: see Rayner Thwaites, \textit{Deportation on National Security Grounds}, LLM Thesis, University of Toronto (2004) at 76-81.

\textsuperscript{72} See in text above accompanying note 25 \textit{supra}.

\textsuperscript{73} ‘The introduction of a right to appeal to an independent commission in these cases means that the commission will be in a position to overturn decisions made personally by the Secretary of State. Of course, any such decisions taken by the commission will be unwelcome to the Secretary of State, but it is an essential aspect of complying with the Chahal judgment that the commission should be able to take decisions, rather than only make non-binding recommendations in the manner of the three advisers who formerly acted in such cases.’: U.K., H.L., Parliamentary Debates, col. 1033 (26 Nov 1997), Parliamentary Under-Secretary of State for the Home Department, Mr Mike O’Brien, on the Third Reading of the Special Immigration Appeals Commission Bill.

\textsuperscript{74} See U.K., H.L., \textit{Parliamentary Debates}, col. 752 (5 June 1997), Lord Williams of Mostyn, ‘it is intended that the decision should bind the Home Secretary. I respectfully suggest that this is a very significant advance in human rights terms.’

\textsuperscript{75} The main provisions of the HRA entered into force on 2 October 2000 (i.e. not every provision).
incompatibly with ‘Constitution rights’ (s 6). As the courts are themselves a public authority, they must develop and apply the law compatibly with Convention rights. In addition, the HRA requires that all legislation be read compatibly with the Convention rights ‘so far as it is possible to do so’ (s 3). Where legislation cannot be read compatibly with the Convention rights, the courts may issue a declaration of incompatibility (s 4).

The HRA is not an ‘incorporation statute’. It does not incorporate the rights under the ECHR into the law of the United Kingdom, rather it gives ‘effect’ to them as domestic statutory rights created by the HRA. This is relevant to our discussion, as it opens up the possibility of a divergence between statutory Convention rights in British law and rights under the ECHR as interpreted at the European level. The possibility of a distinct British rights jurisprudence, with the HRA serving as the ‘floor’ has, with some exceptions, not eventuated. The House of Lords has, by and large, held that British courts should go no further than required by the jurisprudence of the ECtHR in interpreting Convention rights.

Section 1(2) of the HRA provides that the statutory rights under the HRA are to have effect subject to any ‘designated derogation’. This phrase is defined in s 14 as ‘any derogation by the United Kingdom from an Article of the Convention…which is designated for the purposes of this Act in an order made by the Secretary of State’. The relation between s 14 of the HRA, and the criteria for a lawful derogation under Art 15 of the ECHR, is discussed below in the context of the Belmarsh litigation.

3.6 *Rehman* and SIAC’s review function.

The Belmarsh litigation commenced with an appeal to SIAC. An integral part of the context for SIAC’s decision in the Belmarsh litigation is the earlier decision of the House of Lords in *Rehman*, handed down on 11 October 2001, a month after the terrorist

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76 ‘Constitution rights’ are defined for the purposes of the HRA in s1(1) and include Articles 2 to 12, and 14 of the ECHR, in addition to several Articles from protocols to the ECHR.
77 See Beatson et al, *Human Rights*, supra note 8 at para 1-69 to 1-76.
78 See the discussion of the authorities in Beatson et al, *Human Rights*, supra note 8 at para 1-77 to 1-99.
attacks.\textsuperscript{79} \textit{Rehman} is a pre-HRA case. It concerned a decision of the Secretary of State to deport a foreign national from the United Kingdom on the basis that it was conducive to the public good on grounds of national security. Mr Rehman was accused of supporting terrorist activities in the Indian sub-continent. He appealed to SIAC. This was a full appeal, reviewing the Secretary of State’s decision on the law and his findings of fact.\textsuperscript{80} SIAC overturned the Secretary of State’s decision. It held that a threat to national security had to be a direct threat to the United Kingdom. And it further held that the Secretary of State had failed to satisfy a high civil standard of proof in establishing that Mr Rehman was a threat to national security.

The House of Lords overturned SIAC on both holdings. The House of Lord’s reasoning on the second point, the standard of proof, is of particular relevance to developments in this chapter. Lord Slynn stated that whereas past events had to be proved to the civil standard, the Government was best placed to evaluate future risk, with that task falling to the Secretary of State:

He is entitled to have regard to preventative and precautionary principles rather than wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgment or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a ‘high civil degree of probability’. Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be deportation for the public good.\textsuperscript{81}

All members of the House of Lords were supportive of the proposition that evidence of future risk does not have to be proved to a civil standard in the same way as evidence of present or past facts. Lord Slynn and Lord Steyn put this in terms of according due

\textsuperscript{79} Supra note 17.
\textsuperscript{80} SIAC Act, supra note 64, s 4(a). There then lay an appeal from SIAC to the Court of Appeal on ‘any question of law material to’ the Commission’s determination: ibid, s 7(1).
\textsuperscript{81} Rehman, supra note 17 at para 22. Much has been written on the precautionary principle in the context of the ‘war on terror’, see for example Cass Sunstein ‘Beyond the Precautionary Principle’ (2003) 151 U. Pa. L. Rev. 1003; David Runciman, ‘The Precautionary Principle: Tony Blair and the Language of Risk’ (2004) 26:7 London Review of Books 12. The commentators note that it is almost invariably invoked in circumstances where what is being guarded against is so catastrophic that anything that would avoid that result, even if it only results in incremental gains in safety, is justified. The sole dissent in \textit{Belmarsh}, Lord Walker, also explicitly adopted a ‘precautionary’ approach: see \textit{Belmarsh}, supra note 1 at para 197.
weight to the assessment and conclusions of the Secretary of State.\textsuperscript{82} Lord Hoffmann went further, holding that the Secretary of State’s determination should only be interfered with if it could not ‘reasonably be entertained’.\textsuperscript{83} Lord Hoffmann’s statements on this issue were quoted, and referred to, by SIAC in \textit{Belmarsh}. The judgments in \textit{Rehman} were all careful to frame their conclusions on this point with reference to the government’s power of deportation in the public good. It was the exercise of this power that could rest on the evaluation that there was ‘a real possibility of activities harmful to national security’.\textsuperscript{84}

All members of the House of Lords hearing the case acknowledged that the legislation supported the conferral of a full appellate jurisdiction on SIAC: ‘The amplitude of that jurisdiction is emphasised by the express power to reverse the exercise of a discretion’.\textsuperscript{85} Further, the judgments referred to the composition and procedures of SIAC as supporting its expertise and its ability to determine questions of law and fact in the realm of national security. Nonetheless, this conferral of jurisdiction was read down with reference to the deferential position on future risk outlined above. This deferential position was said to ‘flow… from a common sense recognition of the nature of the issue [national security] and the difference in the decision making processes and responsibilities of the Home Secretary and the Commission’.\textsuperscript{86} The House of Lords recast SIAC’s role, bringing it into conformity with a traditional, deferential approach to judicial review in matters of national security. The result was to hobble a legislative experiment, sparked by \textit{Chahal}, that had sought to introduce a new level of accountability into national security.\textsuperscript{87}

The reasoning of Lord Hoffmann in \textit{Rehman} needs to be singled out for attention, as it is his reasoning that subsequently featured most prominently in SIAC’s \textit{Belmarsh}
He explicitly based his reasoning on the separation of powers, which was taken to demand a compartmentalisation of judicial, executive and legislative functions. Where a matter was entrusted to the executive, the courts were not to interfere, ‘under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision.’ The complement of the idea that national security should be largely free from judicial scrutiny was the view that, in this area, accountability should be through the political process. Lord Hoffmann’s postscript to Rehman is a well-known expression of the appropriateness of political, as opposed to legal, forms of accountability, in dire matters of national security.

The converse of entrusting certain matters to the executive was illustrated by Lord Hoffmann’s obiter comment that the question of whether a person deported might be subject to torture in violation of Art 3 was an issue for the courts. In relation to the danger to national security, the European jurisprudence on Art 3, namely Chahal, made clear that whether the individual posed a risk to national security was irrelevant. Lord Hoffmann recognised this, stating that ‘if there is a danger of torture, the Government...

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88 Lord Clyde adopts the reasons of Lord Hoffmann. Lord Hutton adopts the reasons of Lords Slynn, Steyn and Hoffmann.
89 Rehman, supra note 17 at para 50. The clearest application of Lord Hoffmann’s approach to national security was his holding that SIAC was ‘not entitled to differ from the opinion of the Secretary of State’ as to whether the promotion of terrorism in a foreign country by a British resident was contrary to national security: ibid. at para 53. Lord Hoffmann’s conception of a realm of national security as a zone of executive activity largely free of judicial interference is akin to the majority’s understanding of the aliens power in Al-Kateb v Godwin (2004) 219 CLR 562 [Al-Kateb]. This is unsurprising in that they both proceed from the understanding that the separation of powers demands a compartmentalisation of functions.
90 ‘I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can only be conferred by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove: Rehman, supra note 17 at para 62, Lord Hoffmann. This speech was quoted with approval by the Canadian Supreme Court in Suresh v Canada (Citizenship and Immigration) [2002] 1 S.C.R. 3 at para 33, see also 31 (that decision is discussed in Chapter 4, section 4.2.2.)
must find some other way of dealing with a threat to national security. This is what the government attempted to do in the legislation challenged in *Belmarsh*.

### 3.7 The derogation and detention measures at issue in *Belmarsh*.

#### 3.7.1 Factual background to the *Belmarsh* litigation.

Prior to the events of September 11 2001, there were a number of foreign nationals known to the United Kingdom authorities (i.e. MI5), who it wished to deport but could not, due to the real risk of torture on return to their country of nationality and the legal significance of this fact as a bar to removal following *Chahal*. In turn, as confirmed by *Chahal*, the bar on deportation arguably frustrated the precondition for immigration detention under Art 5(1)(f), namely the taking of action ‘with a view to deportation’. Subsequent to the terrorist attacks of September 11 2001, the United Kingdom government renewed its efforts to remove these foreign nationals from the community. In doing so it had to address the incompatibility of both deportation to a real risk of torture, and indefinite detention of a non-citizen subject to a removal order, with the ECHR. It did so by using the derogation provisions in the ECHR.

The ECHR makes provision, in Art 15, for derogation from rights in time of ‘public emergency’. The inclusion of such derogation provisions in the ECHR and other prominent international human rights treaties acknowledges that when governments perceive ‘threats to the life of the nation’ they will take action that seriously impinges on rights. Derogation provisions simultaneously acknowledge the inevitability of ‘exceptional measures’ and seek to extend the legal regime so as to review such measures. The nature of derogation provisions is discussed below.

The government sought to derogate from Art 5(1) in anticipation of the enactment of indefinite detention provisions. Its decision to detain rather than deport was shaped by the architecture for lawful derogation in the ECHR. The government had to work around

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91 *Rehman, supra* note 17 at para 54, Lord Hoffmann. This statement was also quoted by the Canadian Supreme Court in *Suresh, supra* note 90 at para 76. See also *Rehman* at para 57, Lord Hoffmann.
the fact that the prohibition on deportation to torture under Art 3 was ‘non-derogable’. The drafters of the ECHR had concluded that states were not to be released from their obligations with respect to the prohibition on torture in any circumstances. However, the derogation provisions did allow for detention without trial in time of public emergency. The government could derogate from Art 5(1). And this is what it did. It did so on the grounds that there existed, in the form of Al Qaeda, a terrorist threat that constituted a ‘public emergency threatening the life of the nation’.

The legislation served by the derogation was the ATCSA. The ATCSA was introduced into Parliament the day after the Derogation Order had been tabled. Section 23 of the ATCSA provided for ‘international terrorist suspects’ to be taken into indefinite immigration detention. I further detail the operation of the ATCSA below, following a discussion of the derogation provisions under the ECHR.

3.7.2 Derogations in the ECHR.

The HRA appears to adopt the derogation regime in the ECHR in providing for ‘designated derogations’ from Convention rights in ss 1(2) and 14. Certainly, in the Belmarsh litigation, the government conceded that the validity of the derogation in domestic law depended on whether the derogation to which it gave effect was lawful under Art 15 of the ECHR. Under Art 15(1), for a derogation to be lawful it must meet three criteria:

(i) there must be a ‘public emergency threatening the life of the nation’;

(ii) the derogating measures must be ‘strictly required by the exigencies of the situation’; and

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92 See ECHR, Art 15(2).
93 The United Kingdom sent a note verbale to the Secretary General of the Council of Europe, pursuant to its obligations under the ECHR to keep him informed of any derogation. To register a ‘designated derogation’ under the HRA, the government tabled a domestic derogation order before the U.K. Parliament on 11 November 2001: The Human Rights Act 1998 (Designated Derogation) Order 2001, S.I. 2001/3644 (U.K.) [Derogation Order]. The note verbale to the Secretary General of the Council of Europe was scheduled to Article 2 of the Derogation Order.
94 Supra note 13.
95 See SIAC at para 12, and para 38. For an argument that this concession was correctly made see Beatson et al, Human Rights, supra note 8 at para. 1-115.
(iii) the measures are not to be ‘inconsistent with [the relevant state’s] other obligations under international law’.

It is worth pausing here to consider how to regard the provision made in the ECHR for derogations. This is usefully done with reference to Hickman’s distinction between two understandings of derogation, the limitation and derogation models. Hickman introduces the two models against the background of a third, the ‘extra-legal measures’ model. The ‘extra-legal measures’ model argues against seeking to accommodate executive responses to emergencies within the legal framework. It does so on the grounds that it is both futile and counter-productive. It is futile in that there will always be uncontrolled executive action in response to an emergency, and doubly counterproductive, in that it both imposes restraints on the executive precisely when it most needs a free hand, and risks lasting damage to the legal system’s fundamentals in its attempts to accommodate the exceptional.

Of the two different understandings of derogation considered by Hickman, the limitation model is the more vulnerable to the charges of being futile and counterproductive. The limitation model treats a derogation as simply another limitation on rights. Rights obligations that are derogated from still apply, it is simply that their scope is diminished. Perhaps the clearest example of such an approach is the government argument in Belmarsh that the indefinite detention measures enacted under cover of the derogation did not change the nature of immigration detention in any fundamental respect. The derogation was presented as merely enabling an extension of the detention power by way of a corresponding limitation on the right to liberty. The limitations model feels the bite of the criticisms from the extra-legal measures perspective. The executive is still hampered by having to justify its actions in terms of various rights obligations, and these


\[98\] An outspoken, and unrestrained, contemporary expression of this is the allegation, voiced by some in the United States legal community, that courts minded to subject the executive to close scrutiny in the ‘war on terror’ are engaged in ‘lawfare’: see e.g. Andrew C. McCarthy ‘Lawfare strikes again. The Fourth Circuit’s combatant case heralds the return of September 10’, National Review Online, 12 June 2007, online: <http://article.nationalreview.com/?q=YWVlMGZlMzJhN2EwMWU0YjIzZjkwOGRlOTBlY2UxYTQ=>
rights obligations are in turn brought into disrepute when diminished by extensive limitation.

The alternative, the ‘derogation’ model, holds that a derogation does not just limit a right, it releases a state from its obligation to observe that right. The central feature of the model is that it sees a derogation as sanctioning a departure from a rights obligation, but not from legality. A derogation from rights obligations still falls to be assessed against substantive, and strictly applied, criteria for lawfulness. The space opened up between rights and legality softens the criticism from the extra-legal measures quarter. A derogation allows a state to pursue its advertised course of action without having to justify itself with reference to the right, and the legal understanding of the right is in turn insulated, at least to a degree, from the exceptional turn of events. The derogation model remains firmly distinct from the ‘extra-legal measures’ model in that fundamental criteria of legality still apply to the executive’s action. The importance of these criteria is testified to by the House of Lords decision in Belmarsh.

The fact that a derogation releases a state from a rights obligation, rather than simply limit that obligation, raises the stakes considerably. The immediate implication of the heightened consequences of a derogation under the derogation model is that the standard of review applied in assessing the lawfulness of a derogation needs to be correspondingly higher than the standard of review for infringement of a right. It is appropriate that the ability to suspend a right be more tightly circumscribed than the ability to limit it.99 The case law on derogation from the ECHR manifests the derogation model, in that the appropriate test for the second criterion for lawful derogation is that of ‘strict necessity’.100 The difference between ‘ordinary’ proportionality and the ‘strictly required’ test is that the latter ‘invites the government to show, without any initial

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99 This is on the assumption that clear daylight remains between limitation and suspension, and that limitation does not become suspension in disguise.
evidence from which the contrary is to be inferred, that it has considered the alternatives and that no less intrusive possibility exists.  

Applying the derogation model, an assessment of the Belmarsh litigation needs to appreciate the difference between questions about the scope of the relevant Convention rights and the standards for lawful derogation. The central question addressed in the litigation was whether indefinite administrative detention of non-citizens was ‘strictly required by the exigencies of the situation’. If it was (and the other criteria for derogation were established), then the existence of the threat posed by Al Qaeda would have been held to release the United Kingdom from its obligation to justify the serious infringement of liberty constituted by indefinite detention of deemed foreign terrorists. What was directly at issue was not the scope of the right to liberty, but whether the government’s suspension of the right to liberty was arbitrary.

3.7.3 The legislative provisions challenged in Belmarsh.

The indefinite detention regime under challenge in the Belmarsh litigation was contained in Part 4 of the ATCSA (‘Immigration and Asylum’), which provided that where the Secretary of State ‘reasonably’:

(a) believes that a person’s presence in the United Kingdom is a threat to national security, and

(b) suspects that the person is a terrorist,

he or she could issue a certificate with respect to a named individual.  

A person so certified could be deported or, should his or her removal or departure from the United Kingdom be prevented, detained. The power of detention applied to all instances in which the power of deportation was frustrated. A deportation order could be issued despite the fact that the non-citizen’s removal was frustrated for the indefinite future (due

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101 Hickman, ‘Derogation Model’, supra note 96 at 666. See Handyside v United Kingdom (1979) 1 E.H.R.R. 737. In Handyside, ‘strict necessity’ was equated with ‘indispensability’. The ‘strictly required’ standard, employed in relation to particularly pressing human rights issues, requires the state to adopt the course that least interferes with rights.

102 ATCSA, supra note 13, s 21.

103 Ibid, ss 22 and 23.
to either a ‘point of law’ or ‘practical consideration’).\textsuperscript{104} Section 23 provided for a certified individual to be detained under the \textit{Immigration Act} ‘despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely)’.

Part 4 of the ATCSA added to SIAC’s jurisdiction. It provided for two avenues of appeal, in relation to ‘certification’ and ‘derogation matters’ respectively, which gave rise to two lines of litigation. Under the first, a person certified to be a ‘suspected international terrorist’ could appeal from that certification decision.\textsuperscript{105} In this chapter I focus almost exclusively on the second line of litigation, bearing on legality of the derogation. A ‘derogation matter’ was defined as:

\begin{enumerate}
\item[(a)] a derogation by the United Kingdom from Art 5(1) of the Convention on Human Rights which relates to the detention of a person where there is an intention to remove or deport him from the United Kingdom, or
\item[(b)] the designation under section 14(1) of the Human Rights Act 1998 (c. 42) of a derogation within paragraph (a) above.
\end{enumerate}

SIAC had exclusive jurisdiction over derogation matters.\textsuperscript{106} Provision was made for appeal from SIAC to the Court of Appeal on such matters, on a question of law.\textsuperscript{107} As we will see, the Court of Appeal and the House of Lords adopted different readings of what constituted a ‘question of law’ that could be overturned on appeal.

**PART II - THE DOMESTIC BELMARSH LITIGATION**

The ATCSA came into force on 4 December 2001. On 17 or 18 December 2001, the first of the applicants were certified, and detained shortly thereafter, with the other applicants similarly certified and detained in the weeks and months that followed. A number of

\begin{footnotesize}
\textsuperscript{104} \textit{Ibid.}, s 22.
\textsuperscript{105} \textit{Ibid.}, s 25. See also s 26 on review of certification by SIAC.
\textsuperscript{106} \textit{Ibid}, s 30(2). Section 30 was an attempt to manage the potential legal challenges to the derogation. ‘Since it is contained in a statutory instrument, the designated derogation would have been open to judicial review. In addition, it might have been contended by anyone who was detained that the action was unlawful because it was incompatible with human rights’: \textit{Belmarsh (SIAC), supra} note 83 at para 9.
\textsuperscript{107} ATCSA, 30(3) provided that the rules for appeal from SIAC set out in s 7 of the SIAC Act 1997 applied (s 30(3)(b) of the ATCSA qualified the application of s 7 of the SIAC Act to ‘derogation matters’ with the words ‘with any modification which the Commission considers necessary’).
\end{footnotesize}
those detained challenged their detention as incompatible with their Convention rights under the HRA. They argued that the derogation did not meet the requirements for a lawful derogation under the ECHR and that in the absence of a lawful derogation their detention was incompatible with Art 5(1). They sought the quashing of the Derogation Order and a declaration of incompatibility under the HRA in respect of the detention provisions.

In considering the litigation on the derogation, attention has to be paid to the concessions made by the government and how these shaped the proceedings. In the domestic proceedings, the legal debate centred on the criteria for lawful derogation set out in Art 15 of the ECHR. This focus was, to some extent at least, a function of concessions made by the government. The government reserved the issue of whether or not the detention provisions would infringe Art. 5(1)(f) of the ECHR in the absence of the derogation.108 The government conceded that if the derogation was held not to be lawful, then s 23 of the ATCSA was incompatible with Art 5(1) of the ECHR.

Further, the government conceded that the validity of the derogation in domestic law depended on whether the derogation to which it gave effect at international law was lawful under Art 15 of the ECHR.109 As stated above, under Art 15(1), for a derogation to be lawful it must meet three criteria:

(i) there must be a ‘public emergency threatening the life of the nation’;

(ii) the derogating measures must be ‘strictly required by the exigencies of the situation’; and

(iii) they are not to be ‘inconsistent with [the relevant state’s] other obligations under international law’.

My discussion focuses on the second of these criteria, the issue of whether the measures were ‘strictly required’. I do not address the reasoning on the existence of a public

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108 The government did, however, run the argument that the detention provisions were consistent with s 5(1)(f) in the absence of a derogation before the Grand Chamber of the ECtHR. See the discussion of the ECtHR proceedings in A v United Kingdom in chapter 5, section 5.2. The argument was unsuccessful.

109 See Belmarsh (SIAC), supra note 83 at para 12, and para 38. For an argument that this concession was correctly made see Beatson et al, Human Rights, supra note 8 at para. 1-115.
emergency, the first criterion for a lawful derogation. My thesis centres on the discriminatory, and disproportional, aspects of the indefinite detention of non-citizens. These issues are raised under the second and third criteria.

The detainees’ fortunes were reversed at each stage of the domestic proceedings. As required by s 30 of the ATCSA, the detainees’ challenge to the derogation and legislation was first heard by SIAC. Successful in obtaining a declaration of incompatibility from SIAC, this remedy was overturned by the Court of Appeal, before being reinstated by a majority of the House of Lords. The decisions at each level are discussed below. An appreciation of the earlier decisions is needed to properly understand the reasoning of the House of Lords. The majority positions at each level of the litigation represent three highly distinct ways in which a proportionality test can respond to national security concerns, with very different consequences, and the litigation as a whole constitutes an interesting case study of the relationship between deference, standards of review, and rights.

There was also a subsequent application to the ECtHR, admitted, heard and determined by that body. Its decision, handed down in February 2009, essentially confirmed the reasoning of the House of Lords. That decision is discussed in Chapter 5, section 5.2.

### 3.8 The *Belmarsh* litigation before SIAC.

In *A v Secretary of State for the Home Department*,110 SIAC’s sole objection was in effect that the detention measures *did not go far enough in protecting national security*. There was no rational connection between the needs of national security and the decision to subject only non-citizens to indefinite detention. Accordingly, the distributive decision to burden only non-citizens was not justified.

SIAC made the declaration of incompatibility sought by the detainees. The basis on which it did so was confined to two closely interrelated rulings. First, SIAC held that it was irrational to confine the detention provisions to non-citizens, with the consequence

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110 *Belmarsh (SIAC)*, supra note 83.
that the measures were not ‘strictly required’. And second, SIAC held that the provisions were discriminatory, and so incompatible with Art 14 of the ECHR, from which there had been no derogation. In SIAC’s view, the sole flaw in the scheme under challenge was that it was under-inclusive and only targeted a subset of those who posed a threat. Despite the ultimate ruling for the detainees, what is notable about SIAC’s decision is the members’ acceptance of the government’s argument that indefinite preventative detention was necessary to meet the terrorist threat. This assumption shapes the reasoning at every stage of the analysis.

SIAC’s reasoning on the requirement, under Art 15, that a derogation be ‘strictly required’ by the exigencies of the situation was loose. It considered broad arguments: that less intrusive measures were available, and that there was no rational connection between the measures adopted and the end sought to be achieved.\footnote{Belmarsh (SIAC), supra note 83 at para 39.} It did not refer to any particular jurisprudential basis for a proportionality analysis, except to observe that the interveners had urged that at least ‘Daly standards’ should apply, i.e. the link between the measures adopted and the objective should be rigorously scrutinised.\footnote{Ibid. at para 40. The standard of ‘rigorous’ scrutiny is described in R v Secretary of State for the Home Department; ex parte Daly [2001] 2 AC 532 [Daly], and see in particular at paras 26-27, where Lord Steyn stated that proportionality was the appropriate standard for review of Convention rights, as distinct from any variation on the traditional standards based on Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223. The Wednesbury standard Lord Steyn rejected was, ‘[w]hen anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to refer to one or more of the legitimate aims recognised by the Convention’: R(Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840 at para 40, Lord Phillips MR.} The ‘at least’ is a reference to the fact that the ‘strictly required’ standard is more demanding than ordinary proportionality. As noted above, in ECtHR’s jurisprudence, the ‘strict necessity’ standard requires that no less intrusive means of securing the aim exists.\footnote{See the discussion in the text above accompanying note 101, supra.} It is clear that SIAC did not adhere to this standard. The members of SIAC cited with approval a judicial statement in the Supreme Court of Canada that:

> the tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it
overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.\textsuperscript{114}

As the House of Lords has recognised,\textsuperscript{115} proportionality analysis under the HRA (and ECHR) requires that, in determining whether a measure is arbitrary or excessive, a court should ask:

\begin{quote}
whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are not more than is necessary to accomplish these objectives.\textsuperscript{116}
\end{quote}

\textbf{3.8.1 SIAC on ‘less intrusive means’}.

SIAC first considered the argument that there were less intrusive means. Its treatment of this criterion saw the unravelling of the application of the ‘ordinary’ proportionality test by dint of deference to the government on national security (and certainly did not rise to any higher standard of ‘strict necessity’). SIAC’s approach to proportionality was consistent with the view that ‘the serious potential results’\textsuperscript{117} of a terrorist attack mean that any measure of additional protection secured will justify even such a grave rights violation as indefinite preventative detention. An incremental gain in safety was held to justify the imposition of draconian measures. This acceptance of precautionary logic has its most evident source in the \textit{Rehman} decision, quoted repeatedly in SIAC’s reasons.\textsuperscript{118}

The detainees submitted that there were measures falling short of indefinite detention without charge that were available to achieve the desired objectives, citing the range and breadth of criminal offences under the \textit{Terrorism Act} (U.K.), 2000, and the possible use

\textsuperscript{114} \textit{Belmarsh (SIAC)} supra note 83 at para 44, quoting \textit{RJR MacDonald Inc v A-G Canada} [1995] 3 SCR 199 at 342, McLachlin CJ. In \textit{Belmarsh, supra} note 1 at paras 130-131 Lord Hope criticised SIAC’s adoption of this standard. Compare the Canadian Supreme Court in \textit{Charkaoui v Canada (Citizenship and Immigration)} [2007] 1 S.C.R. 350 at para 85: ‘Parliament is not required to use the perfect, or least restrictive, alternative to achieve its objective’.

\textsuperscript{115} \textit{Daly}, supra note 112.

\textsuperscript{116} \textit{De Freitas v Permanent Secretary of Ministry of Agriculture, Lands and Housing} [1999] 1 AC 69 [\textit{De Freitas}] at 80. These criteria are further discussed in the context of the House of Lords decision, in the text in section 3.11.

\textsuperscript{117} \textit{Rehman, supra} note 17 at para 62, Lord Hoffmann.

\textsuperscript{118} \textit{Belmarsh (SIAC)} supra note 83 at para 15, 16, 21.
of telephone intercept evidence.\textsuperscript{119} SIAC was unconvinced, taking the position that as long as the challenged measures conferred ‘additional protection’ they could be said to be ‘strictly required’. SIAC found that the measures did afford ‘additional protection’, accepting the government’s statement that there were some individuals whose neutralization would not be assisted by the criminal and evidential provisions (or proposed provisions) identified by the detainees. SIAC effectively held that it is not necessary to adopt less intrusive anti-terrorism measures if this would lead to any decline in effectiveness.

Because it never questioned the need for indefinite preventative detention, SIAC never approached the differential treatment of non-citizens from the other direction. It never raised the question of why, if indefinite detention was not necessary for those terrorist suspects who were citizens, it could be said to be necessary at all.

3.8.2 SIAC on rational connection.

SIAC ruled that there was no rational connection between the national security purposes of the detention measures and the decision to confine them to non-citizens. SIAC did not hold that there was \textit{no} rational connection, but rather that there was an insufficient connection. SIAC accepted that the detention measures did advance the protective ends to which they were directed \textit{to an extent}. They simply held that the decision to utilise immigration measures meant that the detention provisions were not properly and fully directed at the threat, and were skewed in a discriminatory way.

SIAC’s objection was not that the detention measures were unjustifiably burdensome, but that a fundamental error had been made in how they had been tailored to the threat. The ‘strictly required’ argument was treated as simply replicating the discrimination argument. SIAC’s ruling that it was irrational to confine the detention measures to non-

\textsuperscript{119} The use of telephone intercept evidence has subsequently been provided for. See \textit{Prevention of Terrorism Act} (U.K.), 2005, Sch. para 9.
citizens simply incorporated its reasoning on the Art 14 discrimination violation.\textsuperscript{120} It is to SIAC’s reasoning on the alleged violation of Art 14 that we now turn.

\textbf{3.8.3 SIAC on Art 14 discrimination.}

Art 14 of the ECHR provides:

\begin{quote}
The enjoyment of the rights and freedoms set forth in (the) Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
\end{quote}

Relying on ECtHR jurisprudence, SIAC held that a successful derogation from Art 5 did not render it unnecessary to consider Art 14 (from which there had been no derogation). The legislation allowed for the indefinite detention of foreign nationals only. It was submitted for the detainees that they were in an analogous position to suspected international terrorists who were nationals because they could not be removed from the jurisdiction. Accordingly, the distinction the Secretary of State had drawn between foreign nationals and British nationals was discriminatory.

In response the Attorney-General made two submissions: first, that the measures in the ATCSA formed part of immigration control, and in that field it was legitimate to distinguish between British nationals and others, and; second that there were objective reasons for focussing on foreign nationals as they constituted the predominant source of the threat. SIAC’s wording of the government’s ‘immigration control’ argument was that the ATCSA ‘is intended to protect the United Kingdom population to the same extent that it would be protected by expulsion in circumstances where the Convention rights of the detainee do not permit expulsion.’ The government presented the administrative detention of non-citizens as intersubstitutable with expulsion. This argument proposes that the power to detain non-citizens is as wide as the power to expel, with both being aspects of a more general power to protect ‘the United Kingdom population’. The government argued that while the ATCSA did extend the power of immigration detention beyond what was permitted under Art. 5(1)(f) of the ECHR, it did not change the nature of immigration detention in any fundamental respect. This is a statement of the limitation

\textsuperscript{120} ‘We find it convenient to consider the arguments on this issue [that the measures are irrational in that they are confined to non-citizens] together with those relating to Article 14 of the Convention [on discrimination], which we do…below.’ : SIAC at para 52.
model of derogation outlined in section 3.7, and a clear indication of its potential to hollow out the content of rights.

The government also sought to extrapolate from earlier, general, judicial statements to the effect that the search for a ‘fair balance’ ‘between the general interest of the community and the personal rights of the individual’ was inherent in the ECHR as a whole. The government submitted that the ATCSA achieved a ‘fair balance’ between the state’s interest in ‘being able to protect its population from malevolent aliens’ and the ‘main interest’ of those aliens in not being deported to torture. This ‘fair balance’ argument recurs through the litigation. The argument is a good indicator of the malleability, and dangerousness, of the balance metaphor. By locating the issue of indefinite detention somewhere on the scales between the legitimate aim of protecting the population on one side and deportation to torture on the other, the government sought to sidestep discussion of indefinite detention as itself a rights violation, presenting it as a reasonable accommodation.

SIAC’s response to these government submissions was terse and to the point. It allowed that the government was entitled to a ‘degree of deference’ on how to pursue the legitimate aim of protection against terrorism, and continued:

We further accept that the measures in the [ATCSA] form part of immigration control, but we have more difficulty in understanding why, in response to the threat of terrorism from suspected international terrorists it was considered necessary or even appropriate to focus on immigration control.

SIAC rejected the submission that the ATCSA simply extended Art 5(1)(f) without changing its nature in any fundamental respect. In doing so, it clearly affirmed a rights-protecting view of immigration detention, ‘[c]ritically underlying any normal and lawful action within Art 5(1)(f) is the prospect within a reasonable time of the detainee being

\[122\] Belmarsh (SIAC), ibid. at para 88.
\[123\] See e.g. A v Secretary of State for the Home Department [2004] QB 335 [Belmarsh (Court of Appeal)] at para 28, Woolf CJ (outlining the Secretary of State’s case).
\[124\] There is a considerable literature on the danger of the balance metaphor in the national security context. See for example ELISE (European Liberty and Security), Results of the Three-Year Program, Final Report, CD-ROM (2004), online: http://www.libertysecurity.org/mat99.html.
\[125\] Belmarsh (SIAC), supra note 83 at para 92.
transferred to a place where he or she will be at liberty."  

SIAC supported this statement with reference to the passage from *Chahal*, quoted above, that stated that immigration detention is predicated on deportation proceedings being prosecuted with due diligence, and is not to be excessive in duration. While the SIAC judgment referred to *Chahal*, the phrase ‘reasonable time’ does not appear in that judgment. The language of ‘reasonable time’ suggests that the *Chahal* decision was read against the domestic judgment in *Hardial Singh*.

SIAC then turned to consider the proposition underlying the distinction the government sought to draw between the liberty rights of citizens and non-citizens. The proposition was that aliens have no general right to be here - at large among the population – even when they cannot be removed. SIAC responded, ‘[t]hat seems to us to be an over simplification. The effect of the decision in *Chahal*, as we understand it, is that if the alien cannot be deported he must be allowed to remain’. SIAC continued:

A person who is irremovable cannot be detained or kept in detention simply because he lacks British nationality. In order to detain him there must be some other justification, such as that he is suspected of having committed a criminal offence. If there is to be an effective derogation from the right to liberty enshrined in Article 5 in respect of suspected international terrorists – and we can see powerful arguments in favour of such a derogation – the derogation ought rationally to extend to all irremovable suspected international terrorists. It would be properly confined to the alien section of the population only if, as the Attorney General contends the threat stems exclusively or almost exclusively from that alien section.

In relation to this second ‘empirical’ argument for focussing on aliens, namely that they were the exclusive, or near exclusive, source of the threat, SIAC reached the following finding, critical to the litigation as a whole:

But the evidence before us demonstrates beyond argument that the threat is not so confined. There are many British nationals already identified – mostly in detention abroad – who fall within the definition of ‘suspected international terrorists’, and it was clear from the submission made to us

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127 See text at *supra* note 49.
128 Compare the majority reasons in *Al-Kateb*, *supra* note 89 discussed in Chapter 2 above, and see also the minority judgments in *Zadvydas v Davis* 533 U.S. 678 (2001) [*Zadvydas*].
129 *Belmarsh (SIAC)*, *supra* note 83 at para 94. This proposition is reminiscent of that made by the Full Court of the Federal Court of Australia in *Al Masri* in rejecting the government’s assertion that release was equivalent to the bestowal of a right to remain on the non-citizen: *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54, discussed Chapter 2, section 2.3.3.
130 *Belmarsh (SIAC)*, *ibid.* at para 94.
that in the opinion of the respondent there are others at liberty in the United Kingdom who could be similarly so defined.\footnote{Ibid. at para 95.}

SIAC concluded that the measures were clearly discriminatory on grounds of national origin, and in violation of Art 14.

### 3.8.4 Conclusions on the SIAC judgment.

In its concluding comments, SIAC effectively proposed that the indefinite immigration detention regime put in place by Part 4 was simply ‘unlegalizeable’ in the circumstances. It stated that merely scheduling a derogation to Art 14 ‘would not assist’ because there was no reasonable relation between means and aims; i.e. the decision to confine detention to non-citizens also raised a problem of rational connection.\footnote{Belmarsh (SIAC) ibid. at para 96.} SIAC’s reasoning has the consequence that at least certain forms of discriminatory treatment cannot be provided for by derogation from the ECHR.\footnote{In this, SIAC’s position is arguably consistent with the explicit prohibition on discriminatory derogations contained in the ICCPR, supra note 47. The derogation provision of the ICCPR (Art 4) states: \textit{4(1). In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.} (Emphasis added). The prohibition on discriminatory derogations in the ICCPR is on this view simply making explicit a consequence of the ‘strictly required’ standard: see further Belmarsh, supra note 1 at para 60.} To reiterate, a finding that a measure is discriminatory will also raise issues about whether there is a rational connection between means and aims, and the absence of a rational connection will mean that the ‘strictly required’ criterion for a lawful derogation is not met. SIAC’s reasoning on discrimination constitutes a clear demonstration of the distance between the derogation model under the ECHR and the ‘extra-legal measures’ model. Even in its responses to public emergency, government action is still subject to legal regulation and, if arbitrary, denied legal sanction.

There is a strangeness to SIAC’s reasoning stemming from the way in which it combined resolute opposition to discrimination with an effective emasculation of the need for a
counterterrorism response to be proportionate.\textsuperscript{134} Its acceptance of the need for indefinite preventative detention, and its ruling that the sole flaw with the measures was that they were under-inclusive (where this was registered both as a violation of Art 14 and of the strictly required criterion), meant that its judgment pointed to an expansion of the detention power. SIAC issued a declaration of incompatibility under the HRA. In its concluding substantive paragraph SIAC stated, ‘[w]e recognise, of course, that such a declaration may be of little if any assistance to the appellants should Parliament decide to deal with the discrimination which we perceive to exist by extending the power of detention to nationals.’\textsuperscript{135}

From SIAC’s perspective, the problem with the measures was that they did not apply widely enough. SIAC’s combination of a minimalist approach to proportionality, coupled with a defence of the ‘core’ requirement of a rational connection, had a mixed legacy in the jurisprudence. The Court of Appeal deepened the deference shown by SIAC and effectively removed independent judicial review of even the rational connection requirement. The House of Lords and the ECtHR built on SIAC’s factual finding that the measures were under-inclusive, and broadened and strengthened the proportionality analysis, with the result that the need for indefinite preventative detention, whether directed at non-citizens or all within the jurisdiction, was questioned.

3.9 Belmarsh litigation in the Court of Appeal.

The detainees did not have long to enjoy their legal success. SIAC’s judgment was handed down on 30 July 2002, and on 25 October of that year the Court of Appeal reversed SIAC’s decision, ruling for the government.\textsuperscript{136} The Court of Appeal judgments were, collectively, notable for their deferential stance. There was a division of labour between the judgments. Lord Woolf CJ developed the implications of a deferential approach and the argument for the measures as immigration measures. Brooke LJ presented the more sweeping claim that, even outside the immigration context, in time of

\textsuperscript{134} As noted above in discussing the ‘less intrusive means’ stage, SIAC effectively accepts that ‘any additional protection’ conferred by the detention measures would suffice to justify them.

\textsuperscript{135} Belmarsh (SIAC), supra note 83 at para 96.

\textsuperscript{136} Belmarsh (Court of Appeal) supra note 123.
war or public emergency, detention measures confined to non-citizens found support in international law.\textsuperscript{137}

\textbf{3.9.1 Lord Woolf CJ.}

\textit{(a) Deference.}

Lord Woolf CJ’s judgment is notable in the jurisprudence on indefinite detention of non-citizens discussed in this thesis as the most explicit instance of deference undermining the claim that such detention is discriminatory. He held that the derogation was lawful. His reasoning on the second criterion for a lawful derogation under Art 15 can be summarised as – the detention measures are strictly required because the Secretary of State said they are. He then appeared to hold that, because the measure was strictly required, it did no more than was necessary, and so was not discriminatory. Such reasoning evidenced a fundamental confusion. The need for a measure might establish that a measure that is discriminatory is nonetheless justified. But it is hard to see how it directly removes the claimed discrimination.\textsuperscript{138}

Lord Woolf CJ adopted a range of additional points raised by the government to buttress the argument that indefinite immigration detention was not discriminatory. In this last exercise, he was joined by Brooke LJ, who engaged in a review of international law, concluding that ‘democratic states are entitled to detain non-nationals on national security grounds in time of war or other public emergency’.\textsuperscript{139}

\textit{(b) The legal position in the absence of the derogation.}

Lord Woolf CJ was clear that in the absence of a derogation, the detention measures violated Art 5(1) of the ECHR. In addressing the question of how long it was appropriate to detain a non-citizen subject to a deportation order, he revisited his earlier decision in \textit{Hardial Singh}, stating that a consequence of that decision was that a non-citizen subject

\textsuperscript{137} The third judgment, of Chadwick LJ, is supportive of points already made in the other judgments, and is noted where relevant.

\textsuperscript{138} See the submissions for Liberty recorded in the Queen’s Bench report, \textit{supra} note 123 at p 344.

\textsuperscript{139} \textit{Belmarsh (Court of Appeal)} \textit{supra} note 123 at para 130. The qualifier of ‘democratic’ was left unexplained.
to a deportation order cannot be detained under the immigration legislation ‘if it is known that a deportation is not possible.’\(^{140}\) He then turned to *Chahal* and, as did SIAC, summarised its effect using the language of *Hardial Singh*. On grounds of national security, the Secretary of State could ‘detain pending deportation a person who did not have the right of abode in this country if he was in the position to carry out the deportation within a reasonable time but not otherwise.’\(^{141}\) He stated that the intention of the derogation and Part 4 of the ATCSA was to do ‘no more than’ reverse the legal effects of *Chahal* on the scope of immigration detention.\(^{142}\)

(c) *The scope of review.*

SIAC had held that the questions of whether the measures were ‘strictly required’ and whether they were discriminatory were two sides of the same coin. The reasoning of the Court of Appeal split these two issues apart. It did so on the basis that *SIAC* had reached divergent conclusions on the two issues. It held that SIAC’s ruling against the government had rested on the discrimination point under Art 14 alone. All members of the Court of Appeal found that SIAC had found for the government on the question of whether the measures were strictly required.\(^{143}\) This is not a supportable reading of SIAC’s judgment.\(^{144}\) There was an evident pressure on the Court of Appeal to read SIAC’s judgment as they did on this point, as detailed in the following paragraph.\(^{145}\)

All members of the Court of Appeal treated the question of whether the measures were ‘strictly required’ as a question of fact. Under the ATCSA, an appeal only lay from SIAC on a question of law. On the Court of Appeal’s approach to proportionality, it would appear to follow that no appeal lay from any determination by SIAC that the

\(^{140}\) *Belmarsh (Court of Appeal)* supra note 123 at para 16.

\(^{141}\) *Ibid* at para 17.

\(^{142}\) *Ibid* at para 27, and also 17, 23 and 31. See also Brooke LJ at para 92: ‘The Government made no secret of the fact that one purpose of the measure was to reverse the effect of [*Hardial Singh and Chahal*]*.

\(^{143}\) *Ibid* at para 35, Woolf CJ; at para 91, Brooke LJ; and at paras 147 and 150, Chadwick LJ.

\(^{144}\) See my above discussion of the SIAC judgment, and see also *Belmarsh*, supra note 1 at para 173, Lord Rodger, beginning ‘Unfortunately, the Court of Appeal misconstrued the decision of SIAC. It by no means constituted a finding of fact in favour of the Secretary of State which foreclosed further consideration of the issue…’.

\(^{145}\) The Court of Appeal was not alone in its misreading of SIAC’s judgment. Lord Bingham (but not the other members of the majority in *Belmarsh*) shared in the same erroneous reading of SIAC’s judgment. See the discussion in the text below, section 3.11.2(d).
measures were not ‘strictly required’. The only way for the judges of the Court of Appeal to get around this, consistent with their stated approach to proportionality, was to simply deny that SIAC had found against the government on the ‘strictly required’ criterion. Whatever the reason for the Court of Appeal’s misreading of SIAC’s judgment, it had the effect that a decision that was notably deferential to SIAC’s findings as a matter of doctrine, was anything but deferential to SIAC in practice.

(d) The erasure of discrimination through deference.

Lord Woolf CJ quoted and endorsed the following famous judicial statement in the United States Supreme Court on discrimination:

equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and chose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were effected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.146

This passage is a succinct, and famed, expression of an instrumental argument for equality. This instrumental argument for equality has been influential in scholarship on the appropriate response to coercive counterterrorism measures, in particular those directed at non-citizens.147 A persisting puzzle in relation to Lord Woolf CJ’s judgment was his endorsement of the above passage at the start of a judgment that was deaf to its message.148

146 Railway Express Agency Inc v New York (1949) 336 US 106, 112-113 quoted in Belmarsh (Court of Appeal) supra note 123 at para 7. Woolf CJ also quoted this passage in a public address to the British Academy, 10 days before judgment in Belmarsh: see Lord Woolf, ‘Human Rights: Have the Public Benefited?’ (Paper presented to the British Academy, Thanks-Offering to Britain Fund Lecture, 15 October 2002), online: <www.britac.ac.uk>.

147 See Neal Katyal in ‘Equality in the War on Terror’ (2007) 59 Stan. L. Rev 1365. This passage from Railway Express is quoted by Katyal at 1370, and his article can be understood as a development of Jackson J’s point. I discuss Katyal’s article in the conclusion: Chapter 6, section 6.2. For a similar argument, stressing the way equality gives the populace a self-interested incentive to curb rights infringements, see Gross ‘Chaos and Rules’ supra note 97 at 1037.

148 Contrast Belmarsh, supra note 1 at para 46, Lord Bingham.
Lord Woolf CJ was of the view that the Secretary of State’s reliance on immigration detention was to be lauded as confining to a minimum the number of persons affected by special powers of detention.\textsuperscript{149} There were two components to his position. The first, consistent with the position adopted by SIAC, was that deference to the Minister required him to accept the indefinite preventative detention of the foreign terrorist suspects as necessary. On this view, the probable outcome of a successful discrimination argument would be the extension of the detention powers to citizens. He treated the idea that the ECHR might require that ‘more extensive’ action be taken as a *reductio ad absurdum* of the detainees’ discrimination argument.\textsuperscript{150} However, this idea, that equality might demand ‘more extensive’ allocation of a burden, was the message in the United States Supreme Court authority that Lord Woolf CJ quoted.\textsuperscript{151}

Where Lord Woolf CJ deepened the deference shown by SIAC was in holding that he must find that ‘no more than’ the indefinite preventative detention of *foreign* terrorist suspects was necessary. He afforded decisive weight to the Secretary of State’s determination as to the extent of the measures necessary for national security:

> Whether the Secretary of State was entitled to come to the conclusion that action was only necessary in relation to non-national suspected terrorists, who could not be deported, is an issue on which it is impossible for this court in this case to differ from the Secretary of State.\textsuperscript{152}

If the Secretary of State was of the view that detention of foreigners ‘will achieve all that is required’, the Court could not demur. Adopting the logic of the government, he accepted that compliance with the ‘strictly required’ criterion for lawful derogation *demanded* that the measures be confined to non-citizens:

> No doubt, by taking action against nationals as well as non-nationals the action from a security point of view would have been more effective. Equally, if the non-nationals were detained notwithstanding the fact that they wanted to leave the country, the action would be more effective.

\textsuperscript{149} *Belmarsh (Court of Appeal)*, supra note 123 at para 39.

\textsuperscript{150} *Belmarsh (Court of Appeal)*, *ibid* at para 49: ‘Such a result would not promote human rights...There would be an additional intrusion into the rights of nationals so that their position would be the same as non-nationals...’; see also para 53.

\textsuperscript{151} Contrast *Belmarsh*, supra note 1 at para 68, Lord Bingham: ‘Any discriminatory measure...cannot be justified on the ground that more people would be effected if the measure applied generally’. Note that Woolf CJ did not seek to justify discrimination, but to argue that there is no discrimination.

\textsuperscript{152} *Belmarsh (Court of Appeal)*, supra note 123 at para 40.
However, on his assessment of the situation, the Secretary of State was debarred from taking more effective action because it was not strictly necessary.\textsuperscript{153}

Admirable in his restraint, the Secretary of State had chosen to subject only non-citizens to indefinite detention. The Secretary of State’s decision was characterized as follows, ‘it is only persons who fall within that class [i.e. foreigners] who need to be detained in order to meet the emergency’.\textsuperscript{154} The problem is that this is indistinguishable from a decision motivated by a political choice to sacrifice the liberties of others to further the voters’ security interests.\textsuperscript{155} The grounds the Court of Appeal gave for choosing the first characterisation was deference. The rationale for deference offered was familiar from \textit{Rehman}, namely the superior institutional competence of the Minister in matters of future risk assessment. The consequence, as implemented by the Court of Appeal in \textit{Belmarsh}, was to effectively abandon judicial review of the proportionality of the derogating measures.

It was this reading of the ‘strictly required’ criterion that allowed Lord Woolf CJ to reverse the legal significance of SIAC’s key factual finding, namely that the threat was not confined to aliens. SIAC had reasoned from this finding to hold that confining the measures to non-citizens was under-inclusive, and discriminatory. Lord Woolf CJ countered that SIAC’s position was an ‘over-simplification because the Secretary of State has come to the conclusion that he can achieve what is necessary by either detaining or deporting only the terrorists who are aliens.’\textsuperscript{156} It was ‘impossible to differ’ from the Secretary of State on the question of whether the detention of non-citizens was all that was strictly required. And if it was strictly required, then there was a match between means and aims such that the measure was not discriminatory: ‘If the Secretary of State’s decision as to what the exigencies of the situation strictly required stands (as I think it must), then the argument based on discrimination falls away’.\textsuperscript{157} His argument did not simply justify discrimination, it made it disappear. While ‘the exigencies of the situation’

\textsuperscript{153} \textit{Ibid} at para 45.
\textsuperscript{154} \textit{Ibid} at para 53, Chadwick LJ.
\textsuperscript{156} \textit{Belmarsh (Court of Appeal), supra} note 123 at para 47.
\textsuperscript{157} \textit{Ibid} at para 153.
might supply a *justification for* discrimination, transparency is not served by adopting a deferential approach to the *existence of* discrimination.\textsuperscript{158}

Further, Lord Woolf CJ’s reasoning up-ended the review appropriate to derogations. In the ECHR jurisprudence, the grave consequence of a derogation, namely the suspension of a state’s obligations with respect to the right derogated from, is held to warrant a ‘strictly required’ standard more stringent than ‘ordinary’ proportionality.\textsuperscript{159} But Lord Woolf CJ went in the opposite direction, reasoning that the deference traditionally held to be appropriate in the area of national security extended to a deferential assessment of the criteria for lawful derogation. In so doing, his reasoning constituted another instance of a judicial attempt to scale back an interesting means of maintaining a regime of legality (the criteria for lawful derogation) where there was claimed to be a public emergency.\textsuperscript{160} The derogation process was made to conform to a restrictive model of judicial review in the area of national security.

**(e) The ‘objective justification’ for the differential treatment of non-citizens.**

Lord Woolf CJ’s arguments from deference would by themselves have been sufficient to decide the case against the detainees. However, he went on to argue that, in any case, there was an ‘objective justification’ for the differential treatment of non-citizens.\textsuperscript{161} In examining this additional justification we see how his deferential approach, outlined above, was underwritten by a rights-precluding approach to immigration detention. For him, a government *intention* to remove a non-citizen was all that was needed for authority to detain, irrespective of whether that intention could be implemented:

> There is a rational connection between their detention and the purpose which the Secretary of State wishes to achieve. It is a purpose which cannot be applied to nationals, namely detention pending deportation, irrespective of when that deportation will take place.

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\textsuperscript{158} This point, that an emergency might justify discrimination, but could not erase it, was advanced by Liberty, one of the interveners in the proceeding: see *Belmarsh (Court of Appeal)*, supra note 123 at p 344.

\textsuperscript{159} See the discussion above in section 3.7.2.

\textsuperscript{160} The House of Lord’s treatment of SIAC’s jurisdiction in *Rehman* being an earlier notable example discussed in this chapter, see section 3.6.

\textsuperscript{161} *Belmarsh (Court of Appeal)*, supra note 123 at para 50.
The fact that detention cannot take place immediately does not mean that it ceases to be part of the objective.\textsuperscript{162} He concluded that there was no discrimination, because the non-citizens in detention were not in an analogous position to citizens. The reasons loosely marshalled in support of this conclusion recur in the jurisprudence on indefinite detention of non-citizens. There was the hope that ‘the regular review of their positions, which the legislation requires, will result in their detention being of limited duration’.\textsuperscript{163} And there was the hard-edged distinction between citizens, who possess a ‘right of abode’, and non-citizens who can only claim a lesser ‘right not to be removed’ to treatment that contravenes Art 3.\textsuperscript{164}

Early in his judgment, Lord Woolf stated that to understand the government’s arguments that there was no unlawful discrimination, it was necessary to take into account the history and development of the rights of states to detain and exclude aliens at international law. He did not develop such an account himself, instead relying on the reasoning of Brooke LJ, discussed below, in this regard.

\textbf{3.9.2 Brooke LJ.}

In a departure from the position of Lord Woolf CJ, Brooke LJ stated:

\begin{quote}
[the fact that foreign nationals generally have no right to be in the United Kingdom and are subject to immigration control], though legally accurate, would not, if it stood alone, justify the identification of foreign nationals as being appropriate for discriminatory treatment of the type contemplated by the derogation and Part 4 [of the ATCSA].\textsuperscript{165}
\end{quote}

The further considerations that were determinative for Brooke LJ were his view that SIAC went astray in its analysis of the threat posed by foreigners, and the findings of his review of international law.

\begin{flushright}
\textsuperscript{162} \textit{Ibid} at para 52 and 53.  \\
\textsuperscript{163} \textit{Ibid} at para 51 and see para 64.  \\
\textsuperscript{164} \textit{Ibid} at para 53 and 56. This was in effect an adoption of the government’s ‘fair balance’ argument, see text accompanying note 121.  \\
\textsuperscript{165} Belmarsh (Court of Appeal), supra note 123 at para 104.
\end{flushright}
(a) Threat posed by foreign terrorist suspects.

On the first topic, SIAC’s analysis of the threat posed by foreigners, Brooke LJ found that SIAC had asked itself the wrong question. He held that SIAC’s factual finding that non-citizens did not constitute the exclusive, or almost exclusive, source of the threat did not address the real point at issue, which was the qualitative question of whether non-citizens were the ‘predominant’ source of the threat. He reasoned that ‘five generals and their chiefs of staff may pose a more serious and immediate threat than 5,000 foot soldiers’. 166 The problem with this point, even if plausible in the abstract, was that in context it amounted to discounting SIAC’s factual findings on a speculative basis. The Court of Appeal only had access to the ‘open’ evidence, unlike SIAC, which had access to both the ‘open’ and ‘closed’ evidence. This point furnished a further example (additional to the Court of Appeal’s misreading of SIAC’s findings on proportionality) of the Court of Appeal taking issue with SIAC’s findings of fact on the assumption that SIAC had failed to give sufficient weight to government security concerns.

The primary government response to the discrimination claim was that the measures were appropriately confined to non-citizens because they were, first and foremost, immigration measures. It was in response to this argument that the detainees argued that, to the contrary, the purpose of the measures was to meet the threat from Al Qaeda, and that assessed against this aim, the detention measures were under-inclusive, and so discriminatory.

(b) International law.

In his argument from international law, Brooke LJ is best understood to rely on an alternative argument to the effect that even outside the immigration context, national security justified targeting non-citizens. The legal position of non-citizens in time of public emergency was clearly presented as an exception to the development of restrictions on a state’s power over non-citizens, structured ever more explicitly with

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166 Ibid. at para 103.
reference to human rights norms and an accompanying proportionality analysis:

What emerges from the efforts of the international community to introduce orderly arrangements for controlling the power of detention of non-nationals is a distinct movement away from the doctrine of the inherent power of the state to control the treatment of non-nationals within its borders as it will towards a regime, founded on modern international human rights norms, which is infused by the principle that any measures that are restrictive of liberty, whether they relate to nationals or non-nationals, must be such as are prescribed by law and necessary in a democratic society. The state’s power to detain must be related to a recognised object and purpose, and there must be a reasonable relationship of proportionality between the ends and the means.\textsuperscript{167}

He then went on to state:

On the other hand, both customary international law and the international treaties by which this country is bound expressly reserve the power of a state in time of war or similar public emergency to detain aliens on grounds of national security when it would not necessarily detain its own nationals on those grounds.\textsuperscript{168}

Brooke LJ concluded his review of international law with the statement: ‘the principle that democratic states are entitled to detain non-nationals on national security grounds in time of war or other public emergency is one which is very firmly established’.\textsuperscript{169} I further discuss this position in the context of Lord Bingham’s judgment in the House of Lords, where the same argument from international law is considered.

\subsection{3.9.3 Conclusions on \textit{Belmarsh} litigation in the Court of Appeal.}

The Court of Appeal allowed the redrawing of the rationale for, and practice of, immigration detention in the service of an understanding that immigration detention was for the protection of citizens from non-citizens. The legal thinking that supported such an expansion had a number of mutually reinforcing strands. There was an argument from deference, holding that it was impossible for the Court to question the Minister’s claim that ‘no more than’ the detention of non-citizens was required. The claim of discrimination was addressed directly with an ‘objective justification’ for differential treatment. A non-citizen against whom a deportation order had been issued had no right to be ‘at large’ within the community. And finally, there was the more sweeping ruling that differential treatment, including detention, of non-citizens was justified under

\textsuperscript{167} \textit{Belmarsh (Court of Appeal)}, supra note 123 at para 130.
\textsuperscript{168} \textit{Ibid} at para 130.
\textsuperscript{169} \textit{Ibid} at para 131.
international law in time of public emergency or war. Each of these three strands was separated out, and rejected, by the majority of the House of Lords.

3.10 The Certification Proceedings.

As noted above in introducing the legislation (section 3.7.3), Part 4 of the ATCSA provided for two avenues of appeal, in relation to ‘certification’ and ‘derogation’ matters respectively. The above decisions of SIAC and the Court of Appeal were challenges to the lawfulness of the derogation from Art 5(1), and the legislative provisions that relied on that derogation. In between the above judgment of the Court of Appeal, handed down on 25 October 2002, and the decision of the House of Lords on 16 December 2004, the other statutory avenue of appeal was active, with numerous challenges to the individual certification decisions heard and determined by SIAC and the Court of Appeal.170

In one of the certification proceedings, bail was granted to the applicant known as ‘G’, the move taken because of the damage detention was inflicting on his mental health.171 That the onerous conditions on G’s release were adequate to meet security concerns was noted by both Lord Bingham in the House of Lords in Belmarsh,172 and singled out for comment by the ECtHR in A v United Kingdom.173 The decision appears to have been influential in developing the perception that the security threat could be met by way of conditions on release.

3.11 Belmarsh litigation in the House of Lords.

In Belmarsh, a House of Lords’ majority reaffirmed SIAC’s decision, overruling the Court of Appeal, and held that the detention measures were not ‘strictly required’ and

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170 Of the sixteen individuals who brought challenges to their certification, only one had his certificate cancelled by SIAC. For a thorough overview of these certification challenges before SIAC see the judgment of the ECtHR in A v United Kingdom, supra note 47 under the heading ‘1. The Circumstances of the Case – D. The certification proceedings: the individual determinations’ at para 29 – 77. SIAC’s record can be contrasted with the judicial record under the control order regime, discussed in Chapter 5, section 5.3.


172 Belmarsh supra note 1 at para 35.

173 A v United Kingdom, supra note 47 at para 78 – 81.
were discriminatory. The House of Lords quashed the derogation order and issued a declaration that the detention provisions contained in Part 4 of the ATCSA were incompatible with Art 5 and 14 of the ECHR.

In evaluating the reasoning of the House of Lords, regard has to be had to the concessions made by the government, referred to above. The government conceded that in the absence of a lawful derogation, the detention measures contravened Art 5(1)(f) of the ECHR. Further, it accepted that the validity of the derogation in domestic law depended on the validity of the derogation to which it gave effect under international law, as assessed against the criteria in Art 15. Accordingly, the judicial reasoning addressed these criteria.

The second criterion asks what is ‘strictly required by the exigencies of the situation’. The reasoning of members of the House of Lords on what was ‘strictly required’ occurred against a backdrop of widespread scepticism about the existence of a public emergency. To ignore these reservations would be to ignore the considerations at work in the Opinions. Most famously, Lord Hoffmann found against the government on the basis that there was no ‘public emergency threatening the life of the nation’. But among the seven members of the majority who ruled for the government on the existence of a public emergency, this ruling was delivered ‘not without misgivings’ (Lord Bingham), and

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174 Lord Bingham, Lord Nicholls, Lord Hope, Lord Scott, Lord Rodger, Baroness Hale and Lord Carswell. Lord Hoffmann was the eighth member of the majority, but on a different basis from the other seven. He found that the first criterion for lawful derogation under Art 15(1), the existence of a public emergency, was not satisfied. Lord Walker was the sole dissent.
175 See Belmarsh, supra note 1 at para 51, Lord Bingham. Nonetheless, the better view is that the members of the House of Lords did, expressly or impliedly, consider whether the detention measures were compatible with Art 5(1)(f) before considering the validity of the derogation. The majority found that they were not. See ibid at para 8-9, Lord Bingham; para 103-105, Lord Hope; para 155, Lord Scott; para 163, Lord Rodger; para 222, Baroness Hale. See also Lord Hoffmann’s comment to the same effect at para 97. In A v United Kingdom, the ECtHR stated that the House of Lords had concluded that the detention measures did not fall within the immigration exception set out in Art 5(1)(f): see A v United Kingdom, supra note 47 at para 17 and 155.
176 Belmarsh, supra note 1 at para 95-96.
177 Ibid. at para 26.
‘not without hesitation’ (Lord Rodger),\textsuperscript{178} rising to ‘very great doubt’ on the part of Lord Scott.\textsuperscript{179} Lord Scott openly adverted to the surrounding social context in stating:

\begin{quote}
The Secretary of State is unfortunate in the timing of the judicial examination in these proceedings of the “public emergency” that he postulates…judicial memories are no shorter than those of the public and the public have not forgotten the faulty intelligence assessments on the basis of which United Kingdom forces were sent to take part, and are still taking part, in the hostilities in Iraq. For my part I do not doubt that there is a terrorist threat to this country and I do not doubt that great vigilance is necessary…to guard against terrorist attacks. But I do have very great doubt whether the “public emergency” is one that justifies the description of “threatening the life of the nation”.\textsuperscript{180}
\end{quote}

A notable feature of the House of Lords judgment was that considerable reference was made to statements critical of the detention measures delivered by parliamentary committees, international bodies and officials in the space between the judgment of the Court of Appeal and that of the House of Lords. The extensive quotation from, and reliance on, these references in the reasoning gives documentary reality to Lord Scott’s observation that ‘[t]he Secretary of State is unfortunate in the timing of the judicial examination in these proceedings of the “public emergency” that he postulates’.\textsuperscript{181}

The leading judgment was that of Lord Bingham. I centre my account on his judgment, drawing on other judgments where appropriate.

\textbf{3.11.1 The strictly required criterion for derogation.}

\textit{(a) The rationale for judicial review.}

Lord Bingham presents the dispute between the detainees and the government as one between claims premised on the existence of a fundamental right to liberty, extending to non-citizens, and government insistence on a ‘discretionary area of judgment properly

\textsuperscript{178} \textit{Ibid.} at para 165.

\textsuperscript{179} A more developed way in which the nature of the emergency is brought to bear on the ‘strictly required criterion’, is Lord Hope’s attention to the indefinite and open ended nature of the emergency in considering the detention the derogation sought to authorise: see \textit{ibid}, at para 111-122.

\textsuperscript{180} \textit{Ibid} at para 154.

\textsuperscript{181} In a similar vein, Conor Gearty suggests that the issues of why the ‘fearless liberal’ Lord Woolf was so deferential in the Court of Appeal resolves ‘into one of timing’, ‘The corrosive effect on confidence of the spurious WMD intelligence in Iraq lay in the future. With one exception [the Council of Europe’s Commissioner for Human Rights] no important public body or international organisation had [at the time of the Court of Appeal’s judgment] made a case against part 4 [of the ATCSA]’: Gearty, ‘Human Rights in an Age of Counter-Terrorism’, \textit{supra} note 6 at 39-40.
belonging to the democratic organs of the state’. The central theme of Lord Bingham’s response was that the Court was implementing a constitutional – and hence, fully democratic, mandate. Bingham concluded that ‘the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised.’ He continued, ‘[t]he Attorney-General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.’ This was held to be particularly inappropriate in the context of the general legislative conferral of jurisdiction contained in the HRA, and the more specific conferral constituted by the right of appeal on ‘derogation matters’ under Part 4 of the ATCSA.

Lord Bingham quoted a statement by Professor Jowell that under the HRA, ‘The courts are charged with delineating the boundaries of a rights based democracy’. The short ‘analysis’ piece by Jowell from which the quote was taken provides a useful means of developing Lord Bingham’s understanding of the rationale for judicial review. While a judge can of course simply select a choice phrase that suits his or her purposes without regard for context, aspects of the Jowell piece resonate with the tenor of Lord Bingham’s reasoning in Belmarsh. In the passage from which the quote is taken, Jowell’s subject is the ‘democratic principle’ expressed by Lord Hoffmann in the Rehman decision. There Lord Hoffmann stated:

[These decisions] require a legitimacy which can only be conferred by entrusting them to persons responsible to the community through the democratic process. If people were to accept the consequences of such decisions, they must be made by persons whom the people have elected, and whom they can remove.

182 Belmarsh supra note 1 at para 37. This phrase, ‘discretionary area of judgment’ was first used in A. Lester and D. Pannick, eds, Human Rights Law and Practice (London: Butterworths, 1999). The phrase was then adopted by Lord Hope in R v Director of Public Prosecutions, Ex parte Kebilene [2000] 2 AC 326, 381 in a passage quoted by Lord Bingham at para 39.

183 Belmarsh ibid. at para 42.

184 Ibid at para 42, Lord Bingham;

185 Ibid at para 176, Lord Rodger: ‘If the provisions of section 30 of the [ATCSA] are to have any real meaning, deference to the views of the Government and Parliament on the derogation cannot be taken too far.’


187 Rehman, supra note 17 at para 62. Jowell separates out Lord Hoffmann’s other justification for deference in matters of national security, expressed earlier in the passage from which the quote is taken, the superior institutional capacity of the executive in such matters. Jowell treats it as raising distinct issues.
It is by way of response to this ‘democratic principle’ that Jowell stated, with reference to the changes wrought by the HRA:

No longer can we equate ‘democratic principle’ with ‘majority approval’. Nor can we any longer arrogate the monopoly of legitimacy to those decisions endorsed by the electorate. The new expectations have at their heart the protection of a limited but significant catalogue of rights even against overwhelming popular will.

Even if the above paragraph is wrong, and the HRA in no way intends any expectation of a changed constitutional order, the courts have no need to expose their jugular whenever Parliament or its agents speak on the matter of public interest. Parliament’s continuing power to defy the courts’ declarations on Convention rights does not impinge on the courts’ power to define the scope of those rights. The courts are charged by Parliament with delineating the boundaries of a rights-based democracy. In doing so, they ought not in any way to be influenced by the fact that Parliament may in the end disregard their pronouncements. Nor should they prefer the authority of Parliament or other bodies on the ground that they represent the popular will, or are directly or indirectly accountable to the electorate.’

The quote adopted by Lord Bingham nests in the middle of the second paragraph. It is notable that that paragraph retreats from bolder statements of a ‘changed constitutional order’, to place an emphasis on the need for the courts to ‘define the scope of those rights’, even though ‘Parliament may in the end disregard their pronouncements’. The content of the second paragraph is more in keeping with the Belmarsh decision, which resulted in a declaration of incompatibility with no effect on the continuing operation or validity of the detention measures. The view that Belmarsh was a striking assertion of judicial competence and legitimacy in review of national security measures is often registered by commentators through a comparison between the House of Lord’s position in Belmarsh, and that it adopted three years earlier in Rehman. The juxtaposition of the two quoted passages (from Lord Hoffman and Jowell) identifies the shift.

There was an emphasis in the judgments on the indications of a broad legislative intent to provide for rights based judicial review, in the form of the grants of jurisdiction contained in the HRA, and more specifically, in section 30 of the ATCSA. Nonetheless, at a

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188 Jowell, supra note 186 at 597.
189 See also Simon Brown LJ in International Transport Roth Gmbh v Secretary of State for the Home Department [2003] QB 728 at para 27, Simon Brown LJ, quoted in Belmarsh, supra note 1 at para 41, Lord Bingham: ‘the courts’ role under the [HRA] is as the guardian of human rights. It cannot abdicate this responsibility’.
190 The nature of a declaration of incompatibility is further discussed in the conclusion to this chapter.
191 See for example Beatson et al, Human Rights, supra note 8 at para 3-254 – 3-269; Benvenisti, ‘United We Stand’, supra note 5 at 252-255.
number of points in the judgments this was conjoined with claims to the effect that in exercising judicial review under these provisions ‘British courts are performing their traditional role of watching over the liberty of everyone within their jurisdiction, regardless of nationality’.

The rationale for a non-deferential approach, confident of the legitimacy of a judicial role in guarding rights is essentially the same as that expressed by Gleeson CJ in Al-Kateb v Godwin [Al-Kateb] with reference to the principle of legality. The courts are to guard long term values and principles from anything falling short of legislative repeal by express words or necessary implication. In this way they seek to reconcile representative democracy and robust judicial protection of rights.

In addition, other members of the House of Lords explicitly advanced minority protection as a rationale for judicial review. Lord Hope stated that:

> We are dealing with actions taken on behalf of society as a whole which effect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate. It is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society which respects the principle that minorities, however unpopular, have the same rights as the majority.

(b) Rejection of a case-by-case analysis of indefinite detention.

As noted above (section 3.7.3), Part 4 of the ATCSA provided for two grounds of appeal. One related to challenges to individual certification decisions. These challenges necessarily involved detailed consideration of the evidence against the individual detainees. The second ground of appeal, under s 30, related to ‘derogation matters’. This second ground of appeal went to the lawfulness of the detention power (via the lawfulness of a derogation from the otherwise applicable Convention right).

A feature of the government argument in the Belmarsh litigation was its reiterated preference for matters to be considered on a case by case basis. The reasons for this were

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192 Belmarsh, supra note 1 at para 178, Lord Rodger.
193 Supra note 89.
194 And, in the case of particularly egregious rights infringements, express words alone may suffice.
195 Belmarsh, supra note 1 at para 108. See also at para 237, Baroness Hale.
obvious. Any ruling against the government emerging from such an assessment would be limited to the particular case, with the government power to hold non-citizens in indefinite detention preserved.\textsuperscript{196} Lord Nicholls succinctly summarised the House of Lords response:

> Nor is the vice of indefinite detention cured by the provision made for independent review by [SIAC]. The commission is well placed to check that the Secretary of State’s powers are exercised properly [a reference to the certification review process]. But what is in question on these appeals is the existence and width of the statutory powers, not the way they are being exercised.\textsuperscript{197}

That it was the existence and width of the statutory powers that were at issue blunts objections that the House of Lords was too ready to assume that removal was in fact ‘impossible’ and that the link between detention and removal had been severed.\textsuperscript{198} In \textit{Belmarsh} the House of Lords was focussed on the existence of a statutory power to hold a non-citizen in indefinite detention. It was not directly concerned with whether, in any given case, the length of detention, and prospects for removal, were such as to contravene Convention rights.

\subsection*{(c) The appropriate standard of review of the ‘strictly required’ criterion.}

Lord Bingham headed his consideration of the second criterion for lawful derogation ‘proportionality’ and opened with a statement of the prevailing domestic British criteria for such analysis, originating in \textit{de Freitas v Permanent Secretary of Ministry of Agriculture, Lands and Housing [de Freitas]}.\textsuperscript{199} The \textit{de Freitas} criteria provided that:

\begin{itemize}
  \item[(1)] the legislative objective must be sufficiently important to justify limiting a fundamental right;
  \item[(2)] the measures must be designed to meet the objective and must be rationally connected to it; and
  \item[(3)] the means used to impair the right or freedom are no more than is necessary to accomplish the objective.
\end{itemize}

\textsuperscript{196} The government’s record in relation to the certification decisions that preceded the House of Lords judgment was probably not a matter of indifference either. Of the sixteen individuals who challenged their certification, only one had his certification cancelled by SIAC: see \textit{supra} note 170.

\textsuperscript{197} \textit{Belmarsh, supra} note 1 at para 82.

\textsuperscript{198} For an example of such an objection see Finnis, \textit{supra} note 10.

\textsuperscript{199} \textit{De Freitas, supra} note 116; approved in \textit{Belmarsh, supra} note 1 at para 30, Lord Bingham; and subsequently endorsed by 5 members of the House of Lords in \textit{Huang v Secretary of State for the Home Department [2007] 2 AC 167} at para 19.
Lord Bingham stated that ‘This approach is close to that laid down by the Supreme Court of Canada in…Oakes…and [Libman v Quebec]’. In adopting the de Freitas standard, Lord Bingham was simply adopting the suggestion of the detainees. However, his adoption of an ‘ordinary’ proportionality standard has been criticised as insensitive to the range of standards demanded by the wording of the different provisions in the ECHR. As noted above in introducing the derogation criteria (section 3.7.2), in the ECtHR jurisprudence the second criterion for lawful derogation calls for a standard of ‘strict necessity’. This is a heightened standard, under which a government’s latitude to choose between different measures to achieve the stated aim is more restricted than under an ‘ordinary’ proportionality analysis. The ‘strict necessity’ standard requires that the government choose the least intrusive possibility, and so makes it extremely difficult for broadly framed powers to meet the criterion.

The appropriateness of a higher ‘strict necessity’ standard is supported by other judgments in Belmarsh. Lord Hope was clear that if there was an alternative means of dealing with the emergency, then the ‘prolonged and indefinite detention without trial of those affected by the Derogation Order’ could not be said to be strictly required. Similarly, Lord Scott held that to meet the strictly required standard, the Secretary of State should ‘have to show that monitoring arrangements or movement restrictions less severe than incarceration in prison would not suffice’.

In the Belmarsh case, the better view is that Lord Bingham’s adoption of an ordinary proportionality test did not make a difference. There was no need to determine whether less intrusive measures were available because the Government did not offer any explanation of why suspected terrorists who were nationals were not subject to the

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200 In Huang, ibid. Lord Bingham made clear the de Freitas test derives from Dickson CJ’s judgment in R v Oakes [1986] 1 SCR 103. The doctrinal consequence is that the de Freitas test is seen to include the fourth element of proportionality spelt out in Oakes, namely that ‘the impact of fundamental rights needs to be balanced against the interests of society’. Thus, even where a measure is the least intrusive way of securing an aim (and is rationally connected to that aim) it may still be found to be disproportionate.


202 Belmarsh supra note 1 at para 124, see also para 121.

203 Ibid. at para 155.
indefinite detention power.\textsuperscript{204} No evidence was offered to rebut the obvious inference that less intrusive measures were effective in relation to British nationals. In these circumstances, the indefinite detention of non-citizens did not even meet the requirements of an ordinary proportionality test.\textsuperscript{205}

Applying the \textit{de Freitas} criteria, the majority’s ruling was effectively that the government met neither the second nor the third stage of the test. The detention powers were not rationally connected to tackling the threat from Al Qaeda, in that they allowed international terrorist suspects who were citizens to go free, and for the freedom of non-citizen terrorist suspects post-expulsion. And further, the powers offended the requirement that the means be ‘no more than is necessary’ to the aim. As stated by Lord Nicholls: ‘it is difficult to see how the extreme circumstances, which alone would justify such detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists’.\textsuperscript{206}

\textbf{(d) Application of the standard.}

Lord Bingham noted that the Attorney-General’s submissions had focused primarily on the standard of review.\textsuperscript{207} The government was effectively putting its eggs in the basket of a lower, traditional, standard of judicial review in the area of national security. I have discussed Lord Bingham’s general statements on the rationale for judicial review, and his rejection of an argument that the courts were precluded from scrutinising the issues on grounds of ‘democratic principle’. In addition, Lord Bingham marshalled an array of statements to the effect that the considerations favouring deference to the government in matters of national security were offset by the judicial role in protecting fundamental rights, appropriately invoked where indefinite detention was at issue.\textsuperscript{208} The points he raised in this connection included:

\begin{itemize}
\item \textsuperscript{204} \textit{Ibid.} at para 78, Lord Nicholls; para 129, Lord Hope.
\item \textsuperscript{205} See also Beatson et al, Human Rights, supra note 8 at para 3-165.
\item \textsuperscript{206} Belmarsh supra note 1 at para 76.
\item \textsuperscript{207} Ibid at para 37.
\item \textsuperscript{208} Amongst other decisions, Lord Bingham, at para 41, quotes from the 1984 \textit{Korematsu} decision (\textit{Korematsu v United States} 584 F Supp 1406 (1984) (United States District Court, Northern District of California)), in which a writ of \textit{coram nobis} was issued, overturning Mr Korematsu’s original conviction in 1944 on the basis that the government had knowingly submitted false information to the court that had a
- the right to liberty under Art 5(1) was not a qualified right;
- the particular expertise of the courts in relation to the requirements of a fair trial;\footnote{209}
- the fact that the ECHR is predicated on national courts playing the primary role in protecting the rights under the convention;\footnote{210} and
- the greater intensity of review required under a proportionality approach, as compared to the traditional \textit{Wednesbury} unreasonableness standard.\footnote{211}

Lord Bingham had one final matter to deal with under the ‘strictly required’ criterion. He saw himself as having to overcome a finding by SIAC for the government on the ‘strictly required’ criterion. As discussed in relation to the Court of Appeal’s reasoning, this was an erroneous reading of SIAC’s finding under that criterion. However, the same erroneous reading had markedly different consequences as between Lord Bingham and the Court of Appeal, due to Lord Bingham’s rejection of the idea that proportionality was a question of pure fact, not amenable to review.\footnote{212} Lord Bingham held that the intensity of review involved where the question was one of indefinite detention without charge was sufficient to warrant reexamination of SIAC’s reasoning on proportionality. He held that to treat questions of proportionality as pure questions of fact (as the Court of Appeal purported to do) would effectively ‘emasculate’ the duty of courts to protect Convention material impact on the courts decision. The quote from the 1984 decision was that the United States Supreme Court’s 1944 decision ‘stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.’ The negative example of \textit{Korematsu} was also cited by Kirby J in his dissent in \textit{Al-Kateb}, \textit{supra} note 89: see Chapter 2, section 2.5.5.

\footnote{209} On this point, weight was given to Canadian authority, to \textit{Libman v Attorney General of Quebec} (1987) 3 BHRC 269, and to the dissent of La Forest J in \textit{RJR MacDonald Inc v Attorney General of Canada} \cite{210} supra note 1 at para 197 and 196. The European Court of Human Rights upheld the majority’s understanding of the ‘margin of appreciation’ in \textit{A v United Kingdom}, \textit{supra} note 47 (discussed in Chapter 5, section 5.2) at para 184: ‘The doctrine of margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level’.

\footnote{210} In his dissent, Lord Walker applied the European ‘margin of appreciation’ in the domestic context: \textit{Belmarsh}, \textit{supra} note 1 at para 197 and 196. The European Court of Human Rights upheld the majority’s understanding of the ‘margin of appreciation’ in \textit{A v United Kingdom}, \textit{supra} note 47 (discussed in Chapter 5, section 5.2) at para 184: ‘The doctrine of margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level’.

\footnote{211} \textit{Belmarsh}, \textit{ibid}, at para 39 – 41. See also \textit{supra} note 112.

\footnote{212} \textit{Belmarsh ibid.} at para 44.
rights by treating the judgment of the court at first instance as conclusively precluding further review.\textsuperscript{213}

A comparison of the reasons of SIAC and the House of Lords makes apparent that the House of Lords judgment was not a return to the position adopted by SIAC, but an expansion on it. SIAC had found against the government on the second stage of the \textit{de Freitas} proportionality test. The decision to confine the measures to non-citizens was irrational. The majority of the House of Lords additionally found against the government at the third stage, namely that there was a lack of proportionality between the threat and indefinite administrative detention.

The starting point for the House of Lords, as for SIAC, were questions about the government’s choice to use immigration measures to address a security problem. Lord Bingham quoted from the view of a parliamentary committee that: ‘Some of these problems arise because Part 4 [of the ATCSA] is an adaptation of existing immigration and asylum legislation, rather than being designed expressly for the purpose of meeting the threat from international terrorism.’\textsuperscript{214} But contrary to SIAC, Lord Bingham held that the problem was not merely that the measures did not extend far enough, in not allowing for the detention of \textit{all} international terrorist suspects, non-citizens \textit{and} citizens. The problem was that, if the detention measures were not necessary for citizens who were international terrorist suspects, the government had provided no evidence to rebut the inference that they were not necessary for suspects who were non-citizens either.\textsuperscript{215} This had the consequence that the legal objection could not simply be addressed by extending the measures to citizens.

\textsuperscript{213} \textit{Belmarsh, ibid.} at para 44, Lord Bingham. The question of where review of proportionality falls on the law/fact continuum has continued to be a live issue in judicial review of SIAC, and decisions in the national security area more generally. SIAC’s reasoning on the strictly required criterion in \textit{Belmarsh} was that it was \textit{irrational} to limit the detention power to foreign terrorists: \textit{Belmarsh} at para 174, Lord Rodger. In \textit{RB (Algeria) v Secretary of State for the Home Department [2009]} 2 WLR 512 at para 71, the House of Lords clarified that rationality review of a proportionality finding was permissible, because it was not a review of the weight given to the facts, but of the rationality of the conclusion arrived at. And see para 73: ‘SIAC’s conclusions could only be attacked on the ground that they failed to pay due regard to some rule of law, had regard to irrelevant matters, failed to have regard to relevant matters, or were otherwise irrational.’


\textsuperscript{215} \textit{Belmarsh, ibid.} at para 43, Lord Bingham; see also at para 133, Lord Hope; para 178, 183, 188-189, Lord Rodger; para 228, Baroness Hale.
As an additional ground both for finding a lack of rational connection and a lack of proportionality between aim and means, the majority regarded the allowance for simple expulsion as a perplexing response to dangerous, international, terrorists.\textsuperscript{216} It potentially left the suspects free to operate outside the United Kingdom. The view was taken that ‘the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem’.\textsuperscript{217}

\section*{3.11.2 Discrimination.}

\textbf{(a) The immigration context.}

The majority of Lord Bingham’s reasoning was addressed to the question of whether the detention was discriminatory, in violation of Art 14 of the ECHR. The Attorney-General’s primary line of response to the discrimination objection was that it was immigration detention, and in that field it was not appropriate to compare citizens with non-citizens for the purpose of a discrimination analysis. By way of developing the Attorney-General’s argument, Lord Bingham cited the distinction made by Lord Woolf CJ in the Court of Appeal between a national’s ‘right of abode’ and a non-national’s mere ‘right not to be removed’. Lord Bingham’s response was that, ‘[t]his is…to accept the correctness of the Secretary of State’s choice of immigration control as a means to address the Al-Qaeda security problem, when the correctness of that choice is the issue to be resolved.’\textsuperscript{218} Lord Bingham stated that while it was ‘indeed obvious’ that a distinction had to be made between nationals and non-nationals with reference to immigration, this was not the issue before the Committee, the ‘question is whether and what extent states may differentiate outside the immigration context.’\textsuperscript{219}

Lord Bingham instead started from the proposition that the \textit{aim} of the detention measures was to protect the United Kingdom from Al Qaeda terrorism. The \textit{effect} was to deprive

\begin{footnotes}{
\defcounter{footnote}{216}{
\footnotesize\textit{Ibid}. at para 44.}
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\footnotesize\textit{Ibid} at para 56. See also at para 103 and 105, Lord Hope; at para 157, Lord Scott.}
\end{footnotes}
only non-citizens of their liberty.\textsuperscript{220} In circumstances where the threat presented by suspected international terrorists did not depend on their nationality or immigration status, there was a mismatch between aim and effect that established discrimination.

The signal achievements of the House of Lords in \textit{Belmarsh} were to treat the government’s choice of immigration powers as a reviewable matter, and to reject the government’s characterisation of the detention measures as immigration measures. In doing so they resisted an account that saw the protection of the citizenry from non-citizens as effectively constituting an independent rationale for immigration detention. In what follows, I examine the House of Lords response to the distinct argument that there was, outside the immigration context, a general principle of differential treatment of non-citizens predicated on the idea that a state’s duty was to protect citizens, with non-citizens owed a lower level of protection.

\textit{(b) Use of international law.}

The Attorney-General did not rely on the immigration characterization as the sole answer to the charge that the measures were discriminatory. The Attorney-General advanced a ‘more far-reaching submission’.\textsuperscript{221} Expanding on a power to control entry and expulsion, the Attorney-General asserted ‘that international law sanctions the differential treatment, including detention, of aliens in time of war or public emergency’.\textsuperscript{222} This was the submission that was adopted by Brooke LJ in the Court of Appeal. In response, Lord Bingham drew on a range of legal material for the contrary position that the relevant legal restrictions on detention applied to all in the jurisdiction.\textsuperscript{223}

\textsuperscript{220} This analysis was presented as following the guidance of the ECtHR in the \textit{Belgian Linguistic Case (No 2)} (1968)1 E.H.R.R. 252 that the justification for differential treatment fell to be assessed, under Art 14 of the ECHR, ‘in relation to the aim and effects of the measure under consideration’.

\textsuperscript{221} Belmarsh supra note 1 at para 55, Lord Bingham.

\textsuperscript{222} Ibid at para 55.

\textsuperscript{223} In addition to the discussion of Lord Bingham’s reasons in the text below, for a negative response to the government submission that there was some broader ground, outside the immigration context, for detaining non-nationals in time of public emergency see Belmarsh supra note 1 at para 84, Lord Nicholls and at para 136-137, Lord Hope.
Lord Bingham’s openness to international and comparative law materials has been much remarked upon.224 In reviewing his use of such materials in the Belmarsh decision, I want to highlight two features of it – his engagement with international law, and in particular international human rights law, as a parallel, rich, and continuously developing, body of law; and the central subject matter of his discussion, a thickening set of legal objections to discrimination, and in particular discrimination against non-nationals. In considering Lord Bingham’s extensive recourse to international, and in particular European law and sources, it should be kept in mind that the analysis was directed towards the validity of the derogation under European law (it having been conceded that that those criteria similarly governed the effectiveness of a derogation from statutory ‘Convention rights’ under the HRA).

Lord Bingham did not simply quote from a selection of international treaties. A good contrast here is with the international law reasoning of Brooke LJ in the Court of Appeal, with this comparison developed further below. A reader was directed not just to the text of relevant treaties, but to the commentary and activity they had generated. His judgment conveyed the activity of multiple committees, office holders, and bodies, all exploring and delineating the application of the rights set down in the treaties. International human rights law was presented as a living body of legal debate and discussion and, moreover, one with which domestic law should strive for consistency.

The gist of Lord Bingham’s discussion of international human rights law was the need in the national security context to ensure that a state’s response to security threats was proportionate and general in application, and did not single out non-citizens. Lord Bingham quoted materials in support of the propositions that:225 counterterrorism measures had to be compliant with a state’s national and international human rights obligations; that these rights were applicable to all individuals subject to a state’s jurisdiction; that any infringement of rights must be proportionate to a legitimate aim;

224 See for example Mads Adenas and Duncan Fairgrieve ‘“There is a World Elsewhere” – Lord Bingham and Comparative Law’ in Mads Adenas and Duncan Fairgrieve, eds, Tom Bingham and the Transformation of the Law: A Liber Amicorum (Oxford: Oxford University Press, 2009) 831. Further, two of the five sections of essays in that collection are: ‘European and International Law in National Courts’ and ‘Comparative Law in the Courts’.

225 Belmarsh, supra note 1 at paras 56-63, Lord Bingham.
and that counterterrorism should not serve as a pretext for non-compliance with rights obligations and, in particular, discrimination against persons on grounds of national origin. He finished with two pages of quotations from the Committee established under Art 8 of the Convention against Racial Discrimination, drawn from its Concluding Observations on the United Kingdom (10 December 2003). The quoted comments were specifically directed at the indefinite detention provisions in Part 4 of the ATCSA. The Committee sought to draw the United Kingdom’s attention to its obligations under the Convention Against Racial Discrimination with respect both to the basic prohibition of discrimination, and the requirement of proportionality. Lord Bingham concluded:

The materials I have cited are not legally binding on the United Kingdom. But there is no European or other authority to support the Attorney-General’s submission…These materials are inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat in a time of public emergency.

Lord Bingham’s conclusion that there is no authority at international law for detention measures confined to non-citizens in a time of public emergency contrasts with Brooke LJ’s conclusion in the Court of Appeal that such a proposition ‘is very firmly established’ at international law.

In addition to his extensive reference to international law materials, Lord Bingham’s judgment was characterized by extensive reference to committees of the United Kingdom Parliament. He next turned to the report of the Newton Committee, established under the ATCSA to review the operation of the Act. The Newton Committee had expressed

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227 See also the critical comments on the European Commissioner for Human Rights on Part 4 of the ATCSA, quoted Belmarsh supra note 1 at para 57.
228 Belmarsh, *ibid*, at para 63.
229 The propositions considered by Brooke LJ and Lord Bingham are not identical in that Lord Bingham explicitly qualifies his statement on non-discrimination with reference to nationals ‘presenting the same threat’. Here Brooke LJ’s assumption that non-citizens constituted the ‘predominant’ source of the threat should be recalled: see section 3.9.2 above.
230 See ATCSA, supra note 13, s 122.
231 The Newton Committee made only one review under this provision, see supra note 214.
concern about the limited efficacy of powers directed only at those terrorist suspects who were foreigners.\textsuperscript{232} The Secretary of State had responded:

While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify. Experience has demonstrated the dangers of such an approach and the damage it can do to community cohesion and thus to the support from all parts of the public that is so essential to countering the terrorist threat.\textsuperscript{233}

The above response by the Secretary of State served as something of a lightning rod for criticism of the government’s position in the judgments.\textsuperscript{234} The gist of the judicial responses had a precursor in the Joint Committee on Human Rights’ response to the above, ‘extraordinary’ statement:\textsuperscript{235}

The Government’s explanation in its discussion paper of its reluctance to seek the same powers in relation to UK nationals appears to suggest that it regards the liberty interests of foreign nationals as less worthy of protection than exactly the same interests of UK nationals, which is impermissible under the Convention.\textsuperscript{236}

It is against the background of the above international law material developing the principle of non-discrimination that Lord Bingham turned to consider the Attorney-General’s international law argument, which had been decisive for Brooke LJ before the Court of Appeal. Lord Bingham stated at the outset:

The first step in this argument was to assert the historic right of sovereign states over aliens entering or residing in their territory. Historically, this was the position...But a sovereign state may by

\textsuperscript{232} Newton Committee Report, supra note 214. Conor Gearty credits the report by the Newton Committee as being ‘the key turning point in the public mood, not the first shout that “the Emperor has no clothes” but the first by a set of persons which had been confidently expected to clothe the naked emperor with a fine new suit to last well into the future’: Gearty, ‘Human Rights in an Age of Counterterrorism’, supra note 6 at 40.

\textsuperscript{233} From Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society (Cm 6147, February 2004) at para 36, quoted in Belmarsh supra note 1 at para 64. The idea that measures that target non-citizens are less damaging to community cohesion was explicitly raised as a ‘new’ argument by the government before the European Court of Human Rights in \textit{A v United Kingdom} and rejected by that body as without evidential basis: see Chapter 5 section 5.1.

\textsuperscript{234} See Belmarsh, \textit{ibid}, at para 129, Lord Hope, and para 188, Lord Rodger.

\textsuperscript{235} The Joint Committee on Human Rights is a committee of both Houses of Parliament comprising 12 members. Its terms of reference include consideration of matters relating to human rights in the United Kingdom (excluding individual cases). The aspect of the Committee’s work most relevant to our discussion is its scrutiny of bills and legislation for their compatibility with human rights.

\textsuperscript{236} From Joint Committee on Human Rights, \textit{Sixth Report of the Session 2003-2004} (23 February 2004), HL paper 38, HC 381 at para 44, quoted in Belmarsh supra note 1 at para 65, Lord Bingham. For a closely equivalent, unattributed, statement see para 84, Lord Nicholls.
international treaty restrict its absolute power over aliens within or seeking to enter its territory, and in recent years states have increasingly done so.\textsuperscript{237}

This is not dissimilar from Brooke LJ’s starting point. Brooke LJ was, however, swayed by what he took to be the countervailing message of authorities from times of war and public emergency.\textsuperscript{238} Lord Bingham examined the particular instruments relied on by the Attorney-General in this connection. The first of these was the provision under the Geneva Conventions for wartime internment. Lord Bingham’s response was terse, ‘[i]t is not suggested that the United Kingdom is, in a legal sense, at war or involved in an armed conflict, and it has no bearing on these appeals’.\textsuperscript{239} It is worth pausing to consider the impact of the wartime analogy on legal reasoning in the indefinite detention jurisprudence. The cases of wartime internment are drawn from a conventional war context in which the army of one nation is pitted against another. They are predicated on nationality being relevant to the threat. But the relevance of nationality to the security threat was the central matter in dispute in the proceedings. Reliance on the wartime analogy reintroduced the relevance of nationality to the security threat in a way that avoided discussion and debate.\textsuperscript{240}

McHugh J had also relied on an analogy with wartime cases in his majority judgment in \textit{Al-Kateb}.\textsuperscript{241} A further problem with the wartime internment examples, registered in Kirby J’s response to McHugh J’s use of such, was that there is an onus on anyone relying on such examples to show that they are not qualified or precluded by the corpus of international human rights commitments and domestic analogues that have developed

\begin{footnotesize}
\begin{enumerate}
\item \textit{Belmarsh, ibid.} at para 69. For a critical discussion of the ‘historical position’ outlined in this statement see Chapter 6, section 6.5.3.
\item A notable feature of Brooke LJ’s argument from international and comparative law is that, with the exception of wartime internment and two questionable United States immigration authorities, his examples address a power of expulsion, not detention, of non-citizens.
\item \textit{Belmarsh, supra note 1} at para 69.
\item Here the more general point needs to be made that the stark contrast between Lord Bingham’s conclusions on his review of international law, and those of Brooke LJ, correlated, unsurprisingly, with their position on how the distinction between citizen and non-citizen maps onto that between friend and enemy. Brooke LJ entered into his review of international law on the assumption that non-citizens are the ‘predominant’ source of the threat: See the discussion in the text at section 3.9.2 above. Lord Bingham reviewed the material on the assumption that citizens and non-citizens posed the same threat.
\item McHugh J was relying on the wartime internment examples to rebut Kirby J’s statement that indefinite detention was foreign to Australia’s legal system; while Brooke LJ was using the wartime internment of foreigners to support the justifiability of distinguishing between foreigners and nationals.
\end{enumerate}
\end{footnotesize}
since World War II.\textsuperscript{242} Kirby J’s criticism resonates with the larger issue of a treatment of international and comparative legal materials as isolated artefacts whose meaning has not been affected by an evolving and expanding body of law. This ‘isolated artefact’ approach to international law is consistent with a desire to tether legal sources to approval by the political branches. This anxiety largely ignores the fact that domestic legislation will generally overrule international law to the extent of any inconsistency.\textsuperscript{243}

The faultline between an understanding of international and comparative materials as isolated artefacts and an understanding of them as part of an evolving body of law is seen in the contrast between the international law arguments of the Attorney-General, (endorsed by Brooke LJ in the Court of Appeal) and the approach of Lord Bingham. The problems Lord Bingham identifies with the Attorney-General’s argument can be categorised as follows. The Attorney-General:

- failed to take into account the existence of subsequent treaty obligations that impacted on earlier treaty provisions relied on by the government;\textsuperscript{244}
- selectively took into account only certain provisions from a given treaty instrument;\textsuperscript{245}
- failed to take into account qualifications in the international instruments relied on;\textsuperscript{246} and

\textsuperscript{242} Al-Kateb, supra note 89 at para 165, Kirby J. See Chapter 2, section 2.5.5.
\textsuperscript{243} Cf the position of European Community law in the United Kingdom: European Communities Act 1972 (U.K.), s 2.
\textsuperscript{244} The Attorney-General relied on the provision in the Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 for expulsion on grounds of national security. Lord Bingham’s response is that it does not avail the Attorney-General to show that a course of action is permissible under the Refugee Convention, if it is not permissible under the ECHR. The same comment was made in relation to the Attorney-General’s reliance on a provision of the Convention on the Status of Stateless Persons, 28 September 1954, 360 UNTS 117.
\textsuperscript{245} The Attorney-General relied on the fact that the derogation provision in the ICCPR (Art 4) (quoted supra note 133) contained an absolute prohibition on discrimination on a range of grounds that did not include national origin. Lord Bingham’s response was to point to Arts 2 & 26 in the ICCPR, which did embrace discrimination on grounds of nationality or immigration status. Lord Bingham held that the detention provisions would breach Arts 2 and 26 of the ICCPR, and so fall foul of the third criterion for lawful derogation under art 15 of the ECHR, ‘other obligations under international law’.
\textsuperscript{246} The Attorney-General noted that the UN Declaration on the Human Rights of Nationals who are not Nationals of the Country in Which They Live UN Doc A/RES/40/144, sanctioned differential treatment of non-citizens. Lord Bingham stated that this was qualified in the instrument by the requirement that such
- drew on unjustifiable, or at least very loose, analogies.

In relation to this last point, one of the authorities relied on by the Attorney-General, and picked up by Brooke LJ, was the notorious 1951 judgment of *Shaughnessy v Mezei*. Lord Bingham bluntly stated that this ‘is not a decision which would be followed by a European Court’. Lord Bingham further noted that the United States ‘entry fiction’, whereby an individual in the territory of the United States may be deemed for legal purposes not to have effected an entry, did not obtain in British law. In relation to United States authority more generally, Lord Bingham suggested a more wide-reaching divergence. He moved to distinguish the persuasive value of United States authority with reference to ‘the heightened deference shown by United States courts to the judgments of the political branches with respect to national security’.

Lord Bingham remained unpersuaded that there was any authority for the submission that a state can discriminate against non-nationals by detaining them, but not nationals posing the same threat, in time of public emergency. He quashed the derogation order, and issued a declaration that s 23 of the ATCSA was incompatible with Art 5 and 14 of the ECHR ‘insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status’.

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247 *Shaughnessy v United States ex rel. Mezei*, 345 US 206 (1953). Hayne J endorsed Mezei in *Al-Kateb*, supra note 89, see chapter 2, section 2.4.3.

248 For a statement of the non-applicability of the United States ‘entry fiction’ in the Australian context see *Al-Kateb*, supra note 89 at para 96-97, Gummow J.

249 It is with reference to this distinction that he distanced the House of Lords from the implications of the United States Supreme Court’s obiter comments sympathetic to a ‘terrorism exception’ in *Zadvydas*, supra note 128. This feature of *Zadvydas* is discussed in Chapter 6, section 6.4.1.

250 *Belmarsh*, supra note 1 at para 73.
3.11.3 Legal parameters on the legislative response to *Belmarsh*.

As stated by Lord Scott, the effect of any declaration of incompatibility on the validity of the ATCSA ‘is nil’. Nonetheless, in introducing the second reading of the *Prevention of Terrorism Bill*, the legislative response to *Belmarsh*, the Home Secretary stated that a ‘motivating principle’ behind the Bill was ‘the need to meet the Law Lords’ judgment’. He stated that, ‘we should not ignore the judgment or flout it, but act on it and try to put in place a regime that is both proportionate and not discriminatory’. The government presented the legislation as observing the legal parameters set down by the House of Lords in *Belmarsh*. One evident motivation for repealing Part 4 of the ATCSA was that following the House of Lords ruling that the detention regime was discriminatory, the ongoing legal justification for the detention regime was decidedly unstable. It remained possible for the detainees to appeal against the ATCSA to Strasbourg, which they did, as discussed in Chapter 5, section 5.2.

In assessing the legal parameters on a ‘compliant’ legislative response, the reasoning of the majority in the House of Lords, in contrast to that of SIAC, did not imply that the simple extension of the regime to citizens would result in a solution legally palatable to the courts. The House of Lords held that indefinite detention was itself disproportionate. As to what might be a proportionate measure of addressing the threat, Lord Bingham’s indication of what might be acceptable was indirect. He noted the bail conditions granted to G, one of the appellants, by SIAC in early 2004 on grounds of his severe mental illness, appearing to suggest that they might serve as an example of what could be done, short of institutional incarceration, to address the threat. He did not, however, indicate whether such measures would comply with the HRA.

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251 *Ibid.* at para 144. Lord Scott’s statement was not, strictly speaking, accurate. While the validity of the legislation is unaffected, an individual could bring an action under s 7(1)(a) of the HRA for compensation under s 8: see Clive Walker, ‘Prisoners of “War All the Time”’ [2005] Eur. H.R.L. Rev 50 at 68.

252 Charles Clarke MP, HC Deb vol 431 cols 345-6 (23 February 2005).

253 Additionally, continued detention raised the prospect that it would eventually be found to be ‘inhuman or degrading treatment’ under Art 3 of the ECHR.

254 *Belmarsh* supra note 1 at para 35. On the decision referred to see section 3.10.
3.12 Conclusions on the domestic Belmarsh litigation.

3.12.1 The basic division in the judgments.

The United Kingdom government was faced with foreign terrorist suspects who it could not deport, at least for the time being. It sought to substitute a power of detention for the power of deportation, until such time, if ever, as it could remove the relevant individuals. Such a power of detention could not be accommodated in the ‘immigration exception’ to the right to liberty, in Art 5(1)(f) of the ECHR. Accordingly, the government sought to derogate from the right to liberty in Art 5(1). My account of the Belmarsh litigation has focused on the second criterion for lawful derogation, was the indefinite detention of non-citizens subject to a deportation order ‘strictly required by the exigencies of the situation’?

At the centre of litigation lay the government claim that:

There is a rational connection between their [the foreign terrorist suspects’] detention and the purpose which the Secretary of State wishes to achieve. It is a purpose which cannot be applied to nationals, namely detention pending deportation, irrespective of when that deportation will take place.255

As discussed, the United Kingdom had not derogated from Art 14, the prohibition on discrimination. The issue of rational connection between detention and deportation also had implications for a discrimination analysis. If there was an insufficient rational connection with deportation, why were the detention measures confined to non-citizens?

The question of the rational connection between detention and deportation was answered differently by SIAC and the House of Lords majority on the one hand and the Court of Appeal and Lord Walker on the other. Underlying the different positions were different judicial understandings of the deference appropriate to the executive in matters of immigration and national security and different understandings of the rights of a non-citizen subject to a deportation order. To take Lord Woolf CJ’s judgment in the Court of

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255 Belmarsh (Court of Appeal), supra note 123 at para 52, Lord Woolf CJ.
Appeal, he held that it was ‘impossible to differ’ from the Secretary of State on what was ‘strictly required’. But he took pains to stress that the Minister had an ‘objective justification’ for his decision, in the form of the ‘rational connection’ set out in the indented quote above. By way of contrast, both SIAC and the majority of the House of Lords held that the mere possibility of deportation was too tenuous a justification for detention, and protection of the citizenry did not constitute a rationale for immigration detention irrespective of the prospects for removal.

3.12.2 The declaration of incompatibility.

I have presented the House of Lords majority judgment in Belmarsh as a robust defence of principle. John Finnis takes issue with such a characterisation. He charges that, in issuing an s 4 declaration of incompatibility, the House of Lords ‘passed up on an opportunity to give real legal protection to the rights of the detainees’ by reading in certain restrictions under s 3. I disagree with Finnis, in that I do not think there was any opportunity to pass up on. No compatible interpretation was available. Finnis’ contention is that the House of Lords should have chosen the remedy of ‘reading-in’ under s 3. His suggestion is predicated on his view that all that was legally required to render immigration detention compatible with the ECHR was to require the Home Secretary ‘to satisfy SIAC that he had acted and was continuing to take action for the purpose of securing that they could and would lawfully be deported’ i.e. a rights-precluding approach. A rejection of the compatibility of the rights-precluding approach with Art 5(1)(f) leads to a rejection of Finnis’ suggestion. To address Finnis’ claims that reading in his suggested limitation would have afforded the detainees’ ‘real legal protection’, it is worth pointing out that the central ‘limitation’ he advocates is essentially

256 Belmarsh (Court of Appeal), supra note 123 at para 53, Lord Woolf CJ.
257 Finnis, supra note 10 at 435.
258 For a response to Finnis consistent with that offered here see Clive Walker, ‘The threat of terrorism and the fate of control orders’ [2010] PL 4 at 10. More recently, T.R.S. Allan has expressed sympathy with Finnis’ position that the use of s 4 by the House of Lords in Belmarsh was inappropriate: T.R.S. Allan, ‘Deference, Defiance and Doctrine: Defining the Limits of Judicial Review’ (2010) 60 U.T.L.J. 41 at 57-59. Against Allan’s suggestions, and for substantially the same reasons that I disagree with Finnis, I do not believe a compatible interpretation was available. Further, it was important that the House of Lords indicated its lack of support for an illegitimate exercise of power.
that advocated by the Australian government and adopted by the majority in *Al-Kateb*. In *Al-Kateb* the Australian government argued that the appropriate remedy was not release, but an order to compel the government to make efforts to secure removal. Detainees have not regarded the requirement that the government ‘keep trying’ as offering much protection. Nor have judges upholding indefinite detention, as attested to by McHugh J’s comment on Mr Al-Kateb’s ‘tragic’ position.

Finnis means his suggestion, on ‘reading in’ limitations to the provisions so as to render them compatible with Art 5(1), to be assessed in the context of the detention review mechanisms provided under the ATCSA. These go beyond anything required by the majority judgment in *Al-Kateb*. There are suggestions in his account that such review mechanisms are integral to his preferred approach. For reasons that are central to my discussion of the decision of the Canadian Supreme Court in *Charkaoui* in the next chapter, I do not think that a case-by-case approach to indefinite detention, exclusively reliant on procedural review and without temporal limitation provides adequate protection of the detainees’ rights. Apart from anything else, it takes a gamble on the adequacy of those procedures. Further, as stated above, the House of Lords understood itself to be ruling on ‘the existence and width of the statutory powers, not the way in which they are exercised’.

This approach is to be preferred, in that it asks Parliament to take responsibility for conferring powers that are compatible with rights, rather than allowing it to grant powers that are potentially incompatible with rights, relying on the courts to address these instances on a case by case basis. The latter approach puts the onus on a detainee to pursue his or her case through the courts.

But one can disagree with Finnis on whether the House of Lords should have employed s 4, while still registering the criticism that s 4 does not confer ‘real legal protection’ on the detainees. On one understanding, a declaration of incompatibility under s 4 of the HRA, such as was ordered by the House of Lords in *Belmarsh*, is no legal remedy at all. Lord

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259 Specifically, his reliance on the review mechanisms in his criticism of the *Belmarsh* majority, and his approval of the provision for regular review in *Charkaoui*: Finnis, supra note 10 at 440 and at 440, n 91 respectively.

260 *Belmarsh*, supra note 1 at para 82, Lord Nicholls.
Scott, a member of the majority in Belmarsh, expressed this view. As noted earlier, Lord Scott stated that the legal effect of a declaration of incompatibility on the validity under domestic law of the detainees’ incarceration was ‘nil’. In his view, “[t]he import of such a declaration is political not legal”. Legislation declared in breach of a Convention right remains in full force and effect.

Nonetheless, the practical effect of a declaration should not be overlooked. Where a declaration of incompatibility has become final in its entirety, Parliament has remedied the incompatibility identified, either by primary legislation or a remedial order under s 10 of the HRA, or has taken steps to do so. As will be discussed in Chapter 5, in response to the House of Lords declaration in Belmarsh, Parliament remedied the incompatibility by enacting the Prevention of Terrorism Act 2005. And the ECtHR is likely to give considerable weight to the House of Lords reasoning in support of a declaration. This was evidenced in the reasoning of A v United Kingdom, a decision of the Grand Chamber of the ECtHR on an application by litigants from the domestic Belmarsh proceedings detailed in this chapter. The decisions of the ECtHR are binding on the United Kingdom. But the fundamental point is that when confronted with legislation expressly incompatible with rights, it is important that the courts place on the public record that the Parliament has chosen to depart from its rights commitments. In so doing, a court ensures that this departure is not overlooked in the democratic process.

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261 Lord Scott was a member of the majority, and spoke forcefully on the measures failure to meet the requirements for lawful derogation under Art 15 of the ECHR. However, he makes abundantly clear that he is engaging in the same process as the majority, considering Part 4 of ATCSA against the Art 15(1) criteria, only because ‘the Attorney-General was content to argue the case on…[that] footing’: Belmarsh, supra note 1 at para 152. He makes repeated reference to his ‘puzzlement’ at this concession on the part of the Attorney-General: Ibid. at para 143 and 150-152.

262 Ibid at para 144. As noted earlier in this thesis, this is not strictly accurate as a statement of the domestic legal position. While the validity of the legislation is unaffected, an individual could bring an action under s 7(1)(a) of the HRA for compensation under s 8.

263 Ibid. at para 141.

264 By ‘final in its entirety’ I mean that the declaration was not subject to appeal, in whole or in part.

265 Section 10 of the HRA provides for a ‘fast-track’ procedure whereby primary legislation may be amended by ministerial order.

266 See for example the table on declarations of incompatibility reproduced in Beatson et al, Human Rights, supra note 8 at para 5-154.

267 Prevention of Terrorism Act (U.K.) 2005, c.2, discussed Chapter 5, section 5.3.

268 A v United Kingdom, supra note 47, discussed in Chapter 5, sections 5.2 and 5.3.

269 ECHR, supra note 2, Art 46.
Further, by condemning the measure as incompatible with rights, the court helps to delegitimize its use as a reference point in legal argument.

### 3.12.3 The achievement of Belmarsh.

The United Kingdom’s domestic response to 9/11 had two central characteristics, a ready assumption that the distinction between friend and enemy could be rendered as that between citizen and non-citizen and a focus on anticipatory risk assessment and prevention. Belmarsh signaled the end of the first dynamic, overt legal support for the characterization of the terrorist as foreign. The decision dislodged a preventive detention regime from the immigration setting. Additionally, it marked the rejection of indefinite administrative detention without charge as a proportionate response to the threat, and the beginning of attempts to ensure that the dynamic of risk assessment and prevention was informed by the legal principles of proportionality and procedural fairness.

Seven members of the House of Lords went behind the government’s choice of immigration detention, to ask whether this choice was a rational, and proportionate, response to the threat. The decision constitutes a prominent contemporary example of a judicial body prepared to subject state assertions of a ‘reasonable’ differentiation in treatment between citizens and non-citizens to close scrutiny. The government had pushed for the detention of a non-citizen subject to a removal order to be seen as an aspect of a more general ‘immigration’ purpose of protecting the citizenry from non-citizens. The majority rejected this broader ‘immigration’ purpose asserted by the government and reaffirmed that detention of a non-citizen subject to a removal order was to secure his or her availability for removal. Where removal was frustrated, the purpose of facilitating removal could not supply authority to detain. The decision constituted a statement of unusual clarity of the distinction between detention for the purposes of removal and preventive detention.

270 These themes are identified in Clive Walker, ‘Keeping Control of Terrorists without Losing Control of Constitutionalism’ (2007) Stan. L.R. 1395.
271 This is developed in Chapter 5, section 5.3.
272 These issues did not arise for Lord Hoffmann as he found there was no public emergency to ground the derogation.
3.12.4 Criticisms.

Two further criticisms of Belmarsh warrant mention. First, some critics have pointed to the ‘futility’ of the decision in light of subsequent developments.\textsuperscript{273} I discuss this criticism in Chapter 5. A second, more fundamental, criticism is advanced by John Finnis, who argues that the House of Lords was wrong to reject the government’s submissions.\textsuperscript{274} I will engage with John Finnis’ analysis of Belmarsh in Chapter 6.

\textsuperscript{273} I focus on Ewing and Tham, ‘Futility’ supra note 10.
\textsuperscript{274} Finnis, supra note 10.
CHAPTER 4:

CANADA.

...the position before April 17, 1985, when s. 15 of the Charter of Rights came into force, was dictated by the doctrine of parliamentary sovereignty; generally speaking, the Parliament or a Legislature could discriminate as it pleased in enacting otherwise competent legislation...Before the coming into force of s. 15, discrimination against aliens and naturalized subjects, and against Indians, was undoubtedly competent to the Federal Parliament.

Peter Hogg, quoted by Gonthier, Iacobucci, Major and Bastarche JJ, Lavoie v Canada

The Supreme Court of Canada [the Court] in Lavoie, quoting Peter Hogg, contrasted the relatively unrestrained power to discriminate against aliens (and naturalized subjects and Indians) under a division of powers constitution with the advent of equality jurisprudence under the Charter. In line with this progressive narrative of increasing legal constraints on discrimination, one would expect that the equality provision of the Charter would preclude Canadian courts from taking the position of the majority in Al-Kateb. Al-Kateb is exactly the sort of formalist, discriminatory decision that the opening quote implies s 15 now precludes. The discussion in this chapter shows that Canadian courts have reasoned in a way that effectively transposes key features of the majority position in Al-Kateb into judgments under the Charter.

Charkaoui upheld the constitutionality of the indefinite detention of a non-citizen subject to a deportation order. Strictly, the Court upheld Canada’s security certificate regime, subject to changes to its procedures mandated by the Charter, but that regime has proved dysfunctional when assessed against its ostensible statutory purpose of facilitating removal of foreign terrorist suspects. The regime has resulted in indefinite detention or constraint, not removal. The regime’s characterisation as an immigration detention regime has allowed it to be confined to non-citizens. My focus is on how the Court

3 Where my focus is on one aspect of the decisions, the legality of the indefinite administrative detention of non-citizens.
endorsed the view that a deportation order can effectively remove a non-citizen’s right to liberty under the Charter.

4.1 The constitutional context.

4.1.1 Citizenship under the Constitution.

In Canada, as in Australia and the United Kingdom, the national government’s competence over immigration is grounded in legislation, not the prerogative. The Constitution Act 1867 provides authority for legislation related to aliens and immigration. It contains separate heads of federal legislative power in relation to immigration on the one hand, and aliens and naturalization on the other, as in the Australian Constitution.

‘Citizenship’ is not defined in the Canadian Constitution. As with Australia, this is attributable to Canada’s original status as a Dominion of the British Empire. At the time the Constitution was drafted, the relevant personal status was not ‘Canadian citizen’ but British subject. As a statutory concept, it was only with the current citizenship act in 1976 that ‘alien’ was dropped as the relevant statutory concept and replaced by ‘a person who is not a Canadian citizen’.

With the advent of the Charter, citizenship took on constitutional implications. Canadian citizenship is a required qualification for voting rights (s 3), mobility rights (s

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5 Constitution Act, 1867, s 95. This section is a rare Canadian instance of a concurrent power, conferred on both the federal Parliament and the provincial legislatures, qualified by the requirement that any provincial law shall have effect ‘as long and as far only as it is not repugnant to a federal law’. In practice, ‘provincial legislation [on the subject matter of immigration] has not fared well before the courts: Wydrzynski, ibid. at 27; see also W.H. McConnell, Commentary on the British North America Act (Toronto: Macmillan of Canada, 1977) at 304-307.
6 Constitution Act, 1867 s 91(25).
7 In Law Society of B.C. v Mangat [2001] 3 S.C.R. 113 at para 35, the Supreme Court of Canada stated that the Canadian case law was unhelpful on the tensions ‘within the federal domain between s 91(25) and s 95’. This is distinct from the Australian situation, where at most points in time there was a clear reliance on one or the other power, with a historical shift from the immigration power to the aliens power: see Chapter 2, section 2.1.
9 Ideas of national membership have always had constitutional implications. I simply mean to focus on the concept of citizenship.
10 Section 3 only regulates voting for the federal Parliament.
and minority language educational rights (s 23). With the Supreme Court’s Chiarelli decision in 1992, discussed below, the fact that s 6(1) of the Canadian Charter only confers mobility rights across the national border and a right to remain in Canada on citizens has assumed central importance in the discussion of what amounts to permissible differential treatment of non-citizens.

Hogg notes the potential for conflict between the prohibition on discrimination in s 15 of the Charter and the authorization of laws on the subject of aliens in s 91(25). Any such conflict between the aliens power and constraints on power under s 15 would be closely analogous to the conflict between the aliens power and conceptions of judicial power at the centre of the High Court’s decision in Al-Kateb. As discussed below, in the Canadian post-Charter context this conflict has, however, largely bypassed questions about the scope of federal legislative power, and has instead largely been played out in terms of the relation between Charter provisions (notably the mobility right in s 6(1) and other Charter provisions). Differential treatment between citizens and non-citizens has been grounded in differences in the Charter rights accorded to citizens and non-citizens.

As will become apparent in the discussion of Charkaoui, indefinite administrative detention of non-citizens potentially engages a range of Charter rights (equality, liberty, freedom from cruel and unusual treatment, and the right against arbitrary detention). However, I will provide legal context in respect of only the first two: s 15, the right to equality, and the right to liberty under s 7. I provide some context on s 15 as it most directly addresses the issue of discrimination against non-citizens. Section 7 is discussed

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11 Only s 6(1), relating to mobility across the Canadian national border, is restricted to citizens. The rights under sub-s 6(2)-(4), relating to mobility between provinces, are conferred on both citizens and permanent residents.

12 Section 6(1) reads ‘Every citizen of Canada has the right to enter, remain in and leave Canada.’


14 The contrast that Hogg drew in the opening quote between a division of powers constitution and the Charter is between the competence of the federal Parliament before and after the advent of s 15. A division of powers constitution did potentially provide a mechanism for addressing discrimination against aliens at the provincial level. However, it was an indirect and highly imperfect mechanism. Reviewing the protection s 91(25) afforded against discrimination against aliens under provincial legislation in his 1983 text on Canadian immigration law, Wydrzynski, supra note 4 at 37-38 stated: ‘[i]n the end, the issue is one of human rights. Distinctions based on alienage may offend principles of equality before the law. Reasonable justification for each disability must be required...The provision of s. 91(25) in the Constitution Act, 1867 has not proved adequate for this task.’
as most of the ‘jurisprudential heavy lifting’ with respect to the liberty and security of the person of non-citizens has been performed by this section.\textsuperscript{15}

\textbf{4.1.2. Section 15 of the Charter.}

I examine statements by the Court on s 15 and non-citizens’ susceptibility to removal from Canada in order to introduce and situate the question of how equality of treatment is reconciled with a non-citizen’s vulnerability to removal in Canadian constitutional law. Section 15 reads, in part:

\begin{quote}
15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability
\end{quote}

In its very first judgment on s 15, \textit{Andrews v Law Society of British Columbia}, the Court declared non-citizen status to be a ground of discrimination analogous to those explicitly set out in s 15.\textsuperscript{16} An analogous ground stands as ‘a constant marker of potential legislative discrimination.’\textsuperscript{17} From the outset, differential treatment of non-citizens was subject to an equality rights analysis under the \textit{Charter}.

The Court in \textit{Andrews} effectively established non-citizen status as an analogous ground by emphasising the historical disadvantage suffered by members of the class. Expanding on the understanding that non-citizens were a ‘discrete and insular minority’,\textsuperscript{18} the Court emphasized the vulnerability and political powerlessness of non-citizens. In Wilson J.’s words, ‘\[r\]elative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated.’\textsuperscript{19} Quoting John Hart Ely, she stated that non-citizens are among ‘those

\begin{footnotes}
\textsuperscript{15} Audrey Macklin, ‘Transjudicial Conversations about Security and Human Rights’ in Mark Salter, ed, \textit{Mapping Transatlantic Security Relations: The EU, Canada and the War on Terror} (Routledge, forthcoming 2010).
\textsuperscript{16} [1989] 1 S.C.R. 143 [\textit{Andrews}].
\textsuperscript{18} In \textit{Andrews} at 16, McIntyre J, and 152, Wilson J. The phrase originated in \textit{Carolene Products} 304 US 144 (1938), 152-153 n.4.
\textsuperscript{19} \textit{Andrews}, supra note 16 at 152.
\end{footnotes}
groups in society to whose needs and wishes elected officials have no apparent interest in attending."\(^{20}\)

However, it is not clear that this characterisation of aliens as a defenceless group needing judicial protection was accurate. The class of aliens, certainly by 1989, was remarkably diverse, and not particularly insular.\(^{21}\) *Andrews* struck down provincial legislation restricting the right to practice law to Canadian citizens. The reasoning that did the work in the decision focused not on the fact that aliens were downtrodden, but on an analysis not dissimilar to that successful before the House of Lords in *Belmarsh*, namely that the state could offer no legitimate reason for singling them out. The Court framed the question as whether citizenship was a proxy for good lawyering, understood as being knowledgeable about Canadian political and social affairs and committed to the country. The majority held that it was not a good proxy.\(^{22}\)

*Andrews* said nothing directly about the tension between s 15’s guarantee of equality of treatment and the fact that non-citizens do not have an express constitutional right to remain in Canada.\(^{23}\) The Court had an opportunity to consider that tension in *Canada (Employment and Immigration) v Chiarelli*.\(^{24}\) The constitutional question stated raised the issue of whether s 15 prohibited the mandatory deportation of a non-citizen convicted

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\(^{20}\) Ibid. citing John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980) at 151. The language of La Forest J was stronger again. He stated that ‘non-citizens are an example without parallel of a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions’, before referring to historical instances of discrimination on grounds of nationality as the companion of discrimination on the basis of race and national or ethnic origin. He was well-placed to comment on this history, as author of *Disallowance and Reservation of Provincial Legislation* (Ottawa: Department of Justice, 1955), a work documenting provincial immigration legislation targeting ‘Asiatics and other orientals’. His historical narration however, underlines the way in which the place on non-citizenship status as an analogous ground was underwritten by historical injustice based on racial or ethnic background, not on non-citizenship as such.


\(^{22}\) This characterisation of the decision is informed by Denise Reaume, ‘The Relevance of Relevance to Equality Rights’ (2006) 31 Queen’s L.J. 696 at 710.

\(^{23}\) Certain comments in *Andrews* anticipated that tension, see e.g. *Andrews*, supra note 16 at 196, La Forest J. See also *Miron v Trudel*, [1995] 2 S.C.R. 418 at para 139 and *Égan, supra* note 17 at para 50.

\(^{24}\) [1992] 1 S.C.R. 711 [*Chiarelli*].
of an offence carrying a punishment of five years or more.\textsuperscript{25} The Court’s response consisted of a single paragraph, which read in part:

As I have already observed, s. 6 of the \textit{Charter} specifically provides for differential treatment of citizens and permanent residents in this regard. . . . [O]nly citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.\textsuperscript{26}

The exclusivity of citizens’ rights to enter and remain in Canada was held by the Court to be grounded in the \textit{Charter} itself.

The Court reaffirmed this view in \textit{Lavoie}.\textsuperscript{27} Following the expression of a ‘rule’ that ‘non-citizens are equally vital members of Canadian society and deserve tantamount concern and respect,’ the majority held that ‘[t]he only recognized exception to this rule is where the Constitution itself withholds a benefit from non-citizens, as was the case in \textit{Chiarelli} . . . In such a case it may be said that the \textit{Charter} itself authorizes differential treatment.’\textsuperscript{28}

It is useful to focus on immigration as a recognized area of exception to equality jurisprudence. If it is vital to the concept of citizenship that non-citizens are vulnerable to removal in a way that citizens are not, the question is how far this vulnerability extends. What, if any, are the constitutional restrictions on detention to facilitate removal? The question arises in an acute form when legislation provides for detention for the purpose of removal and removal is not a foreseeable prospect.

\begin{footnotesize}
\begin{enumerate}
\item The respondent did not make any submissions on the section: \textit{Chiarelli}, supra note 24 at 735.
\item \textit{Ibid.} at 736.
\item The three claimants in \textit{Lavoie}, supra note 1, alleged that an express and regulated preference for citizens within the appointment process for the federal public service was discriminatory. Four members of the Court (Bastarache J. with Gonthier, Iacobucci and Major JJ.) held that the preference in question did violate s 15(1), but was justified under s 1, and two members of the Court (Arbour and LeBel JJ.) held that there was no violation of s 15. Accordingly, the preference withstood constitutional challenge. McLachlin C.J.C., L’Heureux-Dubé and Binnie JJ. dissented.
\item \textit{Lavoie}, supra note 1, at para 44. This passage is reminiscent of the statement of the joint judgment in \textit{Lim} that ‘[w]hile an alien who is actually within this country enjoys the protection of our law, his or her status, rights and immunities under that law differ from the status rights and immunities of an Australian citizen in a variety of important respects….’. The most important of these lay ‘in the vulnerability of the alien to exclusion or deportation’: \textit{Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs} (1992) 176 CLR 1 at 29.
\end{enumerate}
\end{footnotesize}
4.1.3 Section 7 of the Charter.

(a) Section 7 and non-citizens’ procedural rights under immigration statutes.

The Charter provision most centrally implicated by detention is s 7:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Writing in 1983, at a time when any assessment of the Charter’s effects on non-citizens’ rights lay in the future, Wydrzynski, in his textbook on Canadian immigration law, wrote:

aliens seem to suffer under an extended, severe handicap when they seek to apply elements of fundamental rights to domestic law immigration processes. …Permission to enter Canada is not viewed as a right, but a privilege to be granted on whatever terms are deemed appropriate by the state. While courts do often speak of aliens having statutory rights, or those rights which are extended by the State in relation to the administration of immigration, the underlying presumption seems to be that aliens have no cause for complaint if legislative rights do not measure up to an objective standard offered by a concept of overriding fundamental rights. This anomaly seems to suggest that aliens may not be able to point to a bill or Charter of rights as a source of protection from infringing provisions of immigration statutes, because the presence of aliens within the jurisdiction is a matter of privilege.29

Twenty-five years on, the tensions between fundamental rights and the idea of their conditional extension to non-citizens continue to dominate Canadian jurisprudence on non-citizens. When it comes to the effect of s 7 on non-citizens’ rights under immigration statutes, there are competing strands of jurisprudence. One strand of the jurisprudence has welcomed s 7 as breaking with the presumptions complained of by Wydrzynski in the above quote. There is, however, another strand of the jurisprudence that fully bears out Wydrzynski’s concerns about the tenacity and possible continuing significance of the rights/privilege distinction under the Charter.

(i) Singh.

The Court first considered the application of s 7 to non-citizens in Singh.30 The decision exemplifies a strand of s 7 jurisprudence that requires that rights extended to non-citizens under immigration legislation must measure up to Charter standards. It involved a

29 Wydrzynski, supra note 4 at 458-459.
30 Singh v Canada (Minister of Employment and Immigration) [1985] 1 S.C.R. 177 [Singh].
challenge to the refugee determination procedures under the *Immigration Act* 1976.\(^{31}\) Only one of the two concurring judgments, that of Wilson J (Dickson CJ and Lamer J concurring), applied a s 7 analysis and it is that judgment that I discuss.\(^{32}\)

It was not disputed by the Minister that the term ‘everyone’ in s 7 was sufficiently broad to encompass the appellants.\(^{33}\) As to what was secured to them by s 7, the appellants did not assert a constitutional right to enter and remain in Canada analogous to the right accorded to non-citizens by s 6(1) of the *Charter*.\(^{34}\) Rather, the substance of their case was that they did not have a fair opportunity to present their claim for refugee status, or to know the case they had to meet.\(^{35}\) The appellants had not been granted the status of Convention refugees; their claim was that they were entitled to fundamental justice in the determination of whether or not they were Convention refugees.\(^{36}\) The significant rights, conferred by legislation, that followed on any finding of refugee status,\(^{37}\) and the dire consequences of a wrong decision, being sent back to a country where one had a ‘well-founded fear of persecution’ on Convention grounds,\(^{38}\) led Wilson J to hold that it was ‘unthinkable that the *Charter* would not apply to entitle them to fundamental justice in the adjudication of their status’.\(^{39}\)

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\(^{31}\) *Immigration Act*, S.C. 1976-77, c. 52 [*Immigration Act* 1976]. The procedures provided for a refugee applicant to be interviewed by an immigration officer as to the basis for his or her claim. The decision whether or not to grant refugee status was made by the Minister’s delegate on the basis of a transcript of this interview together with other material that was not disclosed to the applicant. A decision against the applicant could be appealed to the Immigration Appeals Board (IAB), but to get an oral hearing on the merits, the applicant had first to satisfy the IAB that, on the balance of probabilities, there were ‘reasonable grounds to believe that a claim could, upon the hearing of the application, be established.’ All seven appellants in *Singh* had had their claim rejected by the Minister and had been denied an appeal to the IAB. The question of their refugee status arose in the context of removal proceedings.

\(^{32}\) Beetz J (Estey and McIntyre JJ concurring) refrained from considering the applicability of s 7 of the *Charter* to the facts of the case, preferring to analyse the procedures through the earlier *Canadian Bill of Rights*. He was concerned that existing rights instruments not be eclipsed by the *Charter*, holding that the protection of rights would be better served by the cumulative effect of multiple instruments: *Singh*, supra note 30 at 22 and he read s 2(e) of the *Canadian Bill of Rights* (see infra note 40) as better serving rights conferred by legislation: *ibid.* at 228. He found that the procedures were in conflict with s 2(e) of that instrument.

\(^{33}\) *Singh*, supra note 30 at 189. See also discussion of the implications of s 32(1)(a) of the *Charter* at 201.

\(^{34}\) *Ibid.* at 189.

\(^{35}\) *Ibid.* at 201.


\(^{37}\) *Ibid.* at 210. See also the earlier discussion at 204.

\(^{38}\) *Refugee Convention*, supra note 36, Art 1A(2).

\(^{39}\) *Singh*, supra note 30 at 210.
Wilson J presented the Charter as constituting a clear step away from assumptions that non-citizens were in some sense strangers to constitutional protections. She considered an argument that ‘might be suggested’ by cases under the Canadian Bill of Rights, a 1960 federal statute,\(^{40}\) that whatever procedure was provided under statute exhausted the ‘due process’ and ‘fundamental justice’ to which an alien subject to immigration control was entitled.\(^{41}\) She stated that ‘[t]he creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the Canadian Bill of Rights’.\(^{42}\) And she concluded that the ‘restrictive attitude’ expressed through the dichotomy between privileges and rights under the Canadian Bill of Rights had no place under the new Charter regime, in particular in its ‘application to the adjudication of rights granted to an individual by statute’.\(^{43}\)

Wilson J held that there had been a breach of s 7. Her account of what s 7 requires speaks to later procedural issues encountered in the context of the security certificate regime in Canada and under the control order regime in the United Kingdom. She held that the procedures did not accord with fundamental justice as they denied a refugee claimant the opportunity to make an ‘effective challenge’ to the information or policies that underlay the Minister’s decision.\(^{44}\) The problem with the procedures was that a refugee claimant had to establish to the Immigration Appeal Board that the Minister’s decision not to accord refugee status was wrong ‘without any knowledge of the Minister’s case beyond the rudimentary reasons which the Minister has decided to give him in rejecting his claim’.\(^{45}\)

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\(^{40}\) The Canadian Bill of Rights, S.C. 1960, c. 44 [Canadian Bill of Rights]. The Canadian Bill of Rights was made only applicable to federal laws. It remains in force, but has largely been overtaken by the Charter. One of the provisions of the bill not replicated in the Charter was the guarantee in s 2(e) of a fair hearing for the determination of rights and obligations, which was relied upon by Beetz J in Singh: see supra note 32.

\(^{41}\) Ibid. at 208. The immediate reference for these phrases was subs 1(a) and 2(e) of the Canadian Bill of Rights.

\(^{42}\) Ibid. at 209.

\(^{43}\) Ibid. at 209.

\(^{44}\) Ibid. at 216.

\(^{45}\) Singh, supra note 30 at 215. Wilson J concluded (at 216-221) that the s 1 justification was not established in this case. She lamented the paucity of material offered by the government on the s 1 justification and expressed doubt that any argument of administrative convenience could suffice as a s 1 justification, at least in the present case.
(ii) Chiarelli.

Wilson J’s judgment in Singh had suggested that the Charter had inaugurated the end of a ‘restrictive attitude’ to the constitutional rights of non-citizens expressed in terms of the rights/privilege distinction and effecting ‘the adjudication of rights granted to an individual by statute’. However, the Court’s unanimous decision in Chiarelli indicated that the rights/privileges approach prevalent in jurisprudence under the Canadian Bill of Rights had some life in it yet. Chiarelli was a decision on the then security certificate process, a predecessor of the regime challenged in Charkaoui. Chiarelli has been taken to stand for the proposition that the security certificate process was consistent with the Charter even if it did not allow any adversarial challenge to the intelligence that ministers submitted to justify the issuance of a security certificate.

The Canadian government sought the removal of Mr Chiarelli, a permanent resident, on conviction for an offence for which a sentence of more than five years could be imposed. He had come out to Canada when he was fifteen, and was twenty-four at the time of his conviction. The relevant ministers made a joint report to the Security Intelligence Review Committee [SIRC] indicating that they were of the opinion that Mr. Chiarelli was involved in ‘organized criminal activity’. SIRC concluded that a security certificate should be issued.

Mr Chiarelli argued that the SIRC procedures contravened s 7 of the Charter as he and his legal representative were excluded from the portion of the hearing conducted in camera, and were only supplied with a summary of the government case against him. The government claimed that these restrictions were necessary to protect the investigatory processes of the police. Mr Chiarelli objected that the provisions gave

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46 Ibid. at 209.
47 Chiarelli, supra note 24.
48 See for example Re Charkaoui (2005) 261 FTR 1 at para 17.
49 Established under the Canadian Security Intelligence Service Act, S.C. 1984, c.21, SIRC initially reviewed all decisions on deportation for reasons of national security. SIRC’s involvement in the detention review process came to an end in 2002 with the entry into force of the IRPA, infra note 67.
50 Pursuant to Immigration Act, supra note 31 s 82.1(2).
51 Mr Chiarelli was the first RCMP case to appear before SIRC, its previous cases originating with CSIS.
SIRC complete discretion to exclude him from the Minister’s case, and not simply from those portions of it where his exclusion was necessary to safeguard protected information. He argued the relevant statutory provisions were too broad.

The Federal Court of Appeal agreed with him. They held that there had been a breach of s 7 of the Charter. Section 7 required a meaningful opportunity to be heard, where this in turn required that the affected person knew the information before SIRC (in order to be able to contradict it), and also the sources of the information (to challenge its credibility). Under s 1, a majority of the Federal Court of Appeal held that the statutory powers granted to protect confidentiality were disproportionate, as they did not meet the minimal impairment requirement. Stone JA held that the relevant provision, rather than balancing the state’s interest in confidentiality against the certified individual’s interest in procedural justice, ‘opts for a complete obliteration of the individual’s rights in favour of the state’s interests’.

The Supreme Court reversed the Federal Court of Appeal’s ruling that the confidentiality provisions contravened s 7 (so never progressing to a s 1 proportionality analysis). It effectively did so on the basis that the non-citizen facing deportation had no procedural rights. It discussed the constitutionality of the procedures on the ‘assumption’ that s 7 applied. Further, the Court took the strange step of reasoning that it did not need to determine whether the protected interests (of life, liberty and security of the person) under s 7 were affected because there was no breach of fundamental justice. This was to reason on the adequacy of the procedures without reference to the constitutional interests those procedures protected.

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53 Ibid. at para 43.
54 The Court reasoned that as there was no constitutional requirement for a hearing on all the circumstances of the case, there were no constitutional requirements attaching to a hearing (the SIRC hearing) concerned with the denial of a right to appeal on all the circumstances of the case. It held that the hearing before SIRC was ex gratia, going beyond what the government was constitutionally obliged to provide.
Sopinka J, writing for the Court, adopted a ‘contextual approach’ to s 7 in relation to the procedures attending deportation.\(^{55}\) He wrote that

> in determining the scope of the principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.\(^{56}\)

Absent from the Supreme Court’s reasoning was any sense that, given the existence of a statutory framework ostensibly concerned with according a permanent resident some measure of procedural fairness, the *Charter* might require that the statutory framework mandate certain procedural standards.\(^{57}\)

The Supreme Court’s decision in *Chiarelli* was shaped by deference to government decision-making in national security and crime control. After referring to the need for ‘delicate balancing’,\(^{58}\) the Court made a number of generalizations about the desirability of the state ‘effectively conducting national security and criminal intelligence investigations and in protecting police sources’.\(^{59}\) These generalizations were held to sanction an unqualified power to exclude the applicant and his legal representative, and licence the non-disclosure of evidence to them.\(^{60}\) This balancing was internal to s 7, with the state interests informing the content of fundamental justice.\(^{61}\)

The divergent approaches represented in *Singh* and *Chiarelli* define the poles of s 7 *Charter* jurisprudence on non-citizens’ procedural rights under immigration statutes. I

\(^{55}\) See *Chiarelli*, *supra* note 24 at 732–733.

\(^{56}\) *Ibid.* at 733.


\(^{58}\) *Chiarelli*, *supra* note 24 at para 49.


\(^{60}\) The Supreme Court did place an emphasis on the fact that SIRC’s rules, devised by SIRC, expressly directed that it exercise its discretion with regard to the competing state and individual interests: *Ibid.* at para 49. The Court also detailed the options that had been available to Mr Chiarelli in the course of his hearing: at para 52-53. The distinction between the Supreme Court and the Federal Court is that the Supreme Court did not require that the *statute itself* mandate a balancing of the state’s interest in the confidentiality of the information against the individual’s rights under s 7. The Federal Court’s criticism was directed not to SIRC’s actual practices, but to the statutory framework in which it operated.

\(^{61}\) The Court’s reasoning was held to make a ‘just accommodation between the interests of the individual and those of the state, both of which factors play a part in assessing whether a particular law violates the principles of fundamental justice’. *Ibid.* at para 49.
will argue that *Charkaoui* substantially upheld the approach represented by *Singh*, favouring more robust procedural protection for non-citizens under s 7. However, I further argue that these procedural gains were treated as an end in themselves, and so ended up constituting a rather empty proceduralism.

**b) The substantive interests engaging s 7 of the Charter.**

The statement by Sopinka J, speaking for the Court, that ‘the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada’, has become known as the ‘*Chiarelli* principle’. It has been held to establish that deportation of a non-citizen cannot ‘in itself’ implicate the liberty and security interests protected by s 7.62 In *Charkaoui*, the Court’s reasoning on section 7 proceeded on the basis that while deportation ‘in itself’ could not engage that provision, ‘features associated with deportation, such as detention in the course of the certificate process, or the prospect of deportation to torture, may do so’.63

However, deportation ‘itself’ and ‘associated features’ are not easily compartmentalised. They are better viewed as in tension. A judge of the Federal Court has characterized the Canadian security certificate jurisprudence as shaped by the ‘collision between the *Chiarelli* principle [that a non-citizen has no right to remain] and Canada’s international obligations with respect to deportation’.64

### 4.2 Before *Charkaoui*.

In this section I examine the immediate legal context for the Supreme Court’s decision on the constitutionality of the security certificate procedure in *Charkaoui*.65 I introduce the statutory framework challenged in *Charkaoui*, the security certificate regime (section 4.2.1). I next discuss the Court’s earlier 2002 decision in *Suresh*, a decision I argue is central to the Court’s reasoning on indefinite detention in *Charkaoui* (section 4.2.2).

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63 *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2007] 1 S.C.R. 350 [*Charkaoui*] at para 17, see also para 16. There was a subsequent decision of the Supreme Court of Canada involving Mr Charkaoui, discussed in Chapter 5, section 5.3, which will be referred to as *Charkaoui II*.
64 *Almrei v Canada* (2005) 270 FTR 1 at para 430, Layden-Stevenson J.
65 *Charkaoui*, supra note 63.
Finally, through an examination of the case law of the Federal Court of Canada, I look at how the issue of indefinite detention developed under the security certificate regime before *Charkaoui* (section 4.2.3). This case law provides the best basis for evaluating the Court’s decision.\(^6\)

**4.2.1 The security certificate regime.**

The possibility of the indefinite detention of non-citizens arises in Canada in the context of a statutory regime that provides for the removal of non-citizens on security grounds and detention pending removal. The security certificate regime is now found in Part 1, Division 9 of the *Immigration and Refugee Protection Act* [IRPA].\(^6\) An analogous process has, however, operated over a longer period, encompassing two pre-IRPA decisions discussed in this chapter, *Chiarelli* and *Suresh*. Two ministers initiate the procedure by signing a certificate stating that a named permanent resident, refugee or other non-citizen is inadmissible to Canada on one or more of a range of grounds, including organized criminality, or security.\(^6\) At the centre of the process is usually a risk profile that the intelligence services have prepared for the individual involved. Once signed, the security certificate goes to the Federal Court where a judge determines whether it is reasonable.\(^6\) A judicially approved certificate constitutes an order for removal from Canada.\(^7\)

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\(^6\) *Charkaoui* (*ibid.*) is notable, in comparison to both *Al-Kateb* and *Belmarsh*, for the extent to which the reasoning is not responsive to earlier reasoning of the lower courts. The practices of the lower courts (e.g. release on conditions) are registered at points in the judgment, but the reasoning of the lower courts on the points at issue is not engaged with. In these circumstances, an evaluation of *Charkaoui* is better served by showing how the security certificate regime had in fact operated up to the time of judgment (where the Federal court jurisprudence provides a good window onto this), than by outlining the reasoning of the decisions appealed from.

\(^6\) S.C. 2001, c. 27, as am. by S.C. 2002, c. 8, S.C. 2005, c. 38 [IRPA]. This was the version of the IRPA considered in *Charkaoui*, *supra* note 63. Subsequent section changes are cited to IRPA, *ibid.* as am. by S.C. 2008, c. 3 [*Bill C-3*] [IRPA-2008].

\(^6\) IRPA, *ibid.* s. 77(1).

\(^6\) IRPA, *ibid.* s. 78 was the relevant procedural provision challenged in *Charkaoui*. It set out reasonableness hearing procedures that were designed to address concerns about the disclosure of confidential national security information. A judge could convene *ex parte* hearings at the request of the government and could rely on material disclosed in such a hearing without providing it to the named individual or his or her representatives.

\(^7\) IRPA, *supra* note 67, s. 81 (IRPA-2008, s. 80).
The IRPA’s security certificate regime permits the minister to detain a non-citizen on the issuance of a certificate. A certified individual can apply to the Federal Court for review of his or her detention. The IRPA provides that detention is to be continued if the judge is satisfied that release on conditions would be injurious to security, or that the non-citizen would be unlikely to appear at a proceeding or for removal if he or she were released. Under the statute, a finding that release would be a risk to security is a sufficient ground for continued detention. Where that determination is made, the only limit on the period of detention arises from any constitutional requirement that detention must be for the purpose of removal from Canada.

One further feature of the security certificate regime is relevant context for our discussion. The IRPA prohibits the return of ‘protected persons’ to a country where they would be at risk of persecution or torture. The IRPA makes an exception for any protected person:

who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

This ministerial discretion is exercised through ‘danger opinions’ which weigh the risk to the named individual against the danger to the security of Canada. A danger opinion may be quashed on judicial review. Where this occurs, the protected person’s removal is precluded by the IRPA unless and until there is a new administrative determination that

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71 A warrant issued by the Minister was required for the arrest of a permanent resident (IRPA, ibid. s. 82(1)), while no warrant was required for the arrest of other non-citizens (ibid. s. 82(2)). A warrant is now required for all non-citizens: IRPA-2008, supra note 67, s. 81.

72 IRPA, supra note 67, s. 84(2). On the timing and frequency of detention review the IRPA distinguished between permanent residents (s. 83) and other non-citizens (foreign nationals) (s. 84(2)). Charkaoui struck down the more onerous provisions relating to foreign nationals and assimilated their position to that of permanent residents: cf. IRPA-2008, supra note 67 s. 82.

73 See the discussion of Charkaoui in section 4.4. below.

74 IRPA, supra note 67, s. 95(2) defined a protected person as an individual person on whom refugee protection has been conferred under s. 95, and whose claim or application has not been deemed to be rejected.

75 Ibid. s. 115(1):

A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

76 Ibid. s. 115(2)(b).
there is no risk of persecution or torture; or that there is a risk but that a ‘danger opinion’ establishes that the exception to the rule against removal operates.

The Canadian cases on deportation discussed in this thesis arise within the context of the danger opinion process. As a constitutional matter, the ministerial discretion exercised through danger opinions is subject to s 7 of the Charter.

4.2.2 Suresh.

*Suresh* determined a challenge to the pre-IRPA ‘danger opinion’ provision (i.e. a statutory provision allowing for the removal of a non-citizen facing a risk of persecution or torture, where the Minister determined that the risk to the non-citizen was outweighed by the ‘danger to the security of Canada’ he or she posed).\(^{77}\) The decision in *Suresh* determined a challenge to the constitutionality of this discretion, and the attendant process.\(^{78}\)

Mr Suresh was originally a citizen of Sri Lanka, granted refugee status by Canada in 1991. In early January 1998, the Minister issued an opinion that he constituted a danger to the security of Canada, on the basis of his membership of, and connections with, an organization alleged to engage in terrorism in Sri Lanka, and that on those grounds he should be deported. No reasons were required under the statutory provision and none was given. Mr Suresh argued that he faced a substantial risk of torture if returned to Sri Lanka. He argued that s 7 of the *Charter* precluded deportation to torture and further argued that the statutory scheme for deportation on security grounds contained inadequate procedural safeguards against deportation to torture. In a decision handed down on 11 January 2002 (in the initial months after 9/11) the Supreme Court held that the statutory provision for deportation on security grounds where there is a risk of torture was constitutional, but that in exercising his discretion the Minister had failed to meet the procedural requirements demanded by s 7 of the *Charter*.\(^{79}\) The decision to deport was remanded to the minister for reconsideration.

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\(^{77}\) *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3 [*Suresh*].

\(^{78}\) In *Suresh*, the order for deportation was made under *Immigration Act*, R.S.C. 1985, c. I-2, s. 53(1)(b) rep. by IRPA, *supra* note 67, Part 5. The relevant IRPA provision came into force on 27 June 2002.

\(^{79}\) *Suresh, supra* note 77 at para 130.
Suresh has been carefully analyzed in a number of commentaries. There are two aspects of the Suresh judgment that are salient to an understanding of the Supreme Court’s reasoning on the detention of a non-citizen subject to a deportation order in Charkaoui. One is the Court’s reliance in Suresh on procedural guarantees derived from s 7 of the Charter to defuse concerns about the constitutionality of provisions that threaten the rights of non-citizens. This is a pattern that I argue is continued in Charkaoui. The second aspect of Suresh critical to subsequent jurisprudence on the detention of non-citizens subject to deportation orders is the Court’s ruling that section 7 of the Charter does not place an absolute prohibition on deportation to torture. The Court gave extensive consideration to Canadian and international authority, and seemed to be reasoning its way towards such an absolute prohibition, only to veer away from this conclusion at the last moment. In the result, the Court stated that ‘[w]e do not exclude the possibility that in exceptional circumstances, deportation to torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the Charter or under s. 1.’ This has come to be known as ‘the Suresh exception’.

Here, it will be recalled from the Introduction to the thesis that rights under the Charter are qualified by s. 1, the limitations clause, which provides that the Charter ‘guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ In addition, the Charter contains a mechanism, the notwithstanding clause (s 33), which allows Parliament or a legislature to declare, in enacting a law, that it overrides a nominated right in s 2 or ss 7-15 of the Charter. The availability of these means of limitation and override bears on an evaluation of the Court’s reasoning in Suresh.

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81 See Suresh, supra note 77 at paras 58, 78 in relation to the constitutional and international law reasoning respectively. See Roach, ‘Dialogues about Rights’ ibid. at 569-72, 575-76.
82 Suresh, supra note 77 at para 78. The ‘balancing process’ refers to the view that the phrase ‘in accordance with the principles of fundamental justice’ may be understood to qualify the protected interests of “life, liberty and security of the person.” The two distinct parts of s. 7 are seen to create a vehicle for limitation and justification within the section. On this view, the protection afforded to ‘life, liberty and security of the person’ waxes and wanes according to the scope given to ‘fundamental justice.’
The *Suresh* exception is troubling for a number of reasons. First and foremost, the Court allowed that deportation to torture may not even infringe s 7 of the *Charter*. The Court did not require that any government wishing to deport an individual to face torture invoke the notwithstanding clause, or even mount a s 1 justification. The existence of the notwithstanding clause renders more puzzling the question of why the Court left open the possibility that an exceptional discretion to deport to torture was compatible with s 7. Insofar as the exceptional discretion was meant to operate as a ‘safety valve’, allowing for the removal of non-citizens in extreme circumstances, the notwithstanding clause could have performed this function. Relying on the notwithstanding clause would be preferable in that it would constitute a clear statement that the legislature had consciously decided to abrogate the right. It would also clearly present the issue as one in which a rights violation was authorized on the basis of prudential considerations. Finally, it would clearly mark the decision to deport as a departure from rights jurisprudence that should be isolated from that jurisprudence. The notwithstanding clause provides a mechanism under the *Charter*, albeit a crude one, for implementation of the ‘derogation model’, set out in Chapter 3, section 3.8. The establishment of the *Suresh* exception marked a clear rejection of that model. The exception may apply without even going to a s 1 justification. Lodged in the heart of the *Charter* rights jurisprudence, it is a limitation on s 7 that does not require the government to invoke any mechanism to suspend or depart from the *Charter* framework.

A second problem with the *Suresh* exception lay in the complicated, and somewhat ambiguous, landscape of review of ‘danger opinions’ outlined by the Court. This was

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84 For a detailed criticism of the Court’s failure to require a s. 1 justification, see Mullan, *supra* note 80 at 56-59.
85 The legislature would have to explicitly acknowledge that it was overriding constitutional rights on the basis that the mere presence of a certain non-citizen in Canada was held to constitute a threat to Canadian national security that could only be countered by their removal from the country.
86 On the argument that the Court in *Suresh* should have required the government to employ the notwithstanding clause if it wished to provide for deportation to torture see also Roach, ‘Dialogues about Rights’, *supra* note 80 at 572-73.
87 It will be recalled that the model allowed for suspension, rather than just limitation, of rights and placed additional constraints on lawful suspension rather than limitation. Under the notwithstanding clause these constraints are a matter of parliamentary procedure, not substantive legal criteria. The requirement of explicit acknowledgement that the legislature intends to override rights is the same.
88 See Mullan, *supra* note 80 at 43-45.
an attempt to accommodate both the high level of deference it thought appropriate to matters of national security and immigration, and the scrutiny appropriate where Charter rights were at issue.\(^{89}\) On the ‘threshold question’ of whether an individual faces a substantial risk of torture, the Court indicated that the most deferential standard of review should be applied.\(^{90}\) If that question was answered in the affirmative, there was then to be an abrupt shift, with the Court moving to make its own assessment of the justification for deportation to torture.\(^{91}\) Subsequent Canadian Federal Court case law on ‘danger opinions’, discussed in section 4.2.3, shows how the uneven landscape of review inherited from Suresh resulted in an effective deadlock between the government and the courts in relation to deportation in cases where there was, prima facie, a real risk of torture on return.

The reasons for the Court’s adoption of an ‘exceptional discretion’ are not apparent from the judgment. The most that can be said is that it appears that the Court could not bring itself to say that rights under the Charter might operate to serve as an absolute bar on a non-citizen’s removal to his or her country of nationality. The Court did not proceed, as did the European Court of Human Rights in Chahal, to the conclusion that, in certain circumstances, the rights possessed by a non-citizen might result in an effective right to remain.\(^{92}\)

In relation to international law, the Court acknowledged that ‘the better view is that international law rejects deportation to torture, even where national security interests are

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\(^{89}\) For a discussion of this feature of the judgment see \textit{ibid.} at 41-47, 55-60. The problems raised here also apply to Lord Hoffmann’s combination of a highly deferential approach to executive decision making in national security and the absolute nature of the prohibition on deportation to torture in \textit{Secretary of State for the Home Department v Rehman} [2003] 1 AC 153 [Rehman], discussed in Chapter 3, section 3.6.

\(^{90}\) Suresh, supra note 77 at paras 39-41. I have referred to the ‘most deferential standard,’ rather than to the patent unreasonableness standard referred to in Suresh, due to the abolition of the category of patent unreasonableness in \textit{Dunsmuir v. New Brunswick} [2008] 1 S.C.R. 190.

\(^{91}\) Suresh, supra note 77 at paras 41, 76-78.

at stake’. Rather than directly responding to this position at international law, the Court treated this position as a factor in constitutional interpretation, ‘[t]his is the norm which best informs the content of the principle of fundamental justice under s 7 of the Charter’. It is at this point that qualifications began to leach in. The rejection of deportation to torture was ‘virtually categoric’, it would ‘almost always’ be a disproportionate response, and ‘barring exceptional circumstances’ would violate s 7. To the hesitation expressed here, the Court added a quote from the House of Lords in Rehman, on the superior institutional competence of the executive in evaluating matters of future risk. The Court then arrived at the exceptional discretion to deport to torture, which it held could not be ruled out as a possible, if remote, outcome of constitutional balancing.

The balancing exercise engaged in by the Court in Suresh, whereby a prohibition on deportation to torture at international law was reduced to a factor in constitutional balancing, raises questions for certain theories about the legitimacy of judicial review in the counterterrorism area. The noted international lawyer Eyal Benvenisti has written on what he sees as national courts’ increasing confidence in challenging executive unilateralism in the wake of 9/11. Here I want to focus on just one aspect of Benvenisti’s account. He outlines a number of national courts’ accounts of their authority to intervene in matters of national security. He argues that the ‘most far reaching explanation’ for these courts’ assumption of an authority to intervene is their assertion of a role as ‘expert balancers’. He clearly presents this explanation for authority to intervene as part of a judicial self-perception of the courts as guardians of human

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93 Suresh, supra note 77 at para 75.
94 Ibid.
95 The qualifications were arguably already evident in the Court’s use of deormalized language: e.g. ‘rejects’ rather than ‘prohibits’, ‘norm’ rather than ‘rule’.
96 Suresh, supra note 77 at para 76.
97 Ibid. at para 77. See the discussion of Rehman in chapter 3, section 3.6.
98 Ibid. at para 78.
100 Ibid. at 263-268.
101 Ibid. at 265.
rights. But in *Suresh*, it was the Court’s insistence on balancing what had at international law, including in the European jurisprudence, been treated as an absolute prohibition on deportation to torture. Some rights are not qualified, the prohibition on deportation to torture under the *Torture Convention* being a clear example. In such instances, holding that a right is appropriately made subject to judicial expertise in balancing weakens, rather than strengthens, the protection afforded by the right. This is what happened in *Suresh*.

In conclusion, in *Suresh*, the Court’s perception of the need to preserve the government’s discretion to deport to a real risk of torture in exceptional circumstances prevailed over all other considerations. The Court expressed this in the language of the *Charter*, and by treating international law as an influence on *Charter* interpretation, managed to acknowledge the absolute prohibition on deportation to torture in international law while qualifying it.

4.2.3 Federal Court security certificate decisions before *Charkaoui*.

The use of the security certificate regime has proved highly problematic in counter-terrorism cases. The government has so far removed none of the individuals within this category from Canada, despite years of extensive litigation towards that objective, during which the certified individuals have remained in detention or under a form of house arrest. As discussed in Chapter 5, two of the individuals certified have now had the certificates quashed. The central problem is that in all the counter-terrorism cases the government has not, to the satisfaction of the reviewing courts, rebutted a *prima facie* case that there is a real risk of torture or cruel and unusual treatment or punishment on return to the person’s country of nationality. While the security regime has not been successful in achieving its stated immigration objective of removal, it secured the

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103 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*, 10 December 1984, 1465 UNTS 85, Art 3.
104 Tom Hickman drew my attention to this issue.
105 Compare its effective utilisation (i.e. swift deportation) in the case of an alleged Russian spy posing as a Canadian national (removed to Russia): see CBC News, ‘Canada kicks out alleged Russian spy’ at <http://www.cbc.ca/canada/story/2006/12/26/hampel-gone.html>.
106 The phrase ‘cruel and unusual treatment or punishment’ is that in s 12 of the *Charter*. 
isolation of those certified from the rest of the Canadian community, either in detention or under some highly restrictive form of house arrest.

My account of the Federal Court litigation focuses on why these foreign terrorist suspects have not been removed, why they were detained or subject to onerous conditions for many years and why several remain subject to onerous conditions (with others only exiting the security certificate regime in late 2009). I examine the way the balancing exercise mandated by Suresh has been applied in the lower courts. As the courts themselves have acknowledged, the Canadian jurisprudence on deportation to torture has been shaped by the ‘collision between the Chiarelli principle [that a non-citizen has no right to remain] and Canada’s international obligations with respect to deportation’. The metaphor of a collision is apposite. It suggests not a weighing of one consideration against another, but the idea of two incompatible and competing approaches trying to run one another off the road. Unless one or other of those principles is accorded clear priority, there is a crash, and the processes of removal or release are snarled up. My argument is that the current situation, whereby a deportation regime has in practice been converted into an indefinite detention regime, emerges from an ongoing judicial attempt to postpone the collision between the opposed elements (the absence of a right to remain, and Canada’s international obligations with respect to deportation). I contend that this has resulted in a dysfunctional system as assessed against its ostensible statutory purpose of removal. There are two components to my account. The first focuses on the operation of s 115, the ministerial discretion to deport a non-citizen to a risk of torture on the grounds of the danger to Canadian security, the second on the operation of the detention provisions.

(a) Decisions on deportation to torture: The danger opinion process under s 115.

In the Canadian material discussed in this thesis, the recurring issue is that government attempts to remove a foreign terrorist suspect subject to a security certificate are frustrated by the existence of a prima facie case that the individual faces a real risk of persecution or torture if removed. In such cases, the minister must determine whether

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107 See Chapter 5, section 5.4.
108 Almrei v Canada, supra note 64 at para 430, Layden-Stevenson J.
there is a real risk of persecution or torture and if so whether a ‘danger opinion’ applies. The course of Federal Court litigation in relation to five individuals who were held under the security certificate regime at the time of judgment in Charkaoui demonstrates how complex and protracted this process can become.\textsuperscript{109} The Mahjoub litigation provides an illustration. A security certificate was issued for Mr Mahjoub in June 2000, at which time he was taken into detention. In July 2004, a delegate of the Minister of Citizenship and Immigration gave a ‘danger opinion’, indicating that Mr Mahjoub should be removed from Canada because while he could be at ‘substantial risk of ill-treatment and human rights abuses’ on removal to Egypt, this was outweighed by the danger he posed to the security of Canada.\textsuperscript{110} According to the Federal Court, the delegate took the view that:

\begin{quote}

\textit{in Suresh, the Supreme Court of Canada “endorsed” a procedure for making a determination under what is now subsection 115(2) of the Act. Such procedure was said to require the Minister to balance the danger posed by the person named in the security certificate against the risk to that person if removed from Canada.} \textsuperscript{111}
\end{quote}

The delegate treated Suresh as mandating a simple balancing process in which the prospect of Mr Mahjoub’s ill-treatment and abuse on return was weighed against the danger to national security if he remained in Canada. The delegate determined that the latter weighed more heavily. In January 2005, Dawson J. of the Federal Court quashed this decision,\textsuperscript{112} on the ground that it was not based on cogent evidence. The delegate had relied on a narrative provided by the Canadian Security Intelligence Service, without the documents and appendices referred to in that narrative, and she had relied on documents prepared for purposes other than assessing Mr Mahjoub’s risk of torture or ill treatment on return to Egypt.\textsuperscript{113}

A little less than a year later, in January 2006, a delegate for the Minister issued a second danger opinion, indicating that Mr Mahjoub did \textit{not} face any substantial risk of torture on return to Egypt. In December 2006, Tremblay-Lamer J. of the Federal Court quashed

\textsuperscript{109} Hassan Almrei, Adil Charkaoui, Mohamed Harkat, Mahmoud Jaballah and Mohammad Mahjoub. Manickavasagam Suresh was also subject to the security certificate regime at that time.
\textsuperscript{110} \textit{Mahjoub v. Canada (Minister of Citizenship and Immigration)} (2005) 261 F.T.R. 95 \textit{[Mahjoub, first danger opinion]} at para 12, 35.
\textsuperscript{111} \textit{Ibid.} at para 12.
\textsuperscript{112} \textit{Ibid.} at para 67.
\textsuperscript{113} \textit{Ibid.} at paras 48-49 and more generally paras 44-58.
In *Mahjoub, second danger opinion*, Tremblay-Lamer J. recognized the possibility of continuing deportation attempts, and continuing legal resistance to deportation:

I am cognizant that in redetermining this matter, it is possible for the subsequent decision-maker to conclude that Mr. Mahjoub faces a substantial risk of torture and that he continues to pose a danger to the security of Canada. This would inevitably lead to the issue of whether the present circumstances justify deportation to face torture.\(^{115}\)

The pattern seen in Mr. Mahjoub’s proceedings (alternative arguments based on the proposition that there was no substantial risk of torture, and that any substantial risk of torture on return was outweighed by the danger the detainee posed to Canada) was repeated in the litigation involving Hassan Almrei, one of the appellants in the *Charkaoui* case.\(^ {116}\)

**(b) The detention review process.**

As the above administrative process unfolded, Mr Mahjoub made three applications to the Federal Court for release from detention.\(^ {117}\) Giving judgment on his second application for release, Dawson J. was ‘mindful that issues of significant concern to Canadian society are posed . . . This is so because detention of uncertain duration is anathema to the principles which govern our judicial system.’\(^ {118}\) However, it was only on the third application for release that the judge ordered his release on conditions. In his reasons for judgment, Mosley J. stated:

>[T]he fact that Mr. Mahjoub has now been detained for six and a half years cannot be ignored. As

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\(^{115}\) Ibid. at para 110.


\(^{118}\) *Mahjoub, second application for release*, ibid. at para 92.
was stated by Justice Marshall Rothstein in Sahin v. Canada, “... when any number of possible steps may be taken by either side and the times to take each step are unknown, I think it fair to say that a lengthy detention, at least for practical purposes, approaches what might be reasonably termed ‘indefinite’.” In the present instance, the practical reality is that there is no fixed time period for a conclusion of the proceedings or for Mr. Mahjoub’s removal from Canada. In that sense, his detention might reasonably be described as indefinite.¹¹⁹

In practice, the Federal Court has ordered the release of individuals held on security certificates on the second, third or fourth periodic review of their detention provided for under the IRPA.¹²⁰ The orders for release have been given on onerous conditions amounting to house arrest. The Court’s judgments granting release have accepted the government’s claim that the individuals still pose a threat to national security, but have held that the threat can be ‘neutralized or contained’ by an extensive series of restrictive conditions.¹²¹ This reasoning indicated a shift toward what the Court intended to be a less onerous detention regime. The judges acknowledged that ‘[s]tringent release conditions seriously limit personal liberty,’ but they were viewed as ‘less severe than incarceration.’¹²² This practice of release on conditions has, since Charkaoui, been endorsed in the statute.¹²³

The Federal Court decisions on release were intended to ameliorate the burden of detention. However, they left unresolved the impasse between courts and government on

¹¹⁹ Mahjoub, third application for release, supra note 117 at para 103 [emphasis added; citations omitted].
¹²⁰ Release on conditions was ordered in the following judgments: Re Charkaoui (2005) 252 D.L.R. (4th) 601 [Charkaoui, fourth application for release] (17 February 2005, after 21 months in a detention facility); Harkat v. Canada (Minister of Citizenship and Immigration) [2007] 1 F.C.R. 321 [Harkat, second application for release] (23 May 2006, after almost 3.5 years in a detention facility); Mahjoub, third application for release, supra note 117 (15 February 2007, after 6.5 years in a detention facility); Jaballah v. Canada (Minister of Public Safety and Emergency Preparedness) (2007) 296 F.T.R. 1 [Jaballah, third application for release] (12 April 2007, after 5.5 years in a detention facility); Re Almrei, 2009 FC 3 (2 January 2009, after more than 7 years in a detention facility).
¹²¹ See the language in, for example, Charkaoui, fourth application for release, supra note 120 para 78; Harkat, second application for release, supra note 120 at para 82; Mahjoub, third application for release, supra note 117 at para 139.
¹²² Jaballah, third application for release, supra note 120 at para 70. In practice, it is a serious question as to which is worse, detention in a facility or house arrest. A significant factor here is the impact of the onerous conditions on release on the family of the certified individual, who effectively find themselves sharing in his house arrest. After release on conditions, Mr Mahjoub was subsequently readmitted to detention at his request, due to the impact the conditions were having on his family, with whom he shared the home to which he was largely confined: Canada (Minister of Citizenship and Immigration) v Mahjoub, 2009 FC 439. Blanchard J confirmed by order Mr Mahjoub’s request to return to detention (ordering the immediate cessation of all monitoring of the family home). For a detainee and his wife’s own perspective on life under security certificate conditions see: Mike Larsen, Sophie Harkat & Mohamed Harkat, ‘Justice in Tiers: Security Certificate Detention in Canada’ (2008) 17:2 Journal of Prisoners on Prisons 31 at 40-42.
¹²³ See IRPA-2008, supra note 67, s. 82(5).
the use of the security certificate regime as a *mechanism of removal* in circumstances where there was no real prospect of removal within a reasonably foreseeable period. Notwithstanding the Federal Court’s orders for release on conditions, it was still an onerous regime that applied to non-citizens on the basis that they were subject to a removal order, in circumstances where there was no prospect of removal. The question is whether an exception to non-citizens’ right to liberty based on their vulnerability to removal is justified in these circumstances.

(c) Conclusions on the Federal Court jurisprudence prior to Charkaoui.

My discussion of the Federal Court jurisprudence falling between *Suresh* and *Charkaoui* indicates a further problem with the *Suresh* exception. Its practical function has been to defer any conclusive answer on whether deportation is possible. The Supreme Court in *Suresh* sent mixed messages on the possibility of deportation to torture. It offered little encouragement for the view that ‘exceptional circumstances’ justifying deportation to torture might ever be established. Having allowed for the possibility of deportation to torture, the Court emphasized that it was an *extraordinary* possibility given that ‘torture and violations of human rights [are matters] in which Canada can neither constitutionally, nor under its international treaty obligations, be complicit’. In the interval since *Suresh* there has been no case law development to suggest that courts would ever justify the *Suresh* exception. In all but one case, the Federal Court has quashed ‘danger opinions’ on grounds that make it unnecessary to determine whether the *Suresh* exception is made out. And in that one case, the Federal Court held that the minister could not exercise discretion to deport to any country where there was a substantial risk of torture. So received and applied, the principal function of the *Suresh* exception has not been to enable deportation to torture. Rather, its principal function has been to maintain the characterization of detention under the security certificate regime as detention for the purposes of deportation. For so long as the constitutional possibility of deportation to torture remains unresolved, the *possibility* of deportation to torture remains, and this in

124 *Ibid.* at para 120.
125 For cases discussed in this thesis see *Mahjoub, first danger opinion*, supra note 110; *Mahjoub, second danger opinion*, supra note 114; *Almrei, second danger opinion*, supra note 116.
turn lends the aura of constitutionality to indefinite detention of non-citizens subject to a deportation order in Canada.

The impasse between the courts and the government registered in the above decisions on danger opinions is most charitably attributed to unresolved, and opposed, readings of the legal framework supplied by Suresh. The government has chosen to emphasize that deportation in such circumstances is a possibility and the Federal Court has stopped every government attempt to remove foreign terrorist suspects under the security certificate regime, in all bar one case on the basis of administrative law considerations.

The basic problem is that the Suresh exception can be read in light of fundamentally divergent values. As succinctly stated in an article on ‘case-management risk’:

> any form of risk assessment, irrespective of context is dependent on the ascription of value, not just probability, to potential outcomes…In other words, decision outcomes are inevitably conditioned by the degree of weight decision-makers are willing to place on the protection of foreign nationals relative to that of maintaining immigration control.

The centrality of these ‘ascriptions of value’, in particular the degree of weight attached to the protection of foreign nationals relative to national security concerns, is borne out in the above review of the interaction between the Canadian government and the Federal Court on the preliminary ‘factual’ questions under the security certificate regime, both the risk that the refugee poses to Canada, and the risk that the receiving country poses to the refugee, where these are to be balanced.

As noted above, there has been a single instance in which a judge of the Federal Court proceeded to directly address the Suresh exception, Mackay J’s judgment in Jaballah, second reasonableness decision. In considering the issue of ‘legal limitations’ on the Minister’s ability to deport, Mackay J held that ‘the facts of this case do not create an exceptional circumstance that would warrant Mr Jaballah’s deportation to face torture abroad’. In reaching his determination on the Suresh exception Mackay J was well

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127 On a less charitable reading the problems that the Federal Court identifies in the evidential foundation of decisions to deport are suggestive of bad faith on the part of the executive decision-maker.
129 Jaballah, second reasonableness decision, supra note 126.
130 Ibid. para 83.
aware that any decision he made would simply be another step *en route* to a ‘definite judicial or legislative response’.\(^{131}\)

With the one exception of *Jaballah second reasonableness decision*, the Federal Court has not known what to do with the *Suresh* exception. While not foreseeing a case in which the exception will be employed, the Federal Court has not been able to ignore it, and has chosen to treat it as an ever-present possibility whose uncertain application awaits clarification by the Supreme Court. On Mr Mahjoub’s second application for release, Dawson J stated, ‘I find on the balance of probabilities that Mr Mahjoub is unlikely to be removed from Canada until the Supreme Court authoritatively decides whether circumstances will ever justify a removal to torture.’\(^{132}\) The converse of this appears to be that he is also unlikely to be released from a regime of ‘immigration’ constraints until such time as the Supreme Court authoritatively decides whether circumstances will ever justify a removal to torture. The Supreme Court has yet to so authoritatively decide and Mr Mahjoub has yet to be removed from Canada, or released from the security certificate regime.

**4.3 Charkaoui.**

The three appellants in *Charkaoui* challenged the constitutionality of the security certificate regime on a number of grounds.\(^{133}\) They argued that procedures for ‘reasonableness’ review of a decision to issue a security certificate and the procedures for reviewing detention infringed s 7 of the *Charter*, and that the incidence of detention

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\(^{131}\) *Ibid.* at para 78.

\(^{132}\) *Mahjoub, second application for release, supra* note 117 at para 29. Even in the decision on his first application for release under s 84(2), in which it was determined that Mr Mahjoub could be removed within a reasonable time, one of the reasons given for the acknowledged ‘uncertainty’ as to when was the difficulty of deporting him without violating the *Charter* given that he had asserted a risk of torture on return: see *Canada (Minister of Citizenship and Immigration) v Mahjoub* [2004] 1 F.C. 493 at paras 52 and 54-59.

\(^{133}\) The Supreme Court’s decision in *Charkaoui, supra* note 63, was an appeal from three cases of the Federal Court of Appeal involving Messrs Charkaoui, Almrei and Harkat: *Charkaoui* - Leave to Appeal to the Supreme Court granted in August 2005, from Federal Court of Appeal decision of 10 December 2004, 2004 FCA 421; *Almrei v Canada (Minister of Citizenship and Immigration)* - Leave to Appeal to the Supreme Court granted in October 2005, from Federal Court of Appeal decision of 8 February 2005, 2005 FCA 54; *Harkat v Canada (Minister of Citizenship and Immigration)* - Leave to Appeal to the Supreme Court granted in January 2006, from Federal Court of Appeal decision of 6 September 2005, 2005 FCA 285. The Supreme Court heard the matters together over three days in June 2006.
review did not meet the requirements of ss 9 and 10. They also argued that detention under the regime constituted ‘cruel and unusual treatment or punishment’ under s 12, and was discriminatory under s 15.134 The Court devoted most of its reasoning to the deficiencies of the statutory requirements for the Federal Court’s review of certification and detention.135 The Court held that the procedures under the security certificate regime did not comply with s 7 of the Charter and further that the procedures were not justified under s 1.136 It issued a declaration of invalidity (suspended for one year) on this ground.137 The Court suggested procedural changes to mitigate the damage to procedural rights that resulted when information was withheld from those named in security certificates on grounds of national security. It also severed certain phrases and provisions, and read in terms, so as to ensure that judicial review commenced within 48 hours of the beginning of detention, and took place at least once in each six-month period following the preceding review.138

The Court did not set any time limits on how long a non-citizen could be held in detention after a deportation order had been made. Crucially, the Court held that, subject to the procedural changes it required, continuing ‘immigration’ detention under the security certificate regime did not contravene ss 12 (cruel or unusual treatment) or 15 (equality) of the Charter.139 It reasoned that the augmented procedural protections required under its s 7 analysis ‘answered’ the substantive Charter challenges under ss 12 and 15.140

My analysis of Charkaoui has two broad themes: the Court’s attempt to treat procedural rights as a complete substitution for substantive rights; and the way in which the Court

134 A challenge was also mounted based on the constitutional principle of the rule of law. See infra note 208.
135 Charkaoui, supra note 63 at para 12-87.
136 Ibid. at para 85-87.
137 Bill C-3, supra note 67, was Parliament’s response to Charkaoui. It is discussed further in Chapter 5, section 5.5.
138 Charkaoui, supra note 63 at para 141-42. The IRPA had previously provided that non-citizens who were not permanent residents were only eligible for detention review 120 days after a decision had been made on the reasonableness of the certificate, which in some cases (for example that of Harkat) meant that those named were ineligible for detention review for years. Harkat was taken into detention in December 2002. A reasonableness decision was not delivered until 22 March 2005: Re Harkat (2005), 261 F.T.R. 52.
139 Charkaoui, ibid. at para 123, 131.
140 Ibid. at para 3, 123, 131.
relied on the possibility of deportation to torture in characterizing detention under the security certificate regime as detention for the purposes of deportation. I first discuss the Court’s reasoning on the procedures under s 7, and the use to which it puts these procedures in addressing the issues of indefinite detention and discrimination. I then examine how the *Suresh* exception, allowing for deportation to torture, features in the reasoning.

### 4.3.1 Section 7 analysis of the statutory procedure.

The Court held that while deportation itself did not ‘in itself’ engage s 7 of the *Charter*, ‘some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so.’\(^{141}\) It held that the appellants’ challenge raised important issues of liberty and security, engaging s 7 of the *Charter*. The Court then proceeded to focus on an assessment of the statutory procedures against s 7, at the expense of any extended treatment of the substantive limits on detention and removal.

The Court’s analysis under s 7 gave the *Charter* a relatively robust application to procedures under an immigration statute. The Court did not simply replicate the ‘contextual’ approach adopted in *Chiarelli*, that is, it did not adopt the view that whatever rights the legislature accorded in the immigration area were sufficient. It rejected the proposition that the security certificate regime was compatible with the *Charter* even though it did not allow for any adversarial challenge to the intelligence that Ministers submitted in secret *ex parte* hearings. Its stance on the procedural rights of non-citizens was more reminiscent of that adopted in the early *Charter* case of *Singh*, where Wilson J stated that it was ‘unthinkable that the *Charter* would not apply to entitle them [non-citizens] to fundamental justice in the adjudication of their status’.\(^ {142}\) The Court based its analysis of the procedures on ‘the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to

\(^{141}\) *Ibid*. at para 17.

\(^{142}\) *Singh*, supra note 30 at 210. In *Singh*, the status in question was refugee status. In *Charkaoui*, the relevant status was certification as inadmissible on grounds of security. In both cases, the motivation for the application of *Charter* rights was the potential dire consequences of the denial, or ascription of status.
meet the case. The central objection expressed by the Court was to the lack of ‘informed participation’ by the detainee, and the resulting dependence of the judges on ‘what the ministers put before him or her’. The Court’s conclusion was that under the security certificate regime, the judge was:

not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited: it has been effectively gutted. How can one meet a case one does not know?

The Court held that the procedures under the security certificate regime violated s 7 of the Charter. Accordingly, it turned to focus on whether the government had a principled justification for violating s 7 under s 1. The issue to be justified was the non-disclosure of evidence on grounds of national security. The test to be applied in determining whether a violation can be justified under s 1, the Oakes test, is effectively the same proportionality test as was applied by the House of Lords in Belmarsh. As stated by the Court, a finding of proportionality required ‘(a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the effects of the infringement and the importance of the objective’. There was a pressing and substantial objective, to which non-disclosure was rationally connected. The remaining issue for the Court was whether the procedures under the security certificate regime minimally impaired the rights of non-citizens.

Here the Court outlined a range of alternative means for addressing confidentiality issues in the national security context. This section of the judgment effectively set the parameters for the legislative response. The alternative means discussed by the Court

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143 Charkaoui, supra note 63 at para 61. In this as well it was reminiscent of Wilson J’s position in Singh. She focussed on the ability of the appellant’s to make an ‘effective challenge’ to the information or policies underlying the minister’s case: see Singh, supra note 30 at 215-216.
144 Charkaoui, supra note 63 at para 62.
145 Ibid. at para 63. The Court further addressed the dependence of judges on government section and characterisation of information in Charkaoui v Canada (Minister of Citizenship and Immigration) [2008] 2 SCR 326 [Charkaoui II], see Chapter 5 section 5.4 below.
146 Ibid. at para 64.
147 Ibid. at para 65.
149 In Huang v Secretary of State for the Home Department [2007] 2 AC 167, Lord Bingham made clear that the De Freitas test (employed in Belmarsh) was ultimately derived from the Oakes test.
150 Charkaoui, supra note 63 at para 67.
included the past role played by the SIRC in reviewing security certificates,\textsuperscript{151} that is, the ‘Canadian technique’ referred to in Chahal that had been so influential in the development of the ‘special advocate’ role before the United Kingdom’s Special Immigration Appeals Commission [SIAC].\textsuperscript{152} All the alternatives were presented as ‘less intrusive’ upon the procedural rights of those certified than the procedures then employed under the security certificate regime. The Court’s imperfect understanding of how the bodies it discussed handled the challenges of secret information, and the respective merits and failings of each, have received close academic appraisal.\textsuperscript{153} Alongside recording judicial and academic support for the special advocate system, the Court noted Parliamentary criticisms that it did not go far enough.\textsuperscript{154}

The smorgasbord of less intrusive approaches laid out by the Court has also occasioned discussion of the dangers of ‘judicial pre-approval of legislative responses’.\textsuperscript{155} The spur for this discussion is, in no small part, the fact that the eventual legislative response was closely modelled on the role of ‘special advocates’ before SIAC, ‘the one alternative [discussed by the Court] that arguably achieves the worst job of all the alternatives in ensuring fair treatment of the affected person’.\textsuperscript{156} Here, the basic line of criticism, with which I agree, is that it would have been preferable for the Court to confine itself to pointing out the legal shortcomings of the current system, thus leaving itself less open to the perception that the government could meet the legal objections by adopting one of the alternatives mooted by the Court. That said, there is clearly pressure on the Court in the national security area to substantiate the view that there are workable alternatives.

\textsuperscript{151} See supra note 49.
\textsuperscript{152} For the reference to the ‘Canadian technique’ in Chahal, supra note 92 in Chapter 3, section 3.3.2, and for SIAC section 3.4. The other options discussed by the Court were the procedure under s 38 of the Canada Evidence Act; the reliance placed on undertakings by counsel in the Air India trial; and the role of amicus curae in the Arar Commission. See Charkaoui, ibid. at para 70 – 84.
\textsuperscript{156} Roach, ‘Charkaoui and Bill C-3’, supra note 153 at 305.
Reconciling these pressures counsels that the Court register the ‘less intrusive’ measures without much attendant discussion. I defer further discussion the SIAC ‘special advocate’ model to chapter 5, in which the evolution of the model, in both the United Kingdom and Canada, is discussed.

In the Court’s reasoning on the procedures one can see welcome signs of engagement with issues of national security confidentiality. The Court’s requirements were directed at closer scrutiny of government decision-making in the area.\(^{157}\) Whether or not the judgment went far enough,\(^{158}\) it had the merit of transparency in seeking to resolve procedural issues by explicit reference to substantive values of general application.\(^{159}\) It rejected the idea that s 7 rights were confined to the criminal justice system, and/or are to be aggressively contextualised downward in the immigration context.\(^{160}\) The merits, and possible significance, of the Court’s assessment of the statutory procedures against the *Charter* are developed further in Chapter 5, with reference to legal developments subsequent to *Charkaoui*.

At this point in the discussion, I simply note the lulling effect of the Court’s extended discussion of procedure. Having sharply segregated procedural issues from any substantive concerns, the Court devoted the first half of the judgment to s 7’s application to the procedures and, having found a violation of s 7, the s 1 justification.\(^{161}\) At no point in this discussion did it raise as problematic the fact that the regime was confined to non-citizens. The prolonged discussion of the merits and demerits of the procedure under the

\(^{157}\) Subsequent United Kingdom jurisprudence has approvingly referred to *Charkaoui* on this basis: see *Secretary of State for the Home Department v MB* [2008] 1 AC 440 at para 30 (the decision in *MB* is discussed in Chapter 5, section 5.2.3). Thomas Poole appears to tentatively offer *Charkaoui* as an example of the way forward in reviewing counter-terrorism measures on this basis: see Thomas Poole, ‘Court and Conditions of Uncertainty in “Times of Crisis”’ [2008] PL 234 at 254-255.

\(^{158}\) See the discussion of subsequent developments in Chapter 5, section 5.4 below.


\(^{160}\) This position was affirmed by the Supreme Court in *Charkaoui II, supra* note 145 at para 53: ‘But whether or not the constitutional guarantees of s. 7 of the *Charter* apply does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state’s actions for the individual’s fundamental interests of liberty and security and, in some cases, the right to life.’

\(^{161}\) Paragraphs 12-65 are devoted to the application of s 7 to the procedures; paragraphs 66-87 to the attempted s 1 justification for the violation of s 7, from a judgment of 143 paragraphs.
security certificate regime proceeded as if the regime itself was otherwise basically legally and constitutionally sound. Long before we arrived at the Court’s cursory consideration of whether the regime was discriminatory against non-citizens, the judgment had indicated its decision on the substantive treatment by focussing on the secondary issue of whether the procedures for review of that treatment passed constitutional muster.

4.3.2 A procedural solution to indefinite detention?

The Court avoided the substantive issues relating to indefinite administrative detention through reliance on the process of periodic review. Section 12 of the Charter provides that, ‘[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment’. In response to a challenge under this provision, the Court held that the ‘robust ongoing review’ of detention demanded on its interpretation of s 7 meant that the ‘extended’ detention allowed under the statute did not contravene s 12. The Court emphasized ‘the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment’. This possibility of a future ruling confined to the facts of a case was all the Court was prepared to commit to on the question of indefinite detention and the Charter. It avoided defining what would constitute indefinite detention and did not determine whether indefinite detention would constitute cruel and unusual punishment.

The Court stated that ‘[t]he s. 12 issue of cruel and unusual treatment is intertwined with s. 7 considerations, since the indefiniteness of detention, as well as the psychological stress it may cause, is related to the mechanisms available to the detainee to regain liberty.’ This is fine as a general statement. However, the Court shows itself as aware as the Federal Court judges had been that the procedural steps under the statute could continue indefinitely, ‘while the IRPA in principle imposes detention only pending

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162 Charkaoui, supra note 3 at para 123.
163 Ibid.
164 The Court noted that ‘Mr Almrei argues that as far as he is concerned, his detention is indefinite’, but abstains from comment.
165 Charkaoui, supra note 63 at para 96.
deportation, it may in fact permit lengthy and indeterminate detention or lengthy periods subject to onerous release conditions.'\textsuperscript{166} Rather than directly address indefinite detention, the Court proceeded to redefine the harm, adding additional qualifiers so as to make it amenable to a procedural solution. The harm was re-characterized as being detention that was ‘arbitrarily indefinite,’\textsuperscript{167} or a situation where there was ‘no hope of release or recourse to a legal process’.\textsuperscript{168} The Court put recourse to a legal process on an equal footing with release from detention.

The same reliance on the existence of a review process to address substantive constitutional concerns was found in the Court’s response to the s 15 challenge. The Court in \textit{Charkaoui} devoted a cursory three paragraphs of reasoning to the appellants’ s 15 discrimination claim. The Court noted that discrimination may result from indefinite detention where deportation was put off or became impossible, or where the government was using the IRPA to detain a person on security grounds,\textsuperscript{169} but stated, ‘the answer to these concerns lies in an effective review process that permits the judge to consider all matters relevant to the detention’.\textsuperscript{170}

Review procedures do not answer the substantive constitutional issues presented by detention under the security certificate regime. It is convenient to make this point in relation to the Court’s ruling that detention under the security certificate regime did not constitute cruel and unusual treatment. The argument is simply that periodic review is no guarantee that detention will not be indefinite, and so one must move to decide whether a statutory power of indefinite detention is itself in breach of constitutional rights.

\textsuperscript{166} \textit{Ibid.} at para 105, and see more expansively at para 99.
\textsuperscript{167} \textit{Ibid.} at para 96.
\textsuperscript{168} \textit{Ibid.} at para 98.
\textsuperscript{169} \textit{Ibid.} at para 130.
\textsuperscript{170} \textit{Ibid.} at para 131.
The Supreme Court’s position in *Charkaoui* stands in marked contrast to the position adopted by the majority of the United States Supreme Court in *Zadvydas*. In that decision, a majority held:

[F]or the reasons we have set forth, we believe that an alien’s liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used . . . the Constitution permits detention that is indefinite and potentially permanent.

Lord Nicholls’ statement in *Belmarsh* was to similar effect:

Nor is the vice of indefinite detention cured by the provision made for independent review by the Special Immigration Appeals Commission. The commission is well placed to check that the Secretary of State’s powers are exercised properly. But what is in question on these appeals is the existence and width of the statutory powers, not the way they are exercised.

*Charkaoui* inverted this approach. The Supreme Court left the existence and width of the indefinite detention power untouched and focused on the procedures that governed its exercise. The substantive issues at the centre of the litigation — the legality of deportation to torture, and indefinite detention — were left open to be assessed on a case-by-case basis.

The reliance on procedural review put the onus on those affected to bring a legal challenge through the courts. Further, it let the legislature off the hook for ensuring *Charter* compliance. Legislative grants of power that potentially infringed *Charter* rights were allowed to stand, on the understanding that courts could respond to challenges to particular exercises of those powers as and when they arose. Further, the Court’s

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171 The *Zadvydas* majority, in *obiter*, made clear that their comments requiring an implied temporal limitation on immigration detention were not addressed to terrorism or other circumstances ‘[w]here special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.’: *Zadvydas v Davis*, 533 U.S. 678 (2001) [Zadvydas] at 696. This exception is the subject of discussion in Chapter 6, section 6.4.1. In *Zadvydas*, such a terrorism exception remained irrelevant to the case before the Court.

172 *Zadvydas*, *ibid.* at 696 [emphasis added].

173 *A v Secretary of State for the Home Department* [2005] 2 AC 68 at para 82. Lord Nicholl’s statement has particular bite in that the Canadian parliamentary amendments to the security certificate regime enacted in February 2008 (*Bill C-3, supra note 67*) seek to replicate ‘the provision made for independent review by the Special Immigration Appeals Commission’ referred to.

174 See also Roach, ‘*Charkaoui* and *Bill C-3*,’ *supra* note 153 at 349-50.

175 For an argument that where a statute confers a discretion to engage in activities that may breach *Charter* rights, that provision should itself be struck down as failing to take adequate measures to ensure those rights, see Sujit Choudhry & Kent Roach, ‘Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability’ (2003) 41 Osgoode Hall L.J. 1.
failure to require explicit legislative authorisation of deportation to torture or indefinite detention meant that resolution of these grave rights infringements remained a matter for the courts, determined with reference to, and for, a particular case.  

‘[T]he Court’s minimalism in Charkaoui appears to maximize the ability of courts, not legislatures, to make important decisions in future cases.’

The Court provided little express guidance on when a court might find that the circumstances of an individual security certificate detainee amounted to cruel and unusual treatment. It did, however, decline to reach any such finding in relation to any of the appellants. Before the Court was Mr Almrei, who had already been detained for over five years. A judge of the Federal Court had found that he would not be removed within a reasonable time. The Court, by its silence, held that over five years administrative detention without charge, and without end in sight, was not ‘so excessive as to outrage [our] standards of decency’. There was no indication as to what, if any, duration of indeterminate detention would offend the right.

The Supreme Court clearly endorsed the Federal Court practice, discussed above, and established at the time of judgment in Charkaoui, of ordering release from detention on onerous conditions. It recognized that just as detention itself called for regular review, the conditions on which release was ordered would themselves need to be subject to regular review. What the Court did not do was indicate whether there were any outer bounds on the continued deployment of this system of preventive detention and/or restraint without charge. Further, it made clear that the constitutionality of the regime rested on its characterisation as a regime of detention for the purposes of deportation.

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176 The legislature did not attend to these issues in responding to Charkaoui: see Bill C-3, supra note 67 and for commentary, Roach, ‘Charkaoui and Bill C-3’, supra note 153.
177 Roach, ibid. at 349.
178 Ibid. at para 102.
180 See for example Charkaoui, ibid. at para 101: ‘courts have read the provision [s 84(2) of the IRPA] as allowing the judge to inquire whether terms and conditions could make the release safe. This is an invitation that Federal Court judges have rightly accepted’.
181 Charkaoui, supra note 63 at para 122.
182 Ibid. at para 131. Most clearly in the way it distinguished R v Lyons [1987] 2 S.C.R. 309, in which the Court indicated that ‘a sentence of indeterminate detention, applied with respect to a future crime or a
4.3.3 The Court’s treatment of comparative authorities.

It was only after having concluded that, provided that procedures are interpreted in conformity with the Charter, ‘extended periods of detention pending deportation’ did not violate the Charter, that the Court turned to comparative jurisprudence on the issue. The Court simply stated that ‘[t]hese conclusions [on the Charter] are consistent with’ the rulings of courts ‘in the United Kingdom and the United States…that detention in this context can be used only during the period where it is reasonably necessary for deportation purposes: [Hardial Singh]; Zadvydas’.

The Court’s conclusions on the Charter were not, however, consistent with the comparative authorities cited. The idea that they were, that the instances of detention given legal sanction in Charkaoui were ‘reasonably necessary for deportation purposes’ in the sense in which that phrase was understood in Hardial Singh or Zadvydas, ignored the basic distinction in the jurisprudence between a rights-protecting and a rights-precluding approach to detention of a non-citizen subject to a deportation order. It was integral to Hardial Singh and Zadvydas that detention was only authorised for the purposes of deportation for so long as there was a real prospect of removal in the reasonably foreseeable future. This requirement was dropped in Charkaoui. This was clear from the fact that, for a number of the non-citizens certified as inadmissible under the security certificate regime, judges of the Canadian Federal Court had determined that those individuals would not be removed within a ‘reasonable’ time. If the legal reasoning in Charkaoui was, in fact, consistent with ‘the Hardial Singh principles’, this finding would have established that detention was no longer for the purpose of removal, and that accordingly authority to detain had come to an end. In Charkaoui, it seems that detention was authorised for as long as the government claimed that it had an intention to deport the relevant individual.

Again, in Zadvydas, the United States Supreme Court directly considered a position closely analogous to that accepted by the Canadian Supreme Court in Charkaoui, and a crime that had already been punished, would violate s 7 of the Charter’: see ibid. at para 106 and 107. The grounds for distinguishing Lyons was simply that it was not in the ‘immigration context’.

Ibid. at para 124.
majority rejected it. The decision Mr Zadvydas had appealed from, that of the Fifth Circuit, had held that his detention did not violate the United States Constitution because ‘eventual deportation was not “impossible”, good faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review’. 184 This description of the Fifth Circuit’s decision reproduces the essential features of the Supreme Court of Canada’s ruling in Charkaoui. And the United States Supreme Court reversed the decision of the Fifth Circuit. A majority of the Court held that these features, in the absence of an implied temporal limitation, did not suffice to address the ‘serious constitutional problems’ posed by continuing detention under an immigration statute in circumstances where there was no real prospect of removal.

The Court’s reference to Hardial Singh and Zadvydas led it into a more extended discussion of a case ‘raising similar issues’, Belmarsh. The Court’s use of Belmarsh followed the same pattern as its use of the comparative authorities just discussed. The Court claimed its reasoning was compatible with that of the House of Lords, but on examination the claim of compatibility is unsustainable, papering over a fundamental divergence in the reasoning on the legality of indefinite detention of non-citizens subject to a deportation order. The Court’s discussion of Belmarsh straddled its discussion of sections 12 and 15 of the Charter, effectively unifying them, 185 and I adopt the same ‘unified’ approach in discussing the Court’s response to the House of Lords in the following section.

4.3.4 The Suresh exception and the character of detention.

The Court in Charkaoui left the Suresh exception untouched. The Suresh exception helped the Court to continue to characterize the detention as for the purposes of deportation, so justifying the discriminatory burden imposed on non-citizens. The Court did not directly confront the question of whether detention became ‘unhinged’ from

184 Zadvydas, supra note 171 at 685.
185 The thinking of the Court seemed to be that express authorisation of indefinite detention would both constitute cruel and unusual treatment or punishment, violating s 12, and render untenable a characterisation of the detention as immigration detention, so leaving it open to charges of being discriminatory in violation of s 15.
deportation where the only prospect for removal was attended by a real risk of torture on return. The Court avoided this question, central to the workability of the regime as a mechanism of removal, on the basis that a risk of torture remained to be proven in the appellants’ cases. It concluded that ‘[t]he issue of deportation to torture is consequently not before us here.’ The Court adverted to the current Canadian position on deportation to torture with reference to a Federal Court dictum that this remained a possibility, but it refrained from comment. I argue that despite the Court’s concerted effort to avoid the issue of deportation to torture, Charkaoui contained a strong, albeit indirect, affirmation of the Suresh exception in the form of its analysis of Belmarsh.

Belmarsh confronted the Court with a prominent, recent, decision of the House of Lords which had refused to characterise the detention resulting from an absolute prohibition on deportation to torture as detention ‘pending deportation’, justifiably confined to non-citizens. The response of the Court was not to take issue with any aspect of the reasoning of the House of Lords, but rather to seek to distinguish the situation facing the Court in Charkaoui from that before the House of Lords.

In Charkaoui, the Court characterized the reasoning in Belmarsh as follows, ‘Absent the possibility of deportation, it [the provision authorising detention] lost its character as an immigration provision, and hence constituted unlawful discrimination’. The Court emphasized that the legislation considered by the House of Lords in Belmarsh ‘expressly’ provided for indefinite detention. However, this was not a compelling basis to distinguish Belmarsh. In the United Kingdom there is an unequivocal legal prohibition on deportation to torture (established by Chahal). This required the government to enter a derogation to expressly provide for the indefinite detention of non-citizens subject to a

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186 As stated by a Federal Court judge in a security certificate decision, the issue of removal to torture ‘is an issue in virtually all security certificate cases’: Jaballah, second reasonableness decision, supra note 126 at para 76.
187 Charkaoui, supra note 63 at para 15.
188 Ibid. at para 99.
189 Charkaoui, supra note 63 at para 126, see also para 130.
190 Ibid. at paras 127 and 130. As noted in Chapter 3, the Anti-terrorism, Crime and Security Act (U.K.) 2001, c.24, s 23 provided for the detention of a foreign terrorist suspect ‘despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely)’.
deportation order.\textsuperscript{191} For the Court to focus on the fact that the United Kingdom legislation expressly provided for indefinite detention is to focus on a secondary phenomenon. The primary distinction between the two jurisdictions, which shaped the different legislative responses, is that in Canada, as established by \textit{Suresh}, there was and is no absolute prohibition on deportation to torture. In this context, there was no need to make express provision for indefinite detention. The government could continue to entertain the possibility of deportation and detention for the purpose of deportation when a real risk of torture on return was established.

On the Court’s reasoning in \textit{Charkaoui}, the United Kingdom’s open provision for indefinite detention would be condemned as incompatible with fundamental rights commitments, while Canada’s lack of express legal provision for indefinite detention was rewarded. When an indefinite detention regime developed under the legislation, without being expressly provided for, it was not even identified as necessarily infringing a right. The system of incentives generated by the Court’s reasoning inverted the principle of legality, discussed earlier in relation to the Australian jurisprudence.\textsuperscript{192} The distinction the Court drew between the Canadian situation and the reasoning in \textit{Belmarsh} counsels Parliament to avoid expressly stating its intention to abrogate a right, with the publicity and need to directly confront the issues that that would entail. A practice of indefinite detention is simply allowed to develop, and the very fact that such a practice has developed is avoided.

The overall impression derived from the judgment is of a Court that wished to avoid confronting the reality of a regime that provided for the indefinite administrative detention of non-citizens, and as a consequence allowed Parliament to do the same. It was a decision that effectively decided key issues, notably the legality of the detention regime at issue, while saying little about them. The nature of what the Court did not do in \textit{Charkaoui} is developed in the next section.

\textsuperscript{191} On \textit{Chahal}, \textit{supra} note 92, see Chapter 3, section 3.3.2. On \textit{Chahal}’s influence on the derogation see section 3.7.2.

\textsuperscript{192} Chapter 2, section 2.1.2, 2.3 and 2.4.3 (the common law background, the \textit{Al Masri} decision and Gleeson CJ’s dissent in \textit{Al-Kateb}).
4.3.5 *Charkaoui* assessed in the light of *Belmarsh*.

The Supreme Court in *Charkaoui* never engaged in a proportionality analysis of the detention, or the decision to confine the measures to non-citizens, as opposed to the procedures and the regularity of review. The central topics of legal discussion in *Belmarsh* were simply absent from the reasoning of the Court.193

If the Canadian Supreme Court had squarely confronted the real risk of torture on return to a detainee’s country of nationality, pervasive in the security certificate jurisprudence, and closed off the *Suresh* exception, it would likely have followed the persuasive authority of the *Belmarsh* decision.194 If the Supreme Court had instituted an absolute prohibition on deportation to torture (and faced up to the reality of a real risk of torture on return), this would have severed the connection between detention and deportation, so bringing to an end the characterisation of detention as being for the purpose of facilitating deportation. It would then have to be openly acknowledged that the better characterization of the security certificate regime is that it is a preventative detention regime confined to non-citizens. Stripped of a deportation rationale, the regime would be exposed as discriminating against non-citizens, infringing s 15, and the inquiry would move on to whether it was justified under s 1 of the *Charter*.

Like the House of Lords in *Belmarsh*, deprived of a deportation rationale, the Supreme Court would presumably consider security as an independent justification for the detention provisions.195 Here there would arise issues of rational connection analogous to those considered in *Belmarsh*. Why are the security detention measures confined to non-citizens? Once the Court rejected the characterization of the measures as detention for the purpose of deportation, and entered into a s 1 analysis of a security justification for

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194 There is the alternative prospect that, if push came to shove, the Court would simply reject the *Belmarsh* decision. I think this underestimates the authority of the *Belmarsh* decision, as most directly testified to by the Supreme Court of Canada’s efforts to establish that its reasoning was consistent with that of the House of Lords, but that it was dealing with a distinct factual situation.
195 On the nature of a s 1 analysis in the circumstances, also outlined with reference to *Belmarsh*, see also Roach, ‘*Charkaoui* and Bill C-3’ *supra* note 153 at 309.
the provisions, it is likely that it would arrive at a result equivalent to that arrived at by
the House of Lords, holding that the detention measures were discriminatory in violation
of s 15 and could not be justified under s 1.

4.4 Conclusions on Charkaoui.

4.4.1 The two aspects of the decision.

The legal issues raised by Charkaoui place it at the nexus of national security and
immigration. I suggest that how one evaluates the decision has much to do with which
aspect is of greater concern, national security or immigration. In national security terms,
the Court’s focus on issues of non-disclosure led to procedural reforms that could be
expected to be beneficial for those grappling with national security confidentiality. And
as we’ll see in Chapter 5, those reforms have been beneficial for some security detainees.
But in terms of the parameters of what constitutes an ‘immigration’ power, and scrutiny
of government claims to be making a ‘reasonable’ differentiation between the rights of
citizens and non-citizens, the decision was at best a missed opportunity. Further, as will
be broached below, and developed in the concluding chapter, the way the reasoning was
conducted was in itself problematic, in both its minimalism and its conviction that the
extension of procedural rights constituted a complete answer to the substantive rights
challenges.

4.4.2 Commonalities with Suresh.

The consistency of approach the Canadian Supreme Court has shown in cases at the
nexus of security and immigration is worthy of comment. The decision in Charkaoui
was similar in key respects to Suresh. In both cases, by way of a unanimous judgment,196

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196 As regards its unanimity, the absence of any dissenion within the judicial ranks unequivocally situates
the decision as a decision of ‘the Court’ and ensures that the decision carries the authority of the institution,
as opposed to any particular judge. Further, it denies critics the ability to latch onto a dissent, either that
supports the critics’ views or, more weakly, that highlights the contestability of the legal conclusion. And
finally, it guards against the majority decision being defined by way of the contrast with the dissenting
positions. I owe these observations on unanimity to Audrey Macklin.
the Court upheld, as potentially free of constitutional limitation, a sweeping power over non-citizens. In *Suresh*, it was the possibility of deportation to torture. In *Charkaoui*, to this possibility was added that of indefinite administrative detention. Further, in both cases, the Court chose to address any rights infringements on a case by case basis, rather than directly addressing the existence and width of the statutory powers in question.

*Suresh* was a decision handed down in the months after 9/11. Its contemporary in the United Kingdom jurisprudence is the decision of *Rehman*, from which it quotes. Given the timing, the Court’s decision to baulk at imposing an absolute limit on the government’s power to deport a foreign terrorist suspect is perhaps unremarkable. The decision in *Charkaoui* cannot be accounted for on such a basis. By the time the Court came to judgment in *Charkaoui* the inability of the security certificate regime to achieve the ostensible purpose of removal was readily apparent, as elaborated above with reference to the Federal Court jurisprudence. Already by 2005, in the course of an application for release, a judge wrote, ‘Mr Almrei insists that the legislation does not contemplate the present circumstances... it is arguable that when prolonged detention occurs, the legislation has diverted from its stated goal [namely removal from Canada].’ Further, it was readily apparent that government attempts to utilise the *Suresh* exception could give rise to an indefinite number of procedural steps. What was needed to resolve the impasse was a definitive ruling by the Supreme Court on the possibility of deportation to torture. Moreover, the Supreme Court also had the benefit of the *Belmarsh* decision itself, a decision that the Court felt compelled to distinguish, rather than reject on any aspect of its reasoning.

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197 As discussed earlier, the possibility of deportation to torture assisted the argument for the legal permissibility of indefinite detention.

198 In this regard, *Suresh* and *Charkaoui* were consistent with the Supreme Court’s earlier decision in *Chiarelli*. As highlighted by the comparison with the reasoning of the Federal Court in that decision, the Supreme Court focussed on SIRC’s actual practices as opposed to the powers granted under the statute (see section 4.1.3).

199 *Rehman*, supra note 86.

200 Benvenisti, ‘United We Stand’, supra note 99 at para 96.

201 *Almrei v Canada (Minister of Citizenship and Immigration)* 2005 FC 1645 at para 428, Layden-Stevenson J.

202 *Mahjoub*, third application for release, supra note 117 at para 103.

203 ‘I find on the balance of probabilities that Mr Mahjoub is unlikely to be removed from Canada until the Supreme Court authoritatively decides whether circumstances will ever justify a removal to torture.’: *Mahjoub*, second application for release, supra note 117 at para 29.
4.4.3 The Court’s use of international and comparative law.

In *Suresh*, the Court’s decision had the merit of laying out the relevant international law jurisprudence, though it offered little by way of explanation for its ultimate decision to reject a categorical prohibition on deportation to torture. *Charkaoui* found the Court focussed much more inwardly, making scant reference to international law or comparative jurisprudence bearing on indefinite detention, with the exception of the elephant in the room, *Belmarsh*.

The Court’s focus on *Charter* jurisprudence in *Charkaoui* was almost hermetic. There are two points at which foreign practice or jurisprudence was discussed – the Court’s discussion of the ‘special advocate’ regime in the United Kingdom, and its attempts to grapple with the *Belmarsh* decision. Other than that, in the course of a judgment of 142 paragraphs, foreign or international jurisprudence was only referenced at two points, in both cases to buttress a conclusion arrived at under the *Charter*. It was drawn on to support the right, sourced to s 10(c) of the *Charter*, of a foreign national to prompt review of his or her detention. And, as discussed above, *Hardial Singh* and *Zadvydas* were referred to in support of the characterization of the detention as detention for the purpose of deportation. *Charkaoui* was a decision whose legal reference points were almost exclusively *Charter* jurisprudence.

This inward focus sat uncomfortably with both the novelty of the circumstances before the Court and the level of contemporaneous legal attention to such circumstances in the comparative jurisprudence. Further, as discussed above, when the Court did reach for

204 *Charkaoui*, supra note 63 at para 80 and 83, 84.
208 This extends to the dismissal of attempts to rely on Canadian case law not focussed on the *Charter*. In relation to the constitutional challenge premised on unwritten constitutional principles bearing on the rule of law, the Court held that the ‘constitutional protections surrounding arrest and detention are set out in the *Charter*, and it is hard to see what the rule of law could add to these provisions’: *Charkaoui*, *ibid.* at para 137. The Court does, however, discuss procedural practices developed by a range of Canadian bodies in response to issues of national security confidentiality, at the minimal impairment stage of the s 1 analysis of the procedures under the security certificate regime (held to have violated s 7).
209 As attested to by the discussion in *Belmarsh*, to which the Court refers.
comparative authority (*Hardial Singh, Zadvydas, Belmarsh*), it did so in a defensive way supportive of conclusions arrived at under the *Charter*, that distorted the meaning of those authorities.

4.4.4 The Court’s avoidance of the merits – the adverse implications of procedural solutions.

A central characteristic of the Canadian Supreme Court’s reasoning in *Charkaoui* was its lack of decision on the substantive issues. No one was ordered released. No one was ordered removed. The spectacle of a detention regime ostensibly facilitating deportation, under which deportation does not occur, continued. There was no discussion of the discretion to deport to torture in exceptional circumstances, nor was the question of the constitutionality of indefinite detention directly addressed. Instead, the Court provided for the possibility of such infringements being identified on a case by case basis, and devoted its energies to examining and ultimately strengthening the procedural protections afforded to those certified under the regime.

In a response to the question ‘why is it that the litigation concerning the alleged enemy combatants at Guantanamo and elsewhere has been going on for more than six years and almost nothing seems to have been decided?’ 210 Jenny Martinez turned to the way in which the ‘war on terror’ litigation in the United States had been ‘fixated on process’. In a summary of why the procedural solutions to substantive rights issues in the United States counterterrorism context had been problematic she stated, ‘[f]irst, by delaying the ultimate resolution of rights claims, it has allowed serious violations of human rights to continue for years. Second, this approach has foreclosed many rights based challenges without considering the merits of those challenges’. 211

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211 Martinez, *supra* note 159 at 1031.
The first of Martinez’s points is the more obvious, and here I want to focus on the second issue she raises. What was really troubling about the style of reasoning in *Charkaoui* was how much the Court decided without discussion. It upheld the prolonged detention of the appellants without ever openly characterizing it as indefinite administrative detention, or indicating the constitutional status of indefinite detention of non-citizens subject to a deportation order. It allowed for preventive detention of non-citizens on grounds of dangerousness without indicating what the constitutional bounds on this practice are, absent regular review to a particular standard. It raised a number of factors that will break the connection between detention and deportation without explaining why the appellants could not successfully invoke them in the circumstances. It is misleading to characterize these positions as leaving the issues on which they touch open, because the Court’s silence and avoidance gives legal sanction to the relevant practices. The Court’s position on these issues effectively foreclosed rights based challenges without considering them on their merits. This theme is further developed in the conclusion to the thesis, in section 6.1.4.

4.4.5 Drifting towards the formalist discrimination of *Al-Kateb?*

In *Charkaoui*, the Court postponed any decision on the limits of detention for the purposes of deportation. It effectively held that an executive intention to deport a non-citizen was sufficient to characterize detention as being for such a purpose, for at least a span of five years. The absence of any realistic prospect of removal in the reasonably foreseeable future was disregarded. The operative reason for continued detention of the foreign terrorist suspects was their dangerousness and the corresponding need to remove them from the community. In circumstances where isolation from the community would not be a sufficient ground for detaining a citizen, it was accepted as an argument for detaining a non-citizen. On the possibility of the indefinite detention of a non-citizen against whom a deportation order has been issued the Court is presently closer to the majority of *Al-Kateb*, a decision under a division of powers constitution, than the decision in *Belmarsh*, a decision under a statutory bill of rights.
The decision of the majority of the High Court in Al-Kateb exemplified the type of formalist discrimination against non-citizens that the Supreme Court in Lavoie believed s 15 had brought to an end, as conveyed by the opening quote to this chapter. It excluded non-citizens caught by the legislation from fundamental legal protections and placed them into a legal black hole. By focusing its energies on enhancing procedures, the Canadian Supreme Court in Charkaoui avoided facing the prospect that it was trying to fix an unfixable regime. As discussed in the context of the Belmarsh litigation, there is a strong argument that the indefinite detention of non-citizens subject to removal orders is ‘unlegalizeable’. The Canadian Supreme Court arguably created a grey hole — the danger of greyness being that it obscures what is at stake.212

4.4.6 A possible defence of the Supreme Court’s proceduralism?

The Court augmented the constitutional requirements for procedures attending administrative detention. It held open the prospect of a judge ‘concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice’ and ordering a remedy under the Charter on that basis.213 It endorsed the established Federal Court practice of ordering release from detention on onerous conditions sufficient to ‘neutralize’ the threat.214 And it acknowledged that restraint under such conditions was not unproblematic.215

Procedural developments set in train by Charkaoui had, by the end of 2009, resulted in the release of two of the five men held under the security certificate regime. There is a defensible argument in the light of these developments that Charkaoui initiated a cycle of legal developments that was beneficial to constitutionalism, and ultimately, to the detainees. The argument is considered in the next chapter, in section 5.4.

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212 On ‘grey holes’, see David Dyzenhaus, The Constitution of Law: Legality in a Time of Emergency (Cambridge: Cambridge University Press, 2006) at 3. See also Martinez, supra note 159 at 1087: ‘To the extent that seemingly fair procedures distract people from unfair substantive outcomes, these uses of procedure may be dangerous . . . the legitimizing role that procedure plays in perceptions of justice may be part of the problem, not the solution.’

213 Charkaoui, supra note 63 at para 123.

214 Ibid. at para 101.

215 Ibid. at para 103, 104.
CHAPTER 5:

SUBSEQUENT DEVELOPMENTS

This chapter examines legal developments in each jurisdiction. In section 5.1 I provide a brief update on the Australian legal position on indefinite administrative detention of non-citizens. The rest of the chapter reviews legal developments subsequent to Belmarsh and Charkaoui to better evaluate those decisions. In section 5.2, I look at the final act in the Belmarsh litigation, the decision of the Grand Chamber of the European Court of Human Rights [ECtHR] in A v United Kingdom in February 2009.\(^1\) In sections 5.3 and 5.4, the legacy of the Belmarsh decision in the United Kingdom, and of Charkaoui in Canada, is considered, as these decisions bear on the legal parameters for detention and restraint of terrorist suspects in those jurisdictions.

5.1 Australian developments.

The Al-Kateb decision left the imposition of any time limits on immigration detention with the Parliament. Those troubled by indefinite administrative detention of non-citizens hoped for its legislative prohibition following a change of government in late 2007. On 29 July 2008, the Minister for Immigration announced seven key immigration detention values that would inform all aspects of the Department’s immigration detention services. The fourth of these ‘detention values’ was: ‘4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, will be subject to regular review.’\(^2\)

The bill intended to implement these values, the Migration Amendment (Immigration Detention Reform) Bill 2009, was introduced into the Senate on 25 June 2009.\(^3\) At the

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time of writing it remains before the Senate.\(^4\) The Bill does not impose a maximum time limit on immigration detention, nor permit the reasonableness and appropriateness of detention in an individual case to be determined by the courts, nor introduce periodic independent review by a tribunal or court of the ongoing need for detention. Instead it establishes ‘in principle’ that immigration detention centres are only to be used as a ‘measure of last resort’,\(^5\) and affirms ‘in principle’ that, if detained, ‘unlawful non-citizens’ are to be held in immigration detention centres for the ‘shortest practicable time’.\(^6\) The Bill narrows the class of persons subject to mandatory immigration detention,\(^7\) and provides legislative grounding for initiatives intended to enable greater access to, and placement in, the wider community.

In its submission to a Senate Committee inquiring into the Bill, the Australian Human Rights Commission noted that ‘[t]he Bill fails to implement Value… 4 [on the unacceptable nature of indefinite detention] ...The Commission is concerned… that these values have not been given legislative effect in the Bill, and that the government has not indicated further reforms in this area’.\(^8\) A Parliamentarian who has been a prominent and long-term proponent of reform of Australian immigration detention to better respect the rights of non-citizens, Petro Georgiou MP,\(^9\) on reviewing the government initiatives, cautioned that ‘[i]mprovements of any sort are to be welcomed, but the lack of legislative mandate means the reforms are especially vulnerable to the vagaries of the political winds, which, as we know, can shift abruptly.\(^10\) The current Australian legal position is

\(^5\) Migration Amendment (Immigration Detention Reform) Bill 2009 (Text of Bill on First Reading) [Detention Reform Bill] at proposed paragraph 4AAA(2)(a)
\(^6\) Ibid. at proposed paragraph 4AAA(2)(b)
\(^7\) Ibid. at proposed subparagraphs 189(1)(b)(i)-(v)
\(^8\) Australian Human Rights Commission, Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment (Immigration Detention Reform) Bill 2009, 31 July 2009, p 26, quoted in Karlsen, supra note 2. The Commission is an independent statutory organisation that oversees the application of federal legislation in the area of human rights.
\(^9\) Amongst other initiatives, Georgiou, a member of the then governing Liberal Party, introduced a private members’ bill in 2005 that, though not passed, was credited with a ‘softening’ of the immigration detention regime at that time.
\(^10\) Petro Georgiou, ‘Protection should be paramount’ The Age, 31 July 2008, online at: http://www.theage.com.au/opinion/protection-should-be-paramount-20080730-3ncr.html. Georgiou allowed that the migration reforms were ‘a further step towards the establishment of a fairer, more humane and accountable approach to the detention of asylum seekers’, but noted that ‘people may still be detained – even indefinitely – at the discretion of the department and the minister’. This is a situation that would not
that there is statutory authority for indefinite administrative detention of non-citizens, subject to marginal constitutional constraint.\textsuperscript{11}

5.2 United Kingdom: \textit{Belmarsh} in the European Court of Human Rights.

5.2.1 Introduction to \textit{A v United Kingdom}.

On 21 January 2005, following the House of Lords decision in \textit{Belmarsh}, eleven of the detainees under Part 4 of the ATCSA lodged an application with the ECtHR alleging that they had been unlawfully detained in breach of Arts 3, 5(1) and 14 of the \textit{European Convention on Human Rights} [ECHR]\textsuperscript{12} and that they had not had adequate remedies at their disposal, in breach of Arts 5(4) and 13. The case was heard by the Grand Chamber of the ECtHR, comprising 19 judges. The decision determined a set of issues that encompassed, and extended beyond, those raised in the domestic \textit{Belmarsh} proceedings. Before the ECtHR, the United Kingdom sought, with a conspicuous lack of success, to re-litigate the matters which had been decided against it over four years earlier in \textit{Belmarsh}. The judgment in \textit{A v United Kingdom} forms a fitting coda to the domestic \textit{Belmarsh} litigation in that it took up many of the issues first brought to prominence in \textit{Chahal} more than twelve years earlier, and addressed them with unparalleled directness.

The history of the United Kingdom’s submissions to the ECtHR is itself of interest in charting the relationship between the European and domestic courts. In its first set of written observations to the Grand Chamber, the United Kingdom indicated that it would not re-litigate the decision on the lawfulness of the derogation under Art 15, ‘but would leave that point as determined against them by the House of Lords’.\textsuperscript{13} Instead, the government would argue that a lawful derogation was unnecessary, a step taken out of an abundance of caution. The applicants’ detention was properly characterized as the ‘lawful detention…of a person against whom action is being taken with a view to deportation’, and so fell within the exception to the right to liberty contained in Art

\textsuperscript{11} The \textit{Al-Kateb} majority held that the Minister had to be ‘bona fide’ in his intention to remove the detainee.


\textsuperscript{13} \textit{A v United Kingdom, supra} note 1 at para 138
With this argument, the United Kingdom government diverged from the course it had adopted in the domestic litigation. The applicants submitted that ‘it was abusive and contrary to the principle of subsidiarity for the Government to raise a novel argument before the Court and that they should be estopped from doing so.’ The ECtHR dismissed this objection on the grounds that the government’s argument was not inconsistent with the position it had adopted before the national courts. The Court held that the government had clearly kept open the question of the application of Art 5, both in the text of the derogation and the domestic proceedings. Further, the House of Lords had in its reasons ‘expressly or impliedly’ considered the question of whether the detention measures were compatible with Art 5(1)(f). I agree with this assessment of Belmarsh by the ECtHR. It counters claims that the House of Lords had improperly rejected an interpretive remedy under s 3 of the HRA solely on the basis of a government concession (namely that the measures were incompatible with Art 5(1)(f) in the absence of a lawful derogation). The members of the House of Lords had made their own evaluation of the compatibility of the measures with Art 5(1)(f).

Then, at a late stage in the proceedings, the government amended its pleadings to re-litigate the validity of the derogation. Again, the applicants objected. It ‘was abusive of the Government, so late in the proceedings before the Grand Chamber, to challenge the House of Lords’ decision quashing the derogation’. More fundamentally, in the applicants’ view, it would be inconsistent with the purpose of the ECtHR and the principle of subsidiarity to allow a government to seek to limit or derogate from the rights determined by its national courts by going to the ECtHR. The ECtHR was not established to enable governments to undermine the rights protections arrived at by their national courts. The applicants continued, ‘[s]ince the legislation had been revoked and

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14 A v United Kingdom, supra note 1 at para 140.
15 Ibid. at para 155. A majority of the House of Lords found, impliedly or expressly, that the measures were not compatible with Art 5(1)(f).
16 This claim is made in John Finnis ‘Nationality, Alienage and Constitutional Principle’ (2007) 123 LQR 417 at 432-433.
17 See Chapter 3, section 3.11.1 above.
18 A v United Kingdom, supra note 1 at para 142.
the derogation withdrawn, the Government [was] in effect seeking to obtain from the Court an advisory opinion to be relied on potentially at some later stage.’\(^{19}\) The ECtHR responded, ‘[t]he present situation is, undoubtedly, unusual in that Governments do not normally resort to challenging, nor see any need to contest, decisions of their own highest courts before this Court.’\(^{20}\) The ECtHR could, however, see no reason why the government should not have a chance to raise all arguments open to them to defend the proceedings.

The government’s legal strategy was, as the applicants correctly pointed out, clearly an attempt by the United Kingdom government to circumvent its own highest court. Further, it was true to say that its interest was in an advisory opinion recognizing a power to hold non-citizens subject to a removal order in indefinite detention. The government was unsuccessful. A unanimous Grand Chamber of nineteen reaffirmed, and arguably clarified and strengthened, the limits on immigration detention set down in *Chahal*. In what follows, I consider the submissions of the parties and the ruling of the ECtHR on the scope of immigration detention, as well as an additional government argument that invoked the ‘sensitivities of the British Muslim population’ in defence of its decision to target non-nationals. The ECtHR’s discussion of the legality of the derogation essentially adopted the approach of the majority of the House of Lords and so is not elaborated upon.\(^{21}\)

5.2.2 The ECtHR on Art 5(1).

(a) *Action ‘being taken with a view to deportation’.*

To reiterate, Art 5(1)(f) provides:

> Art 5(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

\(^{19}\) *A v United Kingdom, supra* note 1 at para 142. The applicants further submitted that to ‘allow the Government to proceed would impact substantially on the right of individual petition…by deterring applicants from making complaints for fear that Governments would try to upset the decisions of their own supreme courts.’: *ibid.*


\(^{21}\) The Court held it did not need to consider the violation of the Art 14 discrimination provision separately, given its conclusion in relation to Art 5(1): *A v United Kingdom, supra* note 1 at para 192.
(f) the lawful arrest or detention of a person …against whom action is being taken with a view to deportation …

The phrase on which the United Kingdom’s argument fixed was ‘action being taken with a view to deportation’. The government argued that the phrase ‘as a matter of ordinary language…covered the situation where a Contracting State wished to deport an alien, actively kept that possibility under review and only refrained from doing so because of contingent, extraneous circumstances.’\(^{22}\) This active review included ‘monitoring the situation’ in the detainees’ respective countries of origin.\(^ {23}\) As argued in Chapter 3, this proposal expressed a rights-precluding approach to immigration detention. All that was required for authority to detain for the purpose of deportation was that the government keep trying to remove the relevant non-citizen. If accepted, it would result in a position consistent with that adopted by the majority of the Australian High Court in \textit{Al-Kateb}.\(^ {24}\) Detention would continue to be for the purposes of deportation, and therefore authorized, for as long as the government continued to harbour the intention of removing the non-citizen and monitored the situation to that end.

The government began its submissions in support of the above reading of Art 5(1)(f) with the statement that ‘[s]tates have a fundamental right under international law to control the entry, residence and expulsion of aliens’.\(^ {25}\) In the House of Lords, Lord Bingham had offered a two-part response to this starting premise. First, he had rejected the government’s characterization of the measures as immigration measures. Second, in response to the broader contention that international law sanctioned the differential treatment of non-citizens in time of war or public emergency, Lord Bingham had found that ‘[h]istorically, this was the position…But a sovereign state may by international treaty restrict its absolute power over aliens within or seeking to enter its territory, and in recent years states have increasingly done so’.\(^ {26}\)

\(^{22}\) \textit{A} v \textit{United Kingdom, supra} note 1 at para 146.  
\(^{23}\) \textit{Ibid.} at para 147.  
\(^{24}\) \textit{Al-Kateb v Godwin} (2004) 219 CLR 562 \textit{[Al-Kateb]}.  
\(^{25}\) \textit{A} v \textit{United Kingdom, supra} note 1 at para 146.  
\(^{26}\) \textit{A} v \textit{Secretary of State for the Home Department} [2005] 2 A.C. 68 \textit{[Belmarsh]} at para 69.  See further the discussion in Chapter 3, section 3.11.2.  For a development of the nature of the idea of state power expressed here and its qualification by treaty commitments, see Chapter 6, section 6.5.3.
The United Kingdom can be seen to respond to Lord Bingham in its further submission that: ‘[c]lear language would be required to justify the conclusion that the Contracting States intended through the Convention to give up their ability to protect themselves against a risk to national security created by a non-national.’

The language here went to the heart of the government’s case. The government conflated the two lines of argument Lord Bingham had separated: those premised on an immigration rationale and those premised on the different position of non-citizens in exceptional times. The government argued that the right to control the entry, residence and expulsion of aliens (immigration) was a state right to protection. The powers of exclusion and expulsion were treated as applications of a more sweeping right to protect ‘themselves’ against non-citizens. This was reminiscent of the contention of the majority in Al-Kateb that the aliens power in the Constitution extended to authorize detention of non-citizens in order to ‘segregate’ them from the national ‘community’. As presented by the United Kingdom, any diminution or qualification of this power over non-citizens involved a state ‘giving up’ the ability to protect itself against non-nationals. The onus was accordingly on anyone asserting such a qualification. This effectively reversed the presumption against the abrogation of fundamental freedoms in the case of non-citizens, replacing it with a presumption in favour of a ‘fundamental state right’ over non-citizens.

The applicants responded that ‘merely keeping the possibility of deportation under review’ did not amount to ‘action being taken with a view to deportation’; it was merely ‘action, unrelated to any extant deportation proceedings, that might make the deportation a possibility in the future. Detention pursuant to such vague and non-specific action would be arbitrary.’ This submission clearly expressed the rights-protecting model, building on the statements on what was required for detention to be ‘lawful’ as expressed in Chahal:

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27 A v United Kingdom, supra note 1 at para 146.
28 For an argument for the existence of such a ‘fundamental state right’, explicitly intended to displace presumptions against the abrogation of the rights of non-citizens: see Finnis supra note 16, discussed in Chapter 6, sections 6.5 and 6.6.
29 A v United Kingdom, supra note 1 at para 141.
and deportation.

In considering the submissions of the parties on the proper scope of Art 5(1)(f), the ECtHR reaffirmed the reading given to that provision in Chahal.\textsuperscript{31} It held that there was no requirement that taking a non-citizen into detention be reasonably considered necessary to prevent an individual committing an offence or fleeing.\textsuperscript{32} However, it continued ‘[i]t is a fundamental principle that no detention which is arbitrary can be compatible with Article 5(1)’.\textsuperscript{33} And ‘to avoid being branded as arbitrary… the length of the detention should not exceed that reasonably required for the purpose pursued’.\textsuperscript{34} The ECtHR found a clear lack of fit between the United Kingdom’s actions and the purpose of deportation. It reasoned that ‘[o]ne of the principal assumptions underlying the derogation notice, the [ATCSA] and the decision to detain the applicants was … that they could not be removed or deported “for the time being”’.\textsuperscript{35}

\textit{(b) The fair balance argument.}

In addition, the United Kingdom resurrected its argument of ‘fair balance’, discussed in Chapter 3 in the context of SIAC’s decision\textsuperscript{36} and that of the Court of Appeal\textsuperscript{37} in the domestic Belmarsh proceedings. Using the same language it had employed before SIAC, the government argued that Article 5(1)(f) had to be interpreted:

\begin{quote}
so as to strike a balance between the interests of the individual and the interests of the State in protecting the population from malevolent aliens. Detention struck that balance by advancing the legitimate aim of the State to secure the protection of the population without sacrificing the predominant interest of the alien to avoid being returned to a place where he faced torture or death. The fair balance was further preserved by providing the alien with adequate safeguards against the arbitrary exercise of the detention powers in national security cases.\textsuperscript{38}
\end{quote}

\begin{footnotes}
\footnote{Chahal, supra note 30.}
\footnote{\textit{A v United Kingdom, supra} note 1 at para 164.}
\footnote{\textit{Ibid.}}
\footnote{\textit{A v United Kingdom, supra} note 1 at para 167.}
\footnote{\textit{A v Secretary of State for the Home Department} [2002] H.R.L.R. 45 [Belmarsh (SIAC)] at para 88. See the discussion at Chapter 3, section 3.8. In the SIAC judgment, the government’s ‘fair balance’ argument was considered not as an argument for the scope of Art 5(1)(f), but as a potential rebuttal of the allegation that the measures were discriminatory. This is a good illustration of the intersubstitutability of arguments ‘for’ an immigration characterization, and ‘against’ discrimination.}
\footnote{\textit{A v Secretary of State for the Home Department} [2004] QB 335 [Belmarsh (Court of Appeal)] at para 28.}
\footnote{\textit{A v United Kingdom, supra} note 1 at para 148.}
\end{footnotes}
Again, detention was presented as a reasonable accommodation arrived at in attempting to square protection of the public with a prohibition on deportation to torture.\textsuperscript{39} The ECtHR was brusque in its response to the ‘fair balance’ argument:

\begin{quote}
The Court does not accept the Government’s argument that Article 5(1) permits a balance to be struck between the individual’s right to liberty and the State’s interest in protecting its population from terrorist threat…If detention does not fit within the confines of the paragraphs [the exhaustive list of exceptions to Art 5(1) contained in 5(1)(a)-(f)] as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee.\textsuperscript{40}
\end{quote}

The structure of Art 5(1) as a right subject to enumerated, exhaustive exceptions assumed particular prominence.\textsuperscript{41} The exception made for immigration detention had its own integrity in the case law, following the lines of the rights-protecting model. To avoid the charge of arbitrary detention, there had to be a real prospect of removal. A purported power of immigration detention in circumstances where there was no such prospect extended beyond Art 5(1)(f) and so was held to violate Art 5(1).

\textbf{(c) The ECtHR’s findings on the facts.}

An interesting feature of the ECtHR judgment, that ventured into territory not covered by the domestic Belmarsh litigation, was that despite the ruling that a case by case analysis was not appropriate, the ECtHR did discuss the facts. Its findings directly address objections that the House of Lords was too quick to assume that removal had been frustrated.\textsuperscript{42} The applicants had responded to the government’s promotion of a case by case approach, in part, by arguing that such an approach would not, in any event, favour the government because removal had not seriously been attempted. On the possibility of the detainees’ removal, the applicants stated that:

\begin{quote}
it was clear that during the periods when the applicants’ cases were being considered by SIAC on appeal (July 2002 – October 2003), the Government’s position was that they could not be deported compatibly with Article 3 and that no negotiations to effect deportation should be attempted with the
\end{quote}

\begin{flushright}
\textsuperscript{39} The ECtHR makes reference to the supporting submission based on the provision of adequate procedural safeguards, a submission not noted in SIAC’s judgment. \\
\textsuperscript{40} \textit{A v United Kingdom, supra} note 1 at para 171. \\
\textsuperscript{41} The reasoning recalls the reasoning in \textit{Chahal, supra} note 30 on Art 3, in which the government’s ‘balance’ argument was rejected on the ground that the jurisprudence on which the government relied related to qualified rights and Art 3 was not a qualified right: see Chapter 3, section 3.3.2. \\
\textsuperscript{42} See for example Finnis, \textit{supra} note 16 at 434-435.
\end{flushright}
That is, over the period of the SIAC and Court of Appeal judgments on the derogation, there were not even any negotiations to effect repatriation. Further, the ECtHR wrote that ‘[t]here is no evidence that during the period of the applicants’ detention there was... any realistic prospect of their being expelled without this giving rise to a real risk of ill-treatment contrary to Article 3.’ Given the absolute prohibition on deportation to torture, on the facts of the individual cases there was no ‘realistic prospect’ of removal. The ECtHR held that ‘[i]n these circumstances, the Court does not consider that the [United Kingdom’s] policy of keeping the possibility of deporting the applicants “under active review” was sufficiently certain or determinative to amount to “action...being taken with a view to deportation”.’ The ECtHR concluded that the United Kingdom had violated Art 5(1)(f) in respect of nine of the eleven applicants (the remaining two had left the United Kingdom).

5.2.3 The ECtHR on Art 15.

As noted above, the ECtHR’s reasoning on the application of the Art 15 criteria followed the reasoning of the House of Lords. The United Kingdom did, however, raise new arguments in relation to Art 15 before the ECtHR. It argued that ‘it was legitimate for

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43 A v United Kingdom supra note 1 at para 141. The appeals referred to above are those relating to individual exercise of certification, discussed in Chapter 3, section 3.10. This account of the facts is consistent with the government’s submissions that ‘from the end of 2003 onwards the Government were in negotiation with Algeria and Jordan, with a view to entering into memoranda of understanding that the applicants who were nationals of those countries would not be ill-treated if returned.’: A v United Kingdom, ibid. at para 147.

44 A v United Kingdom, supra note 1 at para 167.


46 A v United Kingdom, supra note 1 at para 167.

47 The ECtHR refers to these as ‘allegedly’ new arguments, simply noting that it was true that they had not been referred to in the judgments of the domestic courts: A v United Kingdom, supra note 1 at para 187. The other ‘new’ argument was that the measures were justified as a means of tying up the predominant source of the threat, non-nationals, so freeing up resources to concentrate on terrorist suspects who were nationals. This was simply an expression of an argument accepted by Lord Woolf CJ in the Court of Appeal, namely that the detention provisions had to be seen as part of a suite of measures to combat terrorism, and were justified as part of a wider strategy. As noted in the discussion of Lord Woolf CJ’s reasoning in Chapter 3, it is an argument that is deaf to ‘the vice involved in discrimination’: see Chapter 3, section 3.9.1. The ECtHR simply said it had not been provided with any evidence to persuade it to overturn the House of Lords conclusion that the difference in treatment was ‘unjustified’: A v United Kingdom, ibid. at para 189.
the State, in confining the measures to non-nationals, to take into account the sensitivities of the British Muslim population in order to reduce the chances of recruitment among them by extremists’.\(^48\) This may be a development of the claim, made by the Secretary of State in response to the Newton Committee (and recorded in the judgment of the House of Lords) that extending the detention measures to citizens would damage ‘community cohesion and thus support from all parts of the public that is so essential to countering the terrorist threat’.\(^49\) The idea here was that (a) those who pose the threat will be Muslim, and that (b) the Muslim population in Britain is divisible between non-nationals and nationals such that a measure targeting the non-nationals will not be perceived as targeting the national Muslim community.\(^50\) The government argument assumed that the self-identification of the ‘British Muslim’ community tracked the government’s own working distinction between citizens and non-citizens.\(^51\) The Court responded that the government had not provided, ‘any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to Al Qaeda.’\(^52\)

### 5.2.4 Conclusions on A v United Kingdom.

The ECtHR concluded that the right to liberty and security of the person of a number of the applicants, under Art 5(1), had been violated, and that this was not saved by a lawful derogation.\(^53\) The ECtHR ordered payment of what are best seen as token amounts in respect of these violations.\(^54\) In its final, concentrated, paragraph of reasoning on the

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\(^{48}\) *Ibid.* at para 188.

\(^{49}\) *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society* (Cm 6147, February 2004) at para 36, quoted in *Belmarsh*, supra note 26 at para 64. Discussed in Chapter 3, section 3.11.2.

\(^{50}\) The other notable feature of the argument was its instrumental nature. It did not rest on a desire to respect the sensitivities of the British Muslim population, but a desire to avoid radicalising that population.

\(^{51}\) The presumption that citizenship defines membership in the community is further examined in Chapter 6, section 6.6.

\(^{52}\) *A v United Kingdom*, supra note 1 at para 188.

\(^{53}\) It further held, as will be explained below in section 5.3 in the context of a discussion of control orders, that in a number of instances, due to the extent of non-disclosure of the allegations against them, the review of detention had not met the requirements of Art 5(4) of the ECHR, *supra* note 12. It will be recalled that Art 5(4) provides: ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if detention is not lawful’.

\(^{54}\) Amounts ranging from €3,900 to €1,700: *A v United Kingdom*, *supra* note 1 at para 253.
compensation,\textsuperscript{55} the ECtHR withdrew some of the sting of its judgment against the United Kingdom. In reducing the amount claimed by the applicants, the Court gave indirect weight to the government’s ‘fair balance’ argument, effectively accepting that the measures were made in ‘good faith’ in that the government was trying to respond to the terrorist threat while observing its obligations with respect to deportation to torture under Art 3. It further reasoned that the replacement ‘control order’ legislation had met the ‘core part’ of the disproportionality finding going to discrimination. As the applicants had become subjects of the control order regime, this was taken to minimize the legal wrong they had suffered under discriminatory measures. The control order regime was taken to illustrate that they would have suffered some restriction of liberty even in the absence of the discrimination.

The legal parameters on the United Kingdom’s treatment of foreign terrorist suspects had been introduced in the earlier nineteen-member decision of the Grand Chamber of the ECtHR in \textit{Chahal}.\textsuperscript{56} In that decision, the extra-territorial application of Art 3 of the ECHR, that is, an absolute prohibition on deportation to torture, was supported by a majority of twelve of nineteen members of the Court. Further, in that decision the Court held that detention under Art 5(1)(f) could not be arbitrary. The ‘immigration exception’ to the right to liberty invited independent review of whether deportation proceedings were in progress, whether there were being pursued with due diligence, and whether the overall period of detention had become excessive in duration. Nonetheless, it will be recalled that in \textit{Chahal} the Court ruled that Mr Chahal’s prolonged detention did not infringe the provision.

The reasoning on detention with a view to deportation in \textit{Chahal} was pivotal to the United Kingdom’s decision to derogate from Art 5(1) after 9/11. The derogation was to secure the detention of foreign terrorist suspects who the government did not want at large in the community, but who were ‘irremoveable’ by virtue of the Court’s interpretation of Art 3 in \textit{Chahal}. Subsequent to the House of Lords’ \textit{Belmarsh} decision,

\begin{flushright}
\textsuperscript{55} \textit{A v United Kingdom}, supra note 1 at para 252.
\textsuperscript{56} \textit{Chahal}, supra note 30.
\end{flushright}
in *Saadi v Italy*,\(^5^7\) the Grand Chamber of the ECtHR unanimously affirmed that involvement in terrorism did not affect the absolute prohibition on deportation to a real risk of torture under Art 3. Then, in *A v United Kingdom*, the Grand Chamber effectively ruled that the scope of legally permissible detention of a non-citizen subject to a deportation order could not simply be expanded to accommodate security concerns: ‘[i]f detention does not fit within the confines of the paragraphs as interpreted by the Court, it cannot be made to fit by appeal to the need to balance the interests of the State against those of the detainee’.\(^5^8\) As with the majority of the House of Lords, the blurring of immigration and national security purposes to the detriment of non-citizens was rejected.\(^5^9\)

**5.3 Legal Developments in the United Kingdom Post-Belmarsh.**

In sections 5.3 and 5.4 I examine legal developments in the United Kingdom subsequent to *Belmarsh* and in Canada subsequent to *Charakaoui*. The central question is whether the consequences of these decisions require their re-evaluation.

A number of prominent evaluations of the *Human Rights Act 1998* [HRA]\(^6^0\) have made central use of *Belmarsh* as a case study.\(^6^1\) The evaluation of Ewing and Tham focused on the legislative response to *Belmarsh*, and more particularly, the judicial reception of that legislative response, to conclude that despite the boldness of the *Belmarsh* decision the HRA was ‘futile’.\(^6^2\) That is, it had resulted in no better protection of rights. I examine subsequent developments in the United Kingdom with a view to assessing this ‘futility thesis’.

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\(^5^8\) *A v United Kingdom*, supra note 1 at para 171.

\(^5^9\) In section 5.3.2 below, I discuss a distinct aspect of the reasoning in *A v United Kingdom*, relating to its rulings on procedural protections. This aspect of the decision is best considered in the context of the control order jurisprudence, in which it has played a key role.

\(^6^0\) *Human Rights Act 1998* (U.K.), c. 42 [HRA].

\(^6^1\) See e.g. Adam Tomkins, ‘The Rule of Law in Blair’s Britain’ (2007) 26 University of Queensland L.J. 255.

Ewing and Tham are not alone in elaborating such a thesis. Other prominent commentators sympathetic to the conception of human rights, but sceptical of the judiciary’s role in protecting them, have expressed grudging admiration for the House of Lords Belmarsh judgment, but then argue that it serves as no kind of endorsement of the HRA because, in the light of what followed, the decision was futile. I consider Ewing and Tham because they focussed squarely, and in an extended fashion, on Belmarsh and its consequences. They state that ‘after the excitement of the Belmarsh case, normal service …appears to have been resumed’. For the authors, ‘normal service’ denotes a depressing level of judicial quiescence to government violations of rights. In section 5.3, I introduce the legislative response to Belmarsh (5.3.1) and the jurisprudence on that response (5.3.2), in order to better evaluate its legacy (5.3.3).

5.3.1 Control orders.

The legislative response to Belmarsh was the Prevention of Terrorism Act 2005 [POTA]. The POTA provides for ‘control orders’ which apply to both citizens and non-citizens. A control order is defined as ‘an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism’. The legislation sets out a lengthy list of obligations that can be imposed on the subject of a control order.

The control orders continued the pattern of restrictive measures based on anticipatory risk assessment established by the detention measures in Part 4 of the ATCSA. Many of

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63 Ewing himself described Belmarsh as ‘perhaps the most important decision since Entick v Carrington (1765)’ in part because ‘the House of Lords stood up so convincingly to the executive’: Keith Ewing, ‘The Futility of the Human Rights Act – A Long Footnote’ (2005) 37 Bracton L.J 41, 42.
64 Tomkins, supra note 61. Conor Gearty also appears to go some way down this path: Conor Gearty ‘Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?’ (2005) 58 CLP 25.
65 Ewing and Tham, supra note 62 at 692.
66 Prevention of Terrorism Act 2005 (U.K.), c. 2 [POTA].
67 POTA, supra note 66, s 1(1). ‘Terrorism’ is given the same meaning as under the Terrorism Act 2000: see ibid, s 1(5).
68 Ibid, s 1(4).
those detained under Part 4 of the ATCSA became the subject of control orders under the POTA. In *A v United Kingdom*, the ECtHR noted that of the applicants before it, the nine who had remained in the United Kingdom ‘became, immediately upon release in March 2005, the subject of control orders’. But as noted above, the POTA abandoned the sharp distinction between citizen and non-citizen. Control orders have been issued against citizens with regularity. This lends support to the view that Part 4 of the ATCSA was under-inclusive and so discriminatory in addressing the terrorist threat.

Control orders are of two kinds: ‘non-derogating’ and ‘derogating’. Under a ‘non-derogating’ control order, the Home Secretary can impose restrictions on the movement, activities, communications and association of the controlled person provided that these restrictions do not amount to a ‘deprivation of liberty’ under Art 5 of the ECHR. Under a ‘derogating’ control order, greater restrictions, amounting to a ‘deprivation of liberty’ under Art 5 of the ECHR are permitted. As the name suggests, the second type of control order requires a derogation from the ECHR. The Home Secretary has not yet sought to impose derogating control orders. As to what amounts to a ‘deprivation of liberty’, the phrase is to be understood with reference to the ECtHR’s decision in *Guzzardi v Italy*, in which the Court stated that Art 5:

> is not concerned with mere restrictions on liberty of movement…In order to determine whether someone has been ‘deprived of his liberty’ within the meaning of Art 5, the starting point must be his concrete situation and account must be taken of the whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.

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70 *A v United Kingdom*, supra note 1 at para 252. The Court said ‘[a]ll of the applicants in respect of whom the Court has found a violation of Article 5(1)’, but on the disposition of the case this was equivalent to saying all of the applicants who had not left the United Kingdom. No violation of Article 5(1) was found in respect of the second and fourth applicant, who had secured release from detention by leaving for Morocco and France respectively.

71 On this theme see Walker, ‘Keeping Control’, supra note 69 at 1407.


73 *Guzzardi* (A/39) (1981) 3 EHRR 333 at para 91. That this guidance does not provide any ‘bright line’ rule on whether conditions constitute a ‘deprivation of liberty’ under Art 5 is highlighted in the House of Lords decision in *Secretary of State for the Home Department v JJ* [2008] 1 AC 385, discussed in the text below.
The inclusion of citizens within the control order regime meant that SIAC was no longer an appropriate venue for review of the orders. Accordingly, jurisdiction was vested in the High Court. However, the process for the Court’s review continues to resemble the SIAC model, including the provision for special advocates. It is the Secretary of State who issues a control order, but he or she has to obtain the permission of a court to do so. In exceptional circumstances the Secretary of State can issue a control order and subsequently seek to have it confirmed by a court. In considering whether to grant the Secretary of State permission to issue a control order, or to confirm a control order that was granted without permission by reason of urgency, the Court has only to determine whether or not the decision was ‘obviously flawed’.

Before discussing the jurisprudence on control orders, it is necessary to step back for a broader view of the national security picture post-Belmarsh. One needs to be aware of what the decision left untouched. The Belmarsh decision set limits on detention for the purpose of deportation. As noted above, this resulted in some of those detained under Part 4 of the ATCSA being moved into what was intended to be the less onerous regime of control orders. The Belmarsh decision did not, however, address continuing government attempts to deport foreign terrorist suspects. There is ample evidence of an ongoing government focus on an ‘exit strategy’ for addressing counterterrorism, directed at non-citizens. Most directly, this is evidenced by a redoubled practice of deportation following the London subway bombings of July 2005. Up to the end of 2008, 153 persons were deported on national security grounds and 87 for unacceptable behaviour. This practice has been accompanied by a range of legislative and regulatory initiatives directed at facilitating deportation on grounds of national security. Such measures

74 POTA, supra note 66, s 15. In Scotland jurisdiction was vested in the Court of Session.
75 Ibid, Sch. 1.
76 Ibid, s 3(2).
77 Ibid, s 3(3).
78 Ibid, s 3(2) and (3).
80 Home Office, Pursue, Prevent, Protect, Prepare: the United Kingdom’s Strategy for Countering International Terrorism (Cm 7547, London, 2009) at para 8.19 cited in Walker, 2nd ed, supra note 72 at para 7.103. As Walker notes, this qualifies the balance between citizens and non-citizens seen in the control order statistics, in that the number of non-citizens detained would presumably have been higher if not for the aggressive deportation policy.
include an expansion of the grounds for deportation ‘in the public good’, and the attention devoted to securing diplomatic assurances to deport to countries where there is a *prima facie* risk of torture. As developed in the concluding chapter, the expansion of government powers to unilaterally strip a citizen of that status means that even the current possession of citizenship may no longer preclude an individual from being swept up in the ‘exit’ strategy.

### 5.3.2 Control order jurisprudence.

Non-derogating control orders have been challenged on two main grounds: first, the extent of the conditions imposed pursuant to control orders, in particular whether they are so onerous as to amount to a violation of Art 5; and second, the fairness of the procedures under which they may be tested, where the focus has been on whether the regime violates the right to a fair trial under Art 6 of the ECHR.

(a) The extent of the conditions imposed.

In relation to the first set of concerns, going to the extent of the conditions imposed, the litigation on the control order regime has been generated by the government seeing how close it can sail to the wind without actually requiring a derogation from Art 5. The argument for the ‘continuing futility of the Human Rights Act’, referred to above, is grounded in the observation that the line drawn by the courts in the ensuing jurisprudence has given legal sanction to onerous restrictions on movement, communication and association.

81 See the guidelines for deportation or exclusion under s 3(5)(a) of the *Immigration Act 1971* (U.K.) c. 77 issued on 24 August 2005. These changes are further discussed in the concluding chapter.

82 See, for example, the government action on diplomatic assurances detailed in *RB v Algeria* [2009] UKHL 10.

83 *Immigration, Asylum and Nationality Act 2006* (U.K.), c. 13, ss 56 and 57. This prospect does not threaten those British nationals who would be rendered stateless if stripped of British citizenship. These measures are further discussed in Chapter 6, section 6.6.

84 Article 6 provides in part: ‘(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

The judicial decisions on the permissible extent of conditions under a non-derogating control order testify to the fact that the judiciary, in trying to determine the limits of what is legally tolerable under the control orders, is called on to make judgments on the basis of a constellation of factors. The control order challenged in *Secretary of State for the Home Department v JJ*,\(^86\) imposed an 18 hour curfew, coupled with the effective exclusion of social visitors.\(^87\) Of the five judges sitting on the case, two found that the conditions amounted to a deprivation of liberty contrary to Art 5 (Lord Bingham and Baroness Hale)\(^88\) and two found that they did not (Lord Hoffmann and Lord Carswell).\(^89\)

In the deciding judgment, Lord Brown stated that the Strasbourg jurisprudence effectively provided that ‘these appeals fall to be decided as “a matter of pure opinion”’.\(^90\) He held that the 18 hour curfew breached Art 5, and ventured to suggest that ‘12 or 14 hour curfews…are consistent with physical liberty’.\(^91\) A 16 hour curfew, however, ‘should be regarded as the absolute limit’.\(^92\) The House of Lords quashed the control order as in breach of Art 5 and therefore outside the relevant power to issue a non-derogating order under the Act.

The result of the decision in *JJ* was that the curfew was reduced from 18 to 14 hours a day. To the extent that the line drawn seems relatively arbitrary, leaving intact an onerous system of restraints of indefinite duration, implemented in the absence of any charge, let alone conviction, it raises the issue of how helpful the binary of rights compliant/non-compliant is in relation to a fundamentally questionable practice such as

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\(^86\) *JJ*, *supra* note 73.

\(^87\) During the six hours in which the controlled (and electronically tagged) persons were permitted to leave their residences, they were confined to restricted urban areas, which deliberately did not extend to any area in which they had previously lived. They were prohibited from meeting anyone by pre-arrangement without prior Home Office approval.

\(^88\) Lord Bingham observed that the analogy between the conditions imposed and an ‘open air prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy.’: *JJ*, *supra* note 73 at para 24.

\(^89\) Lord Hoffmann held Art 5(1) was only breached by ‘literal physical restraint’: *Ibid.* at para 36.

\(^90\) *Ibid.* at para 102, the phrase ‘a matter of pure opinion’ is taken from the ECtHR decision in *Guzzardi*, *supra* note 73. Compare this with Lord Bingham at para 17: ‘The court [the ECtHR] acknowledges the difficulty attending the process of classification in borderline cases, suggesting that in such cases the decision is one of pure opinion or what may, rather more aptly, be called judgment.’

\(^91\) *JJ*, *supra* note 73 at para 105.

\(^92\) *Ibid.* at para 105.
control orders. If one is tasked with delineating the boundaries of ‘deprivation of liberty’ contained in Art 5 of the ECHR, an indefinite 16 hour curfew may be a good place to draw the line. But there is an evident danger that by entering into such line drawing, legitimacy is being conferred on the legally troubling practice of indefinite preventative restrictions based on no more than the government’s ‘reasonable grounds for suspicion’ that do not appear ‘obviously flawed’ to a reviewing court.

As the control order regime makes clear, resolving the issue of discrimination between citizens and non-citizens only removes one problem. It leaves in place a preventative regime parallel to the criminal law that offends fundamental assumptions on which the criminal law is based. These concerns are addressed in the conclusion to this chapter. JJ concerned the extent to which the restrictions imposed under control orders are compatible with Art 5(1). There is another, albeit closely related, set of judicial decisions that go to the fairness of the procedures.

(b) The fairness of the procedures.

On the topic of the fairness of control order procedures, I discuss three cases which define the current legal parameters for procedures under the regime: Secretary of State for the Home Department v MB (House of Lords, 31 Oct 2007) [MB]; A v United Kingdom (ECtHR, 19 February 2009) [A v United Kingdom]; and AF v Secretary of State for the Home Department (House of Lords, 10 June 2009) [AF (June 2009)]. There is, through these three cases, a slow raising of the disclosure requirements attending control orders. The disclosure at issue is disclosure to the controlee. In

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93 See Zedner, supra note 69 at 185, and more generally 183-187 on the limitations of a human rights analysis as applied to control orders.


95 Zedner, supra note 69.

96 [2008] 1 AC 440 [MB].

97 Supra note 1.

98 [2009] UKHL 28 [AF (June 2009)].
focussing on disclosure to the controlee, the decisions have simultaneously addressed the limitations of the special advocate. The courts have held that while assessed against a civil standard, the procedural protections should be commensurate with the gravity of the potential consequences. The rising disclosure requirements attest to intelligence, where it is used to justify coercive state action, being subject to more demanding evidentiary requirements. The shift from a traditional deferential judicial approach to national security is also registered in the judgments’ recognition of the fallibility and limitations of intelligence. This scepticism in turn grounds the emphasis on the ability of controlees to make an effective challenge to the information alleged against them.

(i) Secretary of State for the Home Department v MB.

The MB decision was in fact two cases, those of MB and AF, consolidated for argument. In both cases, the issuance of non-derogating control orders was supported by an open statement made available to the controlee and a closed statement which was not. The common feature of both cases was the bare and unsubstantiated nature of the allegations revealed in the open statement. In the case of MB, the open statement asserted that he was an Islamic extremist who was involved in terrorism related activities. No details were given of those assertions and it was clear that the justification for them lay in the closed material. The High Court judge who heard the case at first instance accepted that it was not possible to serve a summary of the closed material on MB under the regulations without a disclosure of material which would be contrary to the public interest. However, he did issue a declaration of incompatibility under s 4 of the HRA to the effect that the procedures under s 3 of the POTA for court supervision of non-derogating control orders were incompatible with MB’s right to a fair trial under Art 6 of the ECHR.

In relation to AF, the judge similarly found that the justification for his control order lay in the closed material, the essence of which had not been disclosed to AF, that AF did not know the case against him, and that no allegations of terrorism related activity had been made in the open material. The judge concluded that the cumulative effect of the obligations under the control order breached Art 5 of the ECHR, but did not grant a

99 See MB, supra note 96 at para 24, Lord Bingham.
declaration of incompatibility. Instead, he quashed the control order and fast tracked an appeal of both parties directly to the House of Lords on a number of issues,\(^\text{100}\) including whether the procedures under the POTA for non-derogating control orders were compatible with Art 6(1) of the ECHR.

In *MB*, the majority of the House of Lords held that as the procedures could be made to work fairly and compatibly in many cases it was not appropriate to make a declaration of incompatibility.\(^\text{101}\) Lord Bingham expressed a preference for a declaration of incompatibility because ‘any weakening of the mandatory language [reproduced below] used by Parliament would evidently fly in the face of Parliament’s intention, and secondly, because it might be thought preferable to derogate from article 6…than to accept any modification of the terms of the Act and the Rules’. He did not, however ‘wish to press’ his ‘opinion to the point of dissent’.\(^\text{102}\)

The problem identified was that, on their face, the statute and regulations precluded the judge from ordering disclosure even where he considered this was essential to a fair hearing. To remedy this state of affairs, the court read down the relevant provisions of the schedule to the POTA and rules by inserting an implied limitation (underlined):

\[
\text{Sch 1, para 4(3) Rules of court made in the exercise of the relevant powers must secure-}
\]
\[
(d) \text{that the relevant court is required to give permission for material not to be disclosed where it considers that the disclosure of the material would be contrary to the public interest except where to do so would be incompatible with the right of the controlled person to a fair trial.}\(^\text{103}\)
\]

The result of the amendment was that a court could refuse permission to the Secretary of State to withhold closed material. This is not to say that the Secretary of State was required to serve the material. Rather, if the Secretary of State elected not to disclose, he or she had to face the prospect of a court ruling that the material could not be relied on

\(^{100}\) Under s 12 of the *Administration of Justice Act 1969* (U.K.), c. 58.

\(^{101}\) *MB, supra* note 96 at paras 70 – 73, Baroness Hale; para 84, Lord Carswell; para 92, Lord Brown.

\(^{102}\) *Ibid*. at para 44. Lord Bingham made reference to the judgment of the Canadian Supreme Court in *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2007] 1 S.C.R. 350 [*Charkaoui*], for the principle that ‘ a person whose liberty is in jeopardy must know the case to meet’: *ibid*. at para 30.

\(^{103}\) The same limitation was applied to the relevant rule: Rule 76.29(8).
and that consequently, the decision to issue the control order was flawed and had to be quashed.\textsuperscript{104}

In dissent, Lord Hoffmann, in apparent reliance on \textit{Chahal}, held that ‘in principle the special advocate procedure provides sufficient safeguards to satisfy Article 6’.\textsuperscript{105} Lord Hoffmann held that the existence of the special advocate procedure constituted a full answer to concerns about how to reconcile national security confidentiality with the requirements of a fair trial under the ECHR. His view was underwritten by the view that there could be no core requirement of disclosure in the national security area. Unsurprisingly, Lord Hoffmann’s position became that advocated by the government in subsequent litigation on the control orders.

The implied limitation arrived at in \textit{MB}, quoted above, continues to govern the operation of the control order regime. This implied limitation operates on a determination that at some point non-disclosure becomes incompatible with a right to a fair trial. The central question in \textit{MB}, and subsequent jurisprudence on disclosure under the control order regime, is when that point is reached. The House of Lords judgments in \textit{MB} offered a range of responses to this question. One comment which generated much argument in the application of \textit{MB} by the lower courts was Lord Brown’s statement that even where it was impossible to indicate sufficient of the Secretary of State’s case to enable the suspect to make an effective challenge, this might be compatible with Art 6 where ‘the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded’.\textsuperscript{106} I do not detail the divergent responses in \textit{MB} and ensuing variations

\textsuperscript{104} See \textit{MB, supra} note 96 at para 72, Baroness Hale, and more generally para 68-73. In the result, in \textit{MB}, the majority of the House of Lords ordered that the cases be remitted to the Administrative Court for a final decision as to whether it was possible to confirm the control orders consistently with the right to a fair trial. If, on remittal, the judges concluded that the orders could not fairly be made, s 3 of the HRA was then to be invoked, with the legislation read in the light of implied limitation and further comments of the House of Lords.

\textsuperscript{105} \textit{Ibid.} at para 54.

\textsuperscript{106} \textit{Ibid.} at para 90, Lord Brown. Though see para 91: ‘I cannot accept that a suspect’s entitlement to a fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism.’
in the tests applied by the lower courts as they have been overtaken by subsequent legal developments. For the current legal position, we have to look to \textit{A v United Kingdom} and \textit{AF (June 2009)}.

**(ii) A v United Kingdom.**

My discussion of \textit{A v United Kingdom} in section 5.2 focussed on its reasoning on the compatibility of indefinite detention of a non-citizen subject to a removal order with Art 5(1). In this section of the chapter, I discuss only the ECtHR’s reasoning on Art 5(4). It is this portion of the judgment that has impacted the disclosure requirements under the control order regime. As will be recalled from the discussion of \textit{Chahal}, Art 5(4) of the ECHR states, ‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’ The relevant complaint under Art 5(4) concerned the fairness of the procedures for reviewing decisions to certify a non-citizen as a suspected international terrorist and, in particular, the deficiencies of the special advocate procedure. The critical step in the ECtHR’s reasoning was that:

\begin{quote}

in the circumstances of the present case, and in view of the dramatic impact of the lengthy – and what appeared at that time to be indefinite – deprivation of liberty on the applicants’ fundamental rights, Art 5(4) must import essentially the same fair trial guarantees as Art 6(1) in its criminal aspect.
\end{quote}

Against this background, the ECtHR arrived at the following general conclusions on the part played by the special advocate procedure:

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\textsuperscript{107} Compare for example \textit{Secretary of State for the Home Department v AF} [2008] EWHC 453 (Admin), Burnton J; with \textit{Secretary of State for the Home Department v AN} [2008] EWHC 372 (Admin), Mitting J; and \textit{Secretary of State for the Home Department v AE} [2008] EWHC 585 (Admin), Silber J.

\textsuperscript{108} The ECtHR’s decision in \textit{A v United Kingdom} was on Part 4 of the ATCSA. Those provisions were repealed shortly after the application was lodged with Strasbourg. Nonetheless, the ECtHR decision has shaped the legal response to control orders. The House of Lords subsequently held in \textit{AF (June 2009)}, supra note 98 that the ECtHR’s comments on the fairness of national security procedures involving special advocates under Part 4 of the ATCSA could not be sensibly distinguished from the relevant procedures under the control order regime.

\textsuperscript{109} \textit{A v United Kingdom}, supra note 1 at para 217. The ECtHR referred to \textit{Charakaoui} for the principle that ‘a person whose liberty is in jeopardy must know the case to meet: \textit{ibid.} at para 111. The quotes the ECtHR took from \textit{Charakaoui} are identical to the quotes taken by Lord Bingham in \textit{MB}, supra note 96 (from \textit{Charakaoui}, supra note 102 at para 53 and 64).
The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to give effective instructions to the special advocate...

In clearly alluding to limitations on the ability of the special advocate to perform his or her functions, the ECtHR diverged from Lord Hoffmann’s view in MB that provision for a special advocate in and of itself met the requirements for a fair trial under the ECHR. The ECtHR went on to state that while the question of whether ‘sufficient information’ was provided to make an ‘effective’ response had to be decided on a case by case basis, it could discern three categories of case:

(i) where the evidence was to a large extent disclosed and the open material played the predominant role in the reasons for decision;

(ii) where the evidence was largely undisclosed, but the allegations contained in the open material were sufficiently specific to make an effective response;

(iii) where the allegations in the open material consisted purely of general assertions, and SIAC’s decision was based ‘to a decisive degree’ on closed material.

The ECtHR held that cases falling into the third category would not satisfy the procedural requirements of Art 5(4). Applying the above analysis, the ECtHR determined that in relation to four of the eleven applicants, the application of the SIAC procedures to their case had violated Art 5(4). In relation to two of these four applicants, the relevant allegation against them was that they had engaged in fund-raising for groups linked to Al-Qaeda. The ECtHR stated, ‘[h]owever, in each case the evidence which allegedly provided the link between the money raised and terrorism was not disclosed to either applicant’. In relation to the other two, the allegation was that they were members of named extremist groups. In these cases the open evidence was insubstantial, and the evidence on which SIAC relied was largely in the closed material.

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110 *A v United Kingdom*, supra note 1 at para 220.
111 See text accompanying note 105 *supra*.
112 *A v United Kingdom*, supra note 1 at para 220.
113 *A v United Kingdom*, supra note 1 at para 222.
Conversely, in relation to the other applicants, the allegations had for example ‘included detailed allegations about…the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places’. The ECtHR held that such material was sufficiently specific to make an effective response, and so met the requirements of Art 5(4). The upshot of the ECtHR decision on Art 5(4) was that there was an irreducible core requirement of disclosure, even in cases involving national security confidentiality. Failure to meet that core requirement meant a violation of the right to a fair trial. It remained with the judiciary to determine the disclosure this requirement demanded in each case.

(iii) AF (June 2009).

Like Belmarsh, AF was heard by a committee of nine Law Lords. In the lead judgment Lord Phillips stated:

On 19 February, a little over a week before the commencement of the appeal in the House, the Grand Chamber of the Strasbourg Court handed down its judgment in A and others v United Kingdom…This addressed the extent to which the admission of closed material was compatible with the fair trial requirements of article 5(4). The Secretary of State recognised that the judgment cut the ground from under her feet in so far as she had hoped to persuade the House to adopt the approach of Lord Hoffmann in MB. An amended case was filed on her behalf.

The government argued that the ECtHR reasons should be taken to stand for the principle that a ‘controlee must have a reasonable opportunity to make an effective challenge to the case made against him.’ The government contended that the ECtHR’s reasons should not, however, be read as laying down ‘an inflexible principle that there can never be a fair trial if the basis of the Secretary of State’s suspicion is to be found solely or to a decisive degree in the closed material’. Lord Phillips was unconvinced. He held that the ECtHR had ruled that ‘where…the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case

115 Ibid. at para 222.
116 AF (June 2009), supra note 98 at para 44.
117 Ibid. at para 52.
based on the closed materials may be.\textsuperscript{118}

In elaborating on his reasons in support of the ECtHR’s position Lord Phillips stated:

There are…strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him. The first is that there will be many cases where it is impossible for the court to be confident that disclosure will make no difference. Reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity but, because the threshold is so low, reasonable suspicion may also be founded on misinterpretation of facts in respect of which the controlee is in a position to put forward an innocent explanation. A system that relies upon the judge to distinguish between the two is not satisfactory, however able and experienced the judge.\textsuperscript{119}

What is notable about the above statement, compared with the ‘traditional’ view of the place of the judge in matters of national security,\textsuperscript{120} is the assumption that it is the place of judicial review to verify whether there are grounds for the government’s ‘reasonable suspicion’. In \textit{AF (June 2009)}, a unanimous bench of nine Law Lords endorsed the ECtHR’s view that the right to a fair trial contains a ‘core irreducible minimum’, namely that the controlee ‘must be given sufficient information about the allegations against him to give effective instructions to the special advocate’.\textsuperscript{121}

It is still early days for any assessment of the consequences of \textit{AF (June 2009)} for the control order regime. On the government’s assessment of the continued utility of control orders following the decision in \textit{AF (June 2009)}, the Home Secretary asked Lord Carlile, in his capacity as independent reviewer of counter-terrorism legislation, to ‘keep a watching brief on further control order cases in the High Court over the next few months, in order to help him assess the workability of the regime.’\textsuperscript{122} In his fifth report on the operation of the POTA, issued on 1 February 2010, Lord Carlile concluded that control

\textsuperscript{118}Ibid. at para 59. Contrast Lord Brown’s statement in \textit{MB, supra} note 106.

\textsuperscript{119}Ibid. at para 63. This statement of Lord Phillips follows a long quotation of the classic passage on natural justice from Megarry J in \textit{John v Rees} [1970] Ch 345, at the core of which is the statement: ‘As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered…; Cf the response of Lord Hoffmann to the preceding passage, \textit{AF, supra} note 98 at para 73, ‘Most lawyers will have heard or read of or even experienced such cases but most will also know how rare they are. Usually, if evidence appears to an experienced tribunal to be irrefutable, it is not refuted.’ Lord Hoffmann with great reluctance, followed the ‘rigid’ approach of the ECtHR.

\textsuperscript{120}As expressed for example by the lower courts in the course of the \textit{Chahal} litigation: see Chapter 3, section 3.4.1.

\textsuperscript{121}\textit{AF, supra} note 98 at para 81.

\textsuperscript{122}Alan Travis, ‘Home Secretary orders review of control orders for terror suspects’, guardian.co.uk, 16 September 2009, <http://www.guardian.co.uk/politics/2009/sep/16/control-orders-review-alan-johnson>
orders should remain for ‘the important residue of cases that cannot be dealt with by prosecution’. In his chapter on control orders, Walker said of *AF (June 2009)* that ‘[t]his judgment causes further discomfort for the Home Office, but control is not rendered unworkable since substantial non-disclosure is still flexibly allowed’. He stated that ‘it is almost certain that the notion of control orders will persist for some time’.

5.3.3 *Belmarsh* litigation in light of the control order regime.

The government responded to the House of Lords decision in *Belmarsh* with measures that are at odds with deep presuppositions of the legal system as traditionally expressed in the criminal law. This observation has grounded the extension of ‘futility’ thesis, introduced at the start of this chapter, to *Belmarsh* and its consequences. My initial response to the futility thesis is that it hopes for too much from the courts. There is truth to the charge that those advancing the thesis are disappointed absolutists. The standard against which the courts are found wanting under the futility thesis appears to require that the courts achieve the ‘bald elimination’ of all rights infringing counterterrorism powers granted to the executive. This is an odd requirement for the futility theorists to adopt, because they are judicial sceptics, sharing a distrust of judicial power that is rooted in democratic concerns.

But more fundamentally, the futility thesis undersells the extent to which judicial decisions have positively moulded the legal framework in a rights respecting direction. Ewing and Tham allow that the courts are ‘unquestionably a major irritant for the government’. Even if this were all the courts had achieved, it is no minor achievement. Even where a rights-protecting decision is arguably circumvented, the courts have served as a public forum for questioning the government logic and this has arguably emboldened

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124 Walker, 2nd ed, supra note 72 at para 7.90.
128 Ewing and Tham, *supra* note 62 at 691.
other opponents of the legislative and executive measures in question, including in Parliament.\(^{129}\) Moreover, while judicial developments are always slow, the judicial decisions on control orders have ensured that rights are not so readily discounted, and strengthened their place in the regime. Following a detailed analysis of the reported control order decisions, Walker spoke to the benefits of the regime, ‘[t]here are now over thirty hearings per year, they are heard in the primary courts of justice and not hidden away in a tribunal, and their superintendence has required justification and regular reassessment by the Home Office’.\(^{130}\)

This is not to be dismissive of the sources of disquiet with control orders identified by those advancing the futility thesis. The control orders put in place an onerous system of state constraint, based on anticipatory risk assessment. The control order regime runs parallel to the criminal law, but observes few of its central tenets.\(^{131}\) These concerns are returned to in the conclusion to this chapter.

### 5.4 Developments in Canada Post-Charkaoui.

#### 5.4.1 Bill C-3.

We must always remember that we are not dealing with Canadians. We are dealing with non-Canadians. The security certificate provisions do not involve Canadians, only non-Canadians. The non-Canadian category includes people with no status and people who have permanent resident status but are not citizens.\(^{132}\)

The above statement was made in support of the legislation enacted in response to the Charkaoui decision, Bill C-3.\(^{133}\) My account of the Canadian legislative and judicial developments subsequent to Charkaoui emphasises the similarity of Canadian

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\(^{129}\) Colm O’Cinneade, ‘Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom Human Rights Act and the Terrorist Threat’ in Miriam Gani and Penelope Mathew, eds, Fresh Perspectives on the ‘War on Terror’ (Canberra: ANU E-Press, 2008) 327 at 357-358.

\(^{130}\) Walker, 2nd ed, supra note 72 at para 7.99.

\(^{131}\) ‘Substituting ‘obligation’ for ‘penalty’ and ‘controlled person’ for ‘suspect’ only thinly disguises the fact that Control Orders are intended to substitute the ordinary criminal justice system with a parallel (but more intrusive) system run by the executive’: A Gil-Robles, Report by Mr Alvaro Gil-Robles Commissioner for Human Rights on his visit to the United Kingdom, CommDH (2005) 6 (Strasbourg: Council of Europe, 2004) at 10. See also Zedner, supra note 69.


\(^{133}\) An Act to Amend the Immigration and Refugee Protection Act (Certificate and Special Advocate), SC 2008, c 3.
developments with those in the United Kingdom subsequent to Belmarsh. However, one overarching difference between developments in the two jurisdictions needs to be flagged at the outset. Charkaoui did not dislodge the preventative detention regime in question from the immigration framework. As repeatedly reiterated in the quote, the legislative response to Charkaoui (and subsequent judicial developments) continued to focus on non-citizens alone.

The basic similarity between Canadian and British developments was noted in Chapter 4. All of those certified under the security certificate regime have now been released from detention under conditions.134 The conditions imposed on release effectively implement a control order regime. As noted in Chapter 4, the Federal Court practice of release on conditions was well established at the time of the Charkaoui decision, and endorsed in that judgment.135 The legislation enacted in response to Charkaoui, Bill C-3, now provides the practice with a statutory basis.136 While the Canadian Supreme Court endorsed an existing practice in the case of release on conditions, it made a more active contribution in relation to the procedures to be applied on review of certification and detention, as discussed in Chapter 4. The remainder of this chapter is concerned with the consequences of the Court’s procedural contribution in Charkaoui. In relation to Bill C-3, I simply register that its primary innovation was the introduction of special advocates into the security certificate regime, modelled on the United Kingdom position introduced in Chapter 3.137 I assess the impact of the introduction of special advocates on subsequent legal developments under the security certificate regime.

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134 See Chapter 4, section 4.2.3.
135 Charkaoui, supra note 102 at para 101.
136 See Immigration and Refugee Protection Act S.C. 2001, c. 27 as am. by S.C. 2008, c.3 [Bill C-3], s 82(5)
5.4.2 Jurisprudential developments subsequent to Charkaoui.

Jurisprudential developments subsequent to Charkaoui have seen the slow and ongoing unravelling of the security certificate regime. There is an air of inevitability about this. The idea that the relevant suspects are being detained pending deportation becomes increasingly unsustainable as the years roll on, even if the lapse of time does not affect the rationale for ongoing authority to detain (as it does not under a rights-precluding model of immigration detention). The reality of long years in detention, or under onerous constraint, weighs heavier than the rationales offered in its defence. But the regime is still in place, and to the extent that it has unravelled, the manner in which it has done so is of interest.

Two of the five security certificate detainees have recently exited the regime entirely. In the last several months of 2009, the security certificates issued against Mr Charkaoui and Mr Almrei were ruled to be void, and quashed, respectively. I discuss the circumstances leading to their exit from the security certificate regime below, following an examination of a subsequent Canadian Supreme Court decision bearing on the security certificate regime, Charkaoui II. This decision confirmed a commitment on the part of the Supreme Court, evidenced in Charkaoui, to trying to ensure meaningful judicial review in a context characterized by secret evidence.

(a) Charkaoui II.

The first case I examine did not address the interpretation of Bill C-3, nor its constitutionality. Charkaoui II sought to address certain problems arising from the use of secret evidence and, in particular, the judge’s dependence on the executive’s selection and characterization of secret evidence.\(^\text{138}\) The facts of the case were that prior to the fourth periodic review of Mr Charkaoui’s detention, government counsel informed the

judge that it had failed to disclose a document at the outset of the proceedings, namely a summary of two CSIS interviews with Mr Charkaoui in 2002. The judge ordered their immediate disclosure.

Following a review of the summaries, Mr Charkaoui requested disclosure of the complete notes and recordings of the CSIS interviews. The government responded that there were no recordings on file and that CSIS interview notes were, in accordance with CSIS policy, systematically destroyed once the officers had completed their reports. Mr Charkaoui argued that he was entitled to the notes and applied for a stay of proceedings, requesting that the certificate against him be quashed. The trial judge dismissed the application, drawing a distinction between the work of an intelligence agency and a police force, and holding that the former was not subject to the disclosure obligations of the latter under the criminal law. He also cautioned against the application of criminal justice standards in the immigration context. His decision was upheld by the Federal Court of Appeal.

The Supreme Court allowed Mr Charkaoui’s appeal in part. It held that CSIS’ policy of destroying interview notes breached its duty to retain and disclose information under the Canadian Security Intelligence Service Act [CSIS Act]. The Court interpreted the relevant provision, s 12 of the CSIS Act, in the light of s 7 of the Charter. It rejected the claim that s 7 rights are confined to the criminal justice system or are to be aggressively contextualised downward in the immigration context, stating:

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139 Re Charkaoui (2005) 261 FTR 1 at para 17.
140 In making this point he relied on the Chiarelli decision discussed in Chapter 4, section 4.1.3: Canada (Employment and Immigration) v Chiarelli [1992] 1 S.C.R. 711.
142 It held that the only appropriate remedy was to confirm the duty to disclose Charkaoui’s entire file to the designated judge, who would then act as a filter on what was disclosed to Mr Charkaoui and his counsel. As an appeal on an interlocutory point, it was held to be premature to determine how the destruction of the notes impacted on the reliability of the evidence. That assessment was left with the reviewing judge.
144 Section 12 of the CSIS Act provides:

The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.
whether or not the constitutional guarantees of s. 7 of the Charter apply does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state’s actions for the individual’s fundamental interests of liberty and security and, in some cases, the right to life. By its very nature, the security certificate procedure can place these rights in serious jeopardy, as the Court recognized in Charkaoui. To protect them, it becomes necessary to recognize a duty to disclose evidence based on s. 7.

As it noted, in adopting this position the Court confirmed the approach it had adopted to review of the security certificate regime’s procedures in Charkaoui. The decision in Charkaoui II showed that the Court was well aware of the procedural deficiencies that remained following Charkaoui, chief among them the judge’s dependence on the executive to characterize and select the material introduced as secret evidence. In Charkaoui II, the Court took steps to address this issue. It held that ‘[r]etention of the notes will make it easier to verify the disclosed summaries and information based on those notes.’

The Court held that while CSIS was not a police agency, it was subject to duties of disclosure that went beyond provision of mere summaries of information. The Court took care not to treat the security certificate process as equivalent to a criminal trial. Nonetheless, starting from the proposition that ‘[t]he consequences of security certificates are often more severe than those of many criminal charges’, the Court reasoned that s 7 of the Charter required ‘a procedure for verifying the evidence adduced against [the individual]’, that centred on the reviewing judge. The Court stated that:

If the original evidence was destroyed, the designated judge has access only to summaries prepared by the state, which means that it will be difficult, if not impossible, to verify the allegations.

As things stand, the destruction by CSIS officers of their operational notes compromises the very function of judicial review. To uphold the right to procedural fairness of people in Mr Charkaoui’s position, CSIS should be required to retain all information in its possession and to disclose it to the ministers and the designated judge. The ministers and the designated judge will in turn be responsible for verifying the information they are given.

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145 Charkaoui II, supra note 138 at para 53.
146 See Gus van Harten, supra note 138.
147 Ibid. at para 39.
148 Ibid. at para 50. Earlier in the judgment, the Court stated that the activities of RCMP and CSIS had been converging: see ibid. at para 26, and para 25-28.
149 Ibid. at para 47 and 50-63.
150 Ibid. at para 54. Recall that Lord Bingham had made a similar point in his judgment in MB, see text accompanying note 99, supra.
151 Ibid. at para 56.
152 Ibid. at para 61 and 62. See also at para 42.
In its ruling on disclosure, the Court in *Charkaoui II* referred back to the procedural problems raised by secret evidence identified in *Charkaoui*, namely that ‘[d]espite the judges best efforts to question the government witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information’. The disclosure requirements insisted on in *Charkaoui II* were an attempt to ameliorate this state of affairs. The disclosure in question was disclosure to the designated judge and Minister. Much of this information will then be provided to the special advocates introduced in response to *Charkaoui*, but not the detainees or their lawyers.

The focus on disclosure to the designated judge and Minister in *Charkaoui II* is to be contrasted with the focus on disclosure to the controlee outlined in the United Kingdom and European authorities detailed in the previous section. This is not to say that the United Kingdom and European decisions have necessarily resulted in greater disclosure to the controlee relative to the Canadian cases. It has been suggested that in practice the summaries released to certified individuals under the Canadian security certificate regime had provided fuller disclosure than was the norm under the British control order regime. The implications of *Charkaoui II*, and the way in which it builds on *Charkaoui I*, are best appreciated in the light of Mr Almrei’s 2009 reasonableness decision, examined below, following a discussion of Mr Charkaoui’s own exit from the security certificate regime.

(b) Exit from the security certificate regime 1 – Mr Charkaoui.

The security certificate issued against Mr Charkaoui was declared void in October 2009. The events leading to this ruling constitute an instance in which, faced with the choice between release of someone it has certified as a security risk or greater public disclosure of intelligence the government has opted for release. In *Charkaoui*, the Supreme Court

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153 *Charkaoui*, supra note 102 at para 63, quoted in *Charkaoui II*, supra note 138 at para 60.
154 Discussion between Tom Hickman, who has served as a lawyer for controlees in the United Kingdom, and John Norris, Canadian special advocate at Tom Hickman, ‘Secret Justice?’ (University of Toronto, Constitutional Round Table, 9 September 2009).
had ruled that the certification decisions previously made under the security certificate regime would lose their ‘reasonable’ status one year after judgment. The government accordingly quashed the earlier certification decisions, and on 22 February 2008, the date the amendments introduced by Bill C-3 came into effect, the Ministers signed new security certificates for five foreign terrorist suspects already held under the regime, referring the certificates to the Federal Court for reasonableness review. The events described below arose in the course of the ensuing reasonableness review of Mr Charkaoui’s certificate. To initiate the reasonableness review the Ministers filed a Notice of Referral of Certificate in each case together with a top-secret Security Intelligence Report [SIR] with supporting reference materials. The SIR was a narrative report prepared by CSIS setting out its grounds for believing that a person was inadmissible to Canada. A public summary of the SIR entitled a ‘Statement Summarizing the Information’ with the corresponding open source reference material was served on each of the certified individuals and filed with the Court.

In the course of in camera proceedings for Mr Charkaoui in April and May 2009, special advocates challenged ‘the Minister’s claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person’. As a consequence, the Court was persuaded that the disclosure of certain evidence would not be injurious to national security or the safety of a person, and it issued a number of orders requiring its disclosure. The Ministers disagreed with the Court’s determinations, and decided to withdraw that evidence rather than disclosing it in accordance with the Court’s orders, as they are entitled to do under the IRPA. On 31 July 2009, the Ministers stated that, in their opinion, the evidence remaining in the file was not sufficient to meet their burden of showing that the certificate was reasonable. Nevertheless, they asked the Court to determine whether the certificate was reasonable in

155 Charkaoui, supra note 102 at para 140.
156 S.C. 2001, c. 27, as am. by S.C. 2008, c. 3 [IRPA-2008], s 77(1).
158 Section 85.1(2)(a) of IRPA-2008, supra note 156. The facts are taken from Re Charkaoui 2009 FC 1030 [Charkaoui 2009].
159 Section 83(1)(j) of IRPA-2008, supra note 156, provides that the judge determining the reasonableness of a security certificate ‘shall not base a decision on information or other evidence provided by the Minister . . . if the Minister withdraws it’.
order to force an appeal on the required disclosure. On 5 August 2009 the Court stated the following question for the parties:

Given the Ministers’ admission that the evidence is not sufficient to meet the burden of proof imposed by the IRPA, is it appropriate for the Court to determine whether the certificate is reasonable, or should the certificate simply be withdrawn by the Ministers without further formalities?161

The Ministers reiterated that they were not prepared to withdraw the certificate, and certified two questions on disclosure to the Federal Court of Appeal. Following further submissions by the parties, in a public hearing in Montreal on 24 September 2009, according to media reports the judge ordered the immediate release of Mr Charkaoui without conditions, with reasons to follow. Those reasons were provided in a judgment of 14 October 2009, in which the judge held that the security certificate was ultra vires and void. Accordingly, she did not proceed to determine the reasonableness of the certificate. Further, the judge refused to certify the appeal question proposed by the Ministers, on the grounds that they were in truth just seeking to re-open the courts assessment of the facts.165

(c) Exit from the Security Certificate regime 2 – Mr Almrei.

As with Mr Charkaoui, on 22 February 2008 a new security certificate was issued in respect of Mr Almrei and referred to the Federal Court for reasonableness review. The ‘reasonableness’ decision for Mr Almrei, on the Minister’s ‘post-Bill C-3’ certification decision of 22 February 2008, was handed down on 14 December 2009, following public hearings and in camera hearings spread over 40 days between March and

161 Ibid. at para 17. Bolding in original.
162 Ibid. at para 18. In accordance with s 79 of IRPA-2008, supra note 156.
165 The Ministers were found to be seeking an ‘item-by-item re-assessment of the specific summaries to the disclosure of which the Ministers object. This objection pertains to the facts of this case. It does not transcend the parties’ interests and is not of general importance. It raises no question that meets the criteria of section 79 of the IRPA’ [bold in original]: Ibid. at para 92.
166 Almrei 2009 Reasonableness Decision, supra note 157.
September 2009. At the end of a lengthy judgment, Mosley J concluded that the certificate issued against Mr Almrei was not reasonable and must be quashed.\footnote{Ibid. at para 504.} He further found that CSIS and the Ministers were in breach of their duty of candour to the court.\footnote{Ibid. at para 503. Both Mr Almrei and the special advocates filed motions that the government had breached its duty of candour: see at para 480 and 481. The special advocates did so on the basis of the government’s failure to disclose material exculpatory evidence.}

The \textit{Almrei 2009 Reasonableness Decision} showed how the practical effects of the ruling on disclosure in \textit{Charkaoui II} build on the procedural reforms initiated by \textit{Charkaoui}, i.e. the ability of the special advocate to cross-examine the government. The decision gave grounds for confidence that the procedural innovations required by \textit{Charkaoui} and \textit{Charkaoui II} could achieve real advances in the ability of the courts to scrutinise national security decision-making. The findings also raised serious concerns about the Canadian government’s use of the security certificate process. In concluding that CSIS and the Ministers had breached their duty of candour to the court, Mosley J stated:

\begin{quote}
In this case, information that was inconsistent with that presented to the Court through the SIR only came to light when it was ordered produced in conformity with the Service’s \textit{Charkaoui II} obligations. This included surveillance and intercept reports that contradicted human source reports on which the Service and the Ministers relied. Information that was inconsistent with the content of the Source Exhibit was only disclosed when the Court began to order the production of information from the human source management files. The \textit{Charkaoui II} disclosure obligation does not absolve the Service from the responsibility to fairly consider and present the information in their possession when they prepare the SIR. Nor does it absolve the Ministers from the responsibility to ensure that the information and evidence filed in support of the certificate is complete, thorough and fairly presented.\footnote{Ibid. at para 502.}
\end{quote}

In the course of the judgment Mosley J spoke of shifts in the standard of review of national security matters over the preceding eight years. The Minister had submitted that they were entitled to deference on the dangerousness posed by Mr Almrei, citing the statement from \textit{Suresh} that: ‘Provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister’s decision.’\footnote{\textit{Suresh v Canada (Minister of Citizenship and Immigration)} [2002] 1 SCR 3 at para 85, quoted in \textit{Almrei 2009 Reasonableness Decision}, supra note 157 at para 102.} Mosley J noted that the Court in \textit{Suresh} had
supported its position with reference to Lord Hoffmann’s statements in Rehman on the relative expertise and access to special information possessed by the executive. He continued:

Much has changed in the past eight years, including the Supreme Court’s decision in Charkaoui I and the House of Lords decision in the Belmarsh case in which they resiled from the Rehman dictum where the question to be determined is legal as opposed to political: [Belmarsh].

In Charkaoui I, at paragraph 38, the Supreme Court observed that Judges were correct to eschew an overly deferential approach in security certificate cases given the nature of the proceedings. And at paragraph 39 it was stated that "[t]he IRPA does not ask the designated judge to be deferential, but, rather, asks him or her to engage in a searching review."

Here, the Court is making a fresh determination based on all of the information and other evidence presented including additional material which was not before the Ministers. The Court, as a result of Charkaoui II, has had access to operational and human source management information not previously made available. In the closed sessions, the information relied upon by the Ministers was called into question and the Court heard evidence about the manner in which the SIR was prepared. Having reviewed all of the information and evidence, I consider that little deference is owed to the Ministers decision.171

Later in the judgment, he spoke further on the impact of Charkaoui and Charkaoui II on the proceedings:

Production of the Charkaoui 2 information also allowed for a comparison of the reports of information provided by the human sources with other information held by CSIS including the intercept and surveillance reports. That comparison identified some serious contradictions. In the result, I was satisfied that the highly relevant information provided by one source in particular was not credible as it conflicted with surveillance and intercept reports made by CSIS personnel regarding the same dates and times.

It is of particular concern that these contradictions did not come to light until they were put to the Service witness in cross-examination by the Special Advocates. That witness was unable to provide satisfactory explanations for the failure of the Service to analyse the conflicting reports and to disclose this information to the Ministers and to the Court. This suggests a serious lack of analytical capacity in managing the enormous volume of information collected by the Service.172

The increased disclosure of information under Charkaoui II combined with cross-examination by the special advocates to undermine the credibility of key human sources relied upon by CSIS. The Almrei 2009 Reasonableness Decision conveys that the cumulative effect of Canadian judicial decisions in the area has been to enable more effective judicial scrutiny of national security matters. Mosley J found that the government had made little effort to revise or review the basis on which Mr Almrei was

171 Almrei 2009 Reasonableness Decision, supra note 157 at para 103-105.
172 Ibid. at para 163-164.
held over the eight year period that he was subject to the security certificate regime:

While the experts may disagree about the nature of the security threat and how it can be managed, it is clear from the evidence that their knowledge and understanding of the risk has evolved considerably since 2001. This was not reflected in the SIR and public summary until after Mr. Quiggin was called as [an expert] witness [for Mr Almrei] in the detention review proceedings and questioned the Service’s assessment and the sources on which it was based. I found it troubling that the work done to prepare the new SIR in 2008 had not kept pace with developments in the field. And the sources relied upon by the Service were often non-authoritative, misleading or inaccurate.\footnote{Ibid. at para 413, see also para 426: ‘the SIR presented in 2008 simply recycled stale information without attempting to offer a more balanced and nuanced view.’}

Towards the end of 2009, the Canadian media began to carry reports that the government is conducting a review of the security certificate regime. The government has apparently stated that the review has been triggered by ‘an increasingly complex legal environment’ and spiralling costs.\footnote{See Cristin Schmitz, ‘Security certificate quashed by court’ The Lawyer’s Weekly (25 December 2009), online: http://www.lawyersweekly.ca/index.php?section=article&articleid=1069. See also Jim Bronskill and Sue Bailey, ‘Tories to review anti-terrorist law’ Globe & Mail (14 December 2009) online: <http://www.theglobeandmail.com/news/politics/tories-to-review-anti-terrorist-law/article1398946/>.} At the time of writing, April 2010, the Canadian security certificate regime continued to operate.

5.5 Conclusions on developments in United Kingdom and Canada.

5.5.1 A suggested limitation on control order/security certificate regimes.

Some of the dissatisfaction with the control order jurisprudence arises from the sense that the various judicial rulings that a particular condition infringes a particular right to a certain extent seem too piecemeal and reactive, and leave the basic iniquity of an open-ended system of preventative constraint without charge largely unaffected.\footnote{See Ewing and Tham, \textit{supra} note 62 at 688-690.} The rights rulings do not appear to be unified by any overarching understanding of how the control orders could be transformed into a coherent, rights respecting practice.\footnote{For a discussion on this theme see Zedner, \textit{supra} note 69, in particular at 183-187.} Another way of expressing this dissatisfaction is that the control order regime seems to offend fundamental assumptions of autonomy and responsibility that underpin the various rights, but are not captured by any of them. In terms of looking for a solution to this impasse, it is useful to reflect back on the discussion of detention for the purposes of removal.

\footnotesize
\begin{itemize}
\item \footnote{Ibid. at para 413, see also para 426: ‘the SIR presented in 2008 simply recycled stale information without attempting to offer a more balanced and nuanced view.’}
\item \footnote{See Ewing and Tham, \textit{supra} note 62 at 688-690.}
\item \footnote{For a discussion on this theme see Zedner, \textit{supra} note 69, in particular at 183-187.}
\end{itemize}
Detention for the purposes of deportation is an exception to the right to liberty and is treated as such both under the common law, the separation of powers under the Australian Constitution, the Charter and the ECHR. I have argued in this thesis that for this exception to be rendered consistent with non-citizens having rights, the rights-protecting model of immigration detention has to be adhered to. Central to this model is a limit on the duration of detention for such purposes, defined by the requirement that there be a real prospect of removal within the reasonably foreseeable future. Detention is a provisional measure to facilitate a non-citizen’s availability for removal.

Similarly, the decisive legal move in disciplining control orders should be to impose a time limit. A time limit would transform control orders into either a provisional-charge or provisional-deportation detention. It would allow time for the collection of evidence. A variation on this suggestion would be to hold that while ‘reasonable grounds for suspicion’ might suffice for initial detention, the evidential burden on the government should increase with the lapse of time until a point is reached where the evidential burden is that of criminal law, and the government is forced to charge or release. This proposal, an increase in the evidential burden over time, builds on suggestions in Charkaoui, and aligns with the case law described in the preceding section of this chapter. The addition to the existing Canadian legal framework would be to formalize review under a rising evidential burden and, critically, to set a fixed outer limit on the duration of such detention. And finally, as argued in Chapter 4 and in this chapter, the

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178 Forcese and Waldman, supra note 137 at 409. Another alternative is to argue that in seeking to justify preventative action, ‘the burdens imposed must be proportionate to the potential danger, discounted by the likelihood of its occurrence’: Zedner, supra note 69 at 198. In other words the proportionality requirement should be segmented, the constraints should be proportionate to the gravity of the harm threatened and secondly, to the likelihood of that harm eventuating. Zedner does not suggest an outer temporal limit on control orders. Her segmented proportionality approach has the merit of directly confronting the precautionary logic that drives control orders.

179 See Charkaoui, supra note 102 at para 113: ‘While the government’s evidentiary onus may not be heavy at the initial detention review… it must be heavier when the government has had more time to investigate and document the threat’.

180 On the length of detention, Lord Carlile, the independent review of the Prevention of Terrorism Act 2005 (under s 14(3) of that Act) has recommended that in ‘only in a few cases that control orders can be justified for more than two years’: Lord Carlile, Fourth Report of the Independent Reviewer Pursuant to
Canadian security certificate regime should be expressly acknowledged for what it is, a preventive detention regime rather than detention for the purpose of facilitating removal, and its application should be extended to citizens.

### 5.5.2 Judicial review and policy development.

The procedural developments charted in this chapter testify to the benefits of enhanced procedural protections for the legal subject. The benefit to the individual held under one of the regimes is the primary argument in support of the procedural changes. Here, I offer a second argument in favour of such procedural developments, namely that the traditional non-interventionist approach to judicial review may be bad for policy development. The argument is not that judicial review is a good forum for the development of policy. Rather, it is that the events narrated in this chapter and the thesis more broadly suggest that judicial review can be a valuable spur to the development of policy in a rights protecting direction. The developments in the United Kingdom and Canada discussed in this thesis suggest that the government will continue with a counterterrorism practice until pulled up in the course of judicial review. The impact of *Chahal* on the system for reviewing deportation on grounds of national security, of *Belmarsh* on the detention scheme in Part 4 of the ATCSA, of *A v United Kingdom* on disclosure under the control order regime, and of *Charkaoui I* and *II* on procedures and disclosure obligations respectively, are all instances of judicial review having such an impact on government practice in the area of national security.

In the absence of such judicial intervention, the indications are that the relevant government will simply ‘continue down the garden path’. Such conditions increase the likelihood of the government developing practices that drift far from accepted legal norms. Both *Belmarsh* and *Charkaoui* have resulted in the institution or development of

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181 *Chahal*, supra note 30.


183 *A v United Kingdom*, supra note 1.

184 *Charkaoui*, supra note 102 and *Charkaoui II*, supra note 138 respectively.
statutory regimes that have proved capable of providing meaningful review. Moreover, there are indications that no small part of the reason those statutory regimes have provided meaningful review is that judges have ‘eschewed an overly deferential approach’, taking their cue from Belmarsh and Charkaoui, as attested to in Mosley J’s comments in the Almrei 2009 Reasonableness Decision. While it is not a theme of the thesis, the prospect of benefits for policy development in the need to regularly justify the government position should not be overlooked.

There is also the point, brought home in Almrei’s 2009 Reasonableness Decision, that judicial review may be required to expose less than satisfactory intelligence work, otherwise not revisited over long stretches of time. In addition to the tragedy of authorizing prolonged detention on a questionable basis, an absence of scrutiny may lead significant government resources to be tied up in what might otherwise be concluded to be unnecessary detention and monitoring.

The above evaluation of the procedural benefits that followed from Charkaoui complicates the evaluation of Charkaoui given in Chapter 4. In the light of subsequent developments, my criticisms of Charkaoui are arguably unbalanced in failing to adequately weight the beneficial nature of the procedural reforms resulting from that decision. I remain critical of the decision, for reasons I outlined in chapter 4, centering on the extent to which the decision endorses extensive differentiation between the constitutional rights of citizens and non-citizens, and the nature of the reasoning offered in support of this position. My evaluation of Charkaoui is further developed in the concluding chapter.

185 See text at supra note 171.
186 Almrei 2009 Reasonableness Decision, supra note 157 at para 163-164, 413, 426. See quotes in text at supra notes 172 and 173.
CHAPTER 6:

CONCLUSIONS.

To hold that a foreigner who comes here, and who is answerable to our laws, is at the same time not to have their protection, would, it appears to me, altogether carry us back to the days of barbarism.

*Ex parte Lo Pak* (1888), per Windeyer J

What explains the judicial reasoning on indefinite detention of non-citizens subject to a removal order? At the outset of the thesis, I outlined two models of judicial response to government submissions that legislation authorises the indefinite detention of non-citizens in these circumstances, the rights-precluding and rights-protecting models. I have argued these models explain the reasoning in the case studies. In this chapter, I argue that the two models give effect to different views on the consequences of a removal order for the rights of a non-citizen. I further argue that the view on this issue that animates the rights-precluding model is untenable. Thus, my argument in this chapter has two parts. In Part I, I argue that the rights-precluding model ultimately rests on the premise that a removal order in effect revokes a non-citizen’s right to liberty. Certainly, on the rights-precluding model the liberty interest of a non-citizen who is subject to a removal order has no bearing on judicial interpretation of legislation dealing with that non-citizen, nor does it factor in adjudication on constitutional objections to the indefinite detention of the non-citizen. Also in Part I, I consider the implications of the convergence between Canadian and British developments, and review two thematic differences between rights-protecting and rights-precluding judgments, regarding judicial use of non-national law and judicial invocation of national security concerns. In Part II, I critically evaluate the idea of citizenship that underpins the rights-precluding view that a removal order in effect revokes a non-citizen’s right to liberty.

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1 9 NSWLR 221 at 245, Windeyer J. The Court in that case issued a writ of habeas corpus in favour of the (foreign) applicant.
PART I.

6.1 Premise for the rights-precluding model.

In this thesis, I have looked at judicial responses to the indefinite detention of non-citizens subject to a removal order in three Commonwealth jurisdictions - Australia, Canada and the United Kingdom. There are many discrete doctrinal issues presented by legal challenges to the indefinite detention of non-citizens in these jurisdictions. I argue that underlying this variation, judicial disposition of these challenges can be traced back to views on the impact of a removal order on a non-citizen’s liberty interest. A judge’s response to indefinite detention is, at base, determined by his or her answer to the question, ‘does a non-citizen, against whom a valid removal order has been made, retain any right to liberty?’ The answer to this question flows through adjudication on the scope of various ‘immigration’ exceptions to various legal protections of the personal liberty of non-citizens considered in the case studies.

On the rights-protecting model, the scope of the exceptions must be determined on the basis that the liberty interest continues despite the order for a non-citizen’s removal. The non-citizen’s right to liberty can be infringed for the purpose of securing a non-citizen’s presence at the time of removal. But any such infringement must be proportionate to the purpose of facilitating removal. The indefinite detention of a non-citizen whose removal proves impracticable will not be proportionate to the purpose of removal.

On the rights-precluding model, the ‘immigration exceptions’ to legal protections of the personal liberty of non-citizens apply as a matter of course if a non-citizen’s right to remain in the territory has been revoked. In effect, the rights-precluding model treats the liberty interest of a non-citizen as a privilege that can be revoked by the government, and which is revoked by the operation of a valid removal order.

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2 I use the terminology of ‘removal order’ because the circumstances in Al Masri and Al-Kateb were consequent on a formal request for removal by the detainee, which was, under the legislation, distinct from a deportation order: see Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri (2003) 126 F.C.R. 54 [Al Masri] at para 37. The differences between the two types of order are not material to the present discussion.
In the balance of this section, I develop the above argument by reference to each of the case studies.

6.1.1 The three jurisdictions.

The case studies examined in this thesis are taken from three common law jurisdictions, Australia, the United Kingdom and Canada. Before turning to the case-studies, I briefly recap the differences between the legal orders. Australia has a federal constitution [Constitution], but no entrenched or enacted bill of rights. Legislation can be held invalid as unconstitutional, but the grounds of invalidity are not directly concerned with individual rights. Constitutional reasoning has a direct bearing on statutory interpretation by way of a presumption that legislative provisions are to be read consistently with the Constitution where possible. The United Kingdom has a statutory bill of rights, the Human Rights Act (U.K.), 1998 [HRA]. This mandates a strong interpretive approach to ensure compatibility with those rights, but does not allow legislation to be invalidated as unconstitutional. The United Kingdom is also a state party to the European Convention on Human Rights [ECHR], and accordingly the decisions of the European Court of Human Rights [ECtHR] are binding on it internationally and domestically. Canada has both a federal constitution and an entrenched bill of rights, the Canadian Charter of Rights and Freedoms [Chart]. A legislative provision that infringes a Charter right and is not ‘demonstrably justified in a free and democratic society’ (s 1) is invalid. As in the Australian context, there is a presumption that legislative provisions are to be read consistently with the constitution where possible. Finally, the common law of each of these jurisdictions recognizes a presumption of statutory interpretation against the abrogation of personal liberty.

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3 Canada is a mixed jurisdiction, with Quebec a civil law jurisdiction.
4 Commonwealth of Australia Constitution Act 1900 (U.K.) 63 & 64 Vict., c.12 [Constitution].
5 See Acts Interpretation Act 1901 (Cth), s 15A.
6 Human Rights Act (U.K.) 1998, c. 42 [HRA].
8 Art 46(1) of the ECHR provides that ‘[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties’. Note also Art 46(2): ‘The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution’.
While the structural differences between the jurisdictions are important, I argue that these differences do not determine judicial disposition of challenges to the indefinite detention of non-citizens subject to removal orders. There is, in each jurisdiction, a legal foundation for the rights-protecting model of immigration detention. What matters is whether the judges adopt that model. Perhaps the clearest illustration of this is provided by Gleeson CJ’s dissent in *Al-Kateb v Godwin* [*Al-Kateb*]. He held that the indefinite detention regime purportedly authorised by the statute was an egregious infringement of personal liberty, the ‘most basic’ of common law rights. As such, it could not be dealt with by implication from the general words of the statute as contended by the government. Indefinite detention had to be explicitly provided for. The non-citizen’s right to personal liberty did not have a statutory basis, but was rather the product of judicial recognition that liberty is among those fundamental interests that are assigned a constitutional status, such that it cannot be abrogated by implication. Although he was in dissent, Gleeson CJ’s reasoning demonstrated that Australian common law can support the rights-protecting model of immigration detention.

Before discussing the working of the two models in the cases, one further point should be made. The right to liberty is one of a limited number of the rights provided for in modern rights instruments such as the HRA or the *Charter* that also has a solid foundation in the common law and has been implied from a constitutional separation of judicial power. The derivation of a legal right to personal liberty from sources other than statutory bills of rights may well make the right a special case. Other rights provided for in bills of rights are not recognised at common law or derived from a constitutional separation of

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10 *Al-Kateb v Godwin* (2004) 219 CLR 562 [*Al-Kateb*].
11 Ibid. at para 19.
12 Here I use the term ‘constitutional’ in a way that may jar with an Australian audience. My intention is to register the way in which the principle of legality qualifies the usual subordination of the common law to statute. I am referring to ‘small c’ constitutionalism, that is the values protected by the common law, not to concepts necessarily derived from the written constitutional text. For use of this distinction with reference to the Australian context see Margaret Allars, ‘Of Cocoons and Small ‘c’ Constitutionalism: The Principle of Legality and an Australian Perspective on Baker’ in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 307.
13 On the latter possibility, see the separation of powers analysis in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) CLR 1 [*Lim*], subsequently applied to detention for deportation purposes where there was no real prospect of removal in *Al Masri*, supra note 2 and Gummow J’s dissent (with which Kirby J joined) in *Al-Kateb v Godwin*, supra note 10, all discussed in Chapter 2.
judicial power. On the other hand, it does not follow that the treatment of liberty in the rights-precluding judgments is a special case. The reasoning in the precluding judgments treats non-citizens as guests whose right to liberty is understood as a privilege granted by the government and revokable by the same. It may be that this reasoning is capable of being applied to a range of rights to which a non-citizen might otherwise be thought to be entitled and is not specific to liberty.

6.1.2. The Australian case study: Al-Kateb.

My first case-study was the judgment of the High Court of Australia in Al-Kateb on a challenge to the indefinite detention of non-citizens whose removal from Australian territory proved impracticable. The challenge presented two broad issues, the first of which was whether the Migration Act 1958 (Cth) [Migration Act] required the detention of non-citizens in Australia without permission (i.e. without a visa) whose removal was not practicable. The second issue was whether, if the Migration Act did so require, it was consistent with the Constitution and in particular the qualified right to personal liberty implied from the Constitution’s separation of federal judicial power. As I will explain, the Al-Kateb majority and minority’s determination of these two issues flowed from their views on whether revocation of a non-citizen’s right to remain in Australia had the consequence that his or her liberty interest ceased to be relevant to the interpretation and validity of statutory provisions for the non-citizen’s detention.

(a) A non-citizen’s liberty interest and statutory interpretation.

Al-Kateb involved a challenge to a statutory provision for the mandatory detention of non-citizens in Australia without permission ‘until’ one of three terminating events occurred. The Migration Act did not make any express provision for what was to occur if none of those terminating events happened. The Al-Kateb majority held that the Act mandated that a non-citizen be held in detention indefinitely, possibly permanently, until one of those events occurred. The possibility that none of those events might ever occur was treated as legally irrelevant. The statute did not make express provision for
indefinite detention. Nonetheless, the majority held that the statutory language was ‘intractable’ in providing for it.\textsuperscript{14} They relied on the literal wording, supported by historical judicial statements that legislative purposes were to be interpreted expansively in the area of immigration, and the understanding that it was a principal feature of the detention regime that a non-citizen in Australia without permission must be detained. The combination of these factors was held to make it ‘unmistakeably clear’ that the statute authorised indefinite detention.\textsuperscript{15}

In his dissenting judgment, Gleeson CJ adopted a different interpretation of the Migration Act’s detention provisions. He held that, where the legislation did not expressly address those cases where the relevant terminating events were not viable, the Court should not imply authority for indefinite, even permanent, detention. His interpretation of the Migration Act’s detention provisions was premised on the fact that indefinite administrative detention of non-citizens under the statute was a grave violation of a non-citizen’s right to liberty. He held that it could not be provided for by implication.\textsuperscript{16} If the legislature intended a rights infringement of that gravity, it would have to explicitly convey that intention. He read an implied temporal limitation into the general words, to the effect that where removal was not reasonably practicable, then authority to detain pending deportation was suspended.

Gleeson CJ affirmed an assertive principle of legality that held that the presumption in favour of common law rights applies to every area of government administration, including immigration. He was confident that the judicial role extended beyond ‘giving effect to the will of whatever majority enjoys parliamentary power at a given time’ to accommodate a view of the legal subject as the bearer of rights.\textsuperscript{17} Critically, this view of the legal subject embraced citizens and non-citizens alike. The method by which a judge was to defend the relevant rights was by imputing respect for those rights to Parliament, applying a common law principle of statutory interpretation that fundamental rights are

\textsuperscript{14} Al-Kateb, supra note 10 at para 241, Hayne J.
\textsuperscript{15} Ibid. at para 241, Hayne J.
\textsuperscript{16} Ibid. at para 21, Gleeson CJ.
not to be abrogated by implication. Gleeson CJ spoke to the aspiration that all branches of government were committed to the protection of fundamental rights:

A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.¹⁸

Indefinite administrative detention could only be provided for by express words. The justification for such a position was itself a democratic one; Parliament had to squarely confront what it was doing, and the public had to appreciate the full implications of the unqualified meaning of the legislative provision.

In light of Gleeson CJ’s dissent, it might appear on first reading that the Al-Kateb majority overlooked the common law presumption against the legislative abrogation of fundamental rights. However, the Al-Kateb majority recognised that in Australian law, fundamental common law rights (including a right to personal liberty) could not be abrogated by implication. They endorsed the rule that statutory provisions were not to be construed as abrogating important common law rights in the absence of clear words or necessary implication. So much was evident from contemporaneous judgments of the High Court.¹⁹

Further, it was clear that the Al-Kateb majority recognised that there was no ‘threshold’ requirement for the application of the presumption against abrogation of fundamental rights. That is, the application of the presumption did not require that one first identify some lack of clarity in the statutory language. This too was evident from contemporaneous judgments in the High Court. To take a key example, as discussed in chapter 2, in the earlier decision of Daniels Corporation,²⁰ members of the Al-Kateb majority had found that the legislation must be taken to be subject to an unexpressed

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¹⁸ Al-Kateb, supra note 10 at para 20.
²⁰ Ibid.
exception to preserve the privilege against self-incrimination.21 Here, the common law presumption formed part of the context in which the Court decided on the meaning of the relevant provision. When Al-Kateb is read alongside Daniels Corporation, the majority’s requirement that there be an ambiguity in the statutory language does not look like the simple unfolding of a general interpretive approach that keeps common law presumptions out of sight except in cases where the statutory language, given its ordinary meaning, is ambiguous. Instead, it looks like the exercise of a judicial discretion to apply the ambiguity requirement. The question then, is why the Al-Kateb majority failed to apply the presumption against legislative abrogation of rights to construe the Migration Act’s provisions for the detention of non-citizens. What substantive considerations led the majority to hold that the statute implicitly authorised indefinite detention, i.e. that it authorised indefinite detention though this was not expressly provided for in the Act?

The Al-Kateb majority drew a ‘necessary’ implication that the detention of a non-citizen in Australia without permission was to continue even if his or her removal was not viable. They drew this implication from what they identified as a distinct statutory purpose of the Migration Act’s provisions for detention of non-citizens. The crucial premise in the majority’s statutory reasoning was the adoption of an expansive understanding of the purposes of immigration detention, one that extended to segregating non-citizens from the community pending removal. Read in the light of that statutory purpose, the general words were understood to point irresistibly to the conclusion that indefinite detention was intended. Reading an implied temporal limitation into the statute would have frustrated this purpose and so the limitation was rejected. The general words of the statute were read as ‘intractable’ in providing for indefinite detention and the common law presumption rejected on that basis.

It was apparent that the statutory purpose identified by the Al-Kateb majority (segregating non-citizens from the community pending their removal) effectively denied that a non-citizen in Australia without permission has a right to personal liberty. This statutory purpose was the basis for an implied mandate to detain a non-citizen whose removal was

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21 Hayne, McHugh and Callinan JJ. Heydon J was a later appointment to the High Court.
impracticable. In relying on this purpose the majority revealed their assumption that a non-citizen subject to a removal order retained no right to liberty with any bearing on the interpretation of the statute. This was in stark contrast to the approach taken by Gleeson CJ in his dissent. In his judgment, the purpose of detention was to facilitate removal. This purpose was consistent with judicial recognition that unlawful non-citizens have a right to personal liberty that triggers the presumption against legislative abrogation of rights. Specifically, any curtailment of the non-citizen’s right to liberty had to be authorised expressly, or by implication from the purpose of facilitating removal. And that implication would not be drawn in cases where detention was not a proportionate means of securing a non-citizen’s presence for the purposes of removal.

In summary, the Al-Kateb majority viewed themselves as following the rule that a statute can only abrogate fundamental common law rights by express words or necessary implication. But they drew a necessary implication from a statutory purpose to segregate non-citizens subject to a removal order from the Australian community. In my view, it was only tenable to recognise this as a legitimate statutory purpose on the basis that a non-citizen facing removal or deportation has no right to liberty. The majority’s conclusion that the Migration Act authorised the indefinite detention of non-citizens in Australia without permission could in theory have been reached under a general interpretive approach that treated common law presumptions as illegitimate and expressed itself exclusively in the fictitious language of discovering the actual intention of Parliament. However, the better reading of the reasoning of the Al-Kateb majority was that the adoption of this approach was driven by substantive considerations particular to the detention of non-citizens. It did not follow from a blanket denial of the legitimacy of common law presumptions against the abrogation of fundamental rights. Underlying the Al-Kateb majority’s interpretation of the Migration Act was the understanding that when a non-citizen’s right to remain in Australian territory is revoked, a non-citizen effectively ceases to have any right to personal liberty. Although the majority did not put it so starkly in their reasoning on statutory interpretation, their understanding that it was an unqualified purpose of the Migration Act to segregate non-citizens present in Australia without permission from the community implied this view. The majority explicitly
incorporated this view, that a non-citizen subject to a removal order had no right to liberty, in their reasoning on the constitutional validity of indefinite detention of unlawful non-citizens, discussed below.

(b) Non-citizens’ liberty interest and the separation of judicial power.

Another issue raised in *Al-Kateb* was whether the indefinite detention of non-citizens who are subject to a removal order was consistent with the *Constitution*. Specifically, was it consistent with an implication from the *Constitution*’s separation of federal judicial power? The relevant implication precludes administrative detention except in limited cases, one of which is the case of ‘immigration’ detention. The *Al-Kateb* majority’s ruling was that, while the separation of federal power implied a general right to freedom from administrative detention,²² any detention of non-citizens subject to a removal order necessarily fell within an established exception to that protection, namely the ‘immigration’ exception. In contrast, the minority’s rights-protecting judgment was that the exception for immigration detention applied if detention was proportionate to the purpose of facilitating the non-citizen’s removal from Australian territory. Indefinite detention was disproportionate to that purpose and thus fell outside the scope of the ‘immigration’ exception to the general constitutional right.

As I argued in relation to the role given to common law presumptions in *Al-Kateb*, the difference between the *Al-Kateb* majority and minority on the constitutional issue is, at base, a disagreement on whether non-citizens subject to a removal order retain a right to personal liberty. In the constitutional context this bears on the scope of the implied constitutional right to freedom from administrative detention. On the majority’s rights-precluding approach, the established ‘immigration’ exception to the constitutional right was necessarily engaged in the case of a non-citizen whose right to remain in Australian territory had been revoked. The minority’s rights-protecting approach sought to accommodate the non-citizen’s right to personal liberty, by adopting a more limited

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²² Australian judgments refer to an immunity from administrative detention, rather than a ‘right’ to freedom from administrative detention. I use the term ‘right’ here as ‘immunity’ can be perplexing for a non-Australian audience, and the differences are immaterial to the present discussion.
conception of the ‘immigration’ exception to the implied constitutional right (to freedom from administrative detention). Thus, Gummow and Kirby JJ in dissent held that the separation of powers required that the connection between immigration detention, and the legislative head of power for that detention, the aliens power, had to be justified by way of a proportionality analysis. In effect, to be constitutionally valid, there had to be a sufficient connection between detention and deportation. By way of contrast, the majority held that the aliens power directly authorised detention pending deportation.23 Here there was no need to justify the sufficiency of the connection between detention and deportation in the individual case. Detention was authorized under the relevant head of legislative power as long as it was directed at the exclusion of non-citizens from the national community.24 The majority held that where a valid removal decision was made concerning a non-citizen, there was necessarily authority to detain the non-citizen under the aliens power, and the detention necessarily fell within the ‘immigration’ exception to the implied constitutional right. The viability of deportation (and the proportionality of detention) were constitutionally irrelevant. In effect, the majority’s rights-precluding approach denied that a non-citizen who was subject to a removal order had a liberty interest that influenced adjudication on the scope of the constitutional right to freedom from administrative detention.

(c) Summary.

In Al-Kateb, the Court divided on a question of statutory interpretation and a question of constitutional validity. The majority and minority disagreed on the significance of a common law presumption against legislative abrogation of personal liberty for the construction of the Migration Act’s detention provisions. They also disagreed on the scope of an established ‘immigration’ detention to an implied constitutional right to freedom from administrative detention. There were close affinities between the majority and minority’s reasoning on common law presumptions and their constitutional reasoning. On both issues, the rights-protecting judges (the dissents) adopted the position

23 Al-Kateb, supra note 10 at para 41, McHugh J; para 247, Hayne J.
24 On the qualification that the separation of powers did not apply to detention under the aliens power in its ‘exclusionary’ operation see ibid. at para 259-260, Hayne J.
that generally applicable legal norms (the existence of common law presumptions and/or the separation of powers) required that the detention of a non-citizen who is subject to a removal order should be proportionate to the purpose of effecting his or her deportation. The proportionality analysis was to be made with reference to the viability of removal. On both issues, the rights-precluding judges (the majority) held that the fact that a non-citizen’s right to remain in Australian territory has been revoked necessarily established an exception to the generally applicable legal norms (common law presumptions/ the separation of powers). All that was needed to establish authority to detain was to show that the non-citizen had no right to remain. In other words, the rights-precluding approach reduces to a simple proposition that the revocation of a non-citizen’s right to remain in Australian territory has the consequence that his or her liberty interest ceases to be relevant in adjudication on the legality of his or her administrative detention. On this approach, Australian law on statutory interpretation and the scope of the separation of federal judicial power is blind to the liberty interest of a non-citizen in Australia without permission.

6.1.3. The United Kingdom case-study: The Belmarsh litigation.

In my United Kingdom case-study, the House of Lords took a rights-protecting approach to questions about the legality of the indefinite detention of non-citizens subject to orders for deportation. In this section I argue that the rights-protecting approach rests on the premise that such non-citizens enjoy a right to personal liberty that has to be accommodated in adjudication on the legality of their detention. Conversely, the rights-precluding approach (taken by the Court of Appeal in the judgment appealed to the House of Lords) was based on a judgment that an order for a non-citizen’s deportation in effect trumps the non-citizen’s right to liberty.

The Belmarsh litigation involved a challenge to the validity of the indefinite detention of foreign terrorist suspects under Part 4 of the Anti-Terrorism, Crime and Security Act (U.K.), 2001 [ATCSA]. The litigation focused on the prohibition of discrimination under Art 14 of the ECHR, and the criteria for lawful derogation under Art 15 of the

ECHR, in particular the second criterion, pursuant to which the detention measures had to be ‘strictly required by the exigencies of the situation’. This focus was a function of the government’s reliance on the United Kingdom’s derogation from the ECHR’s guarantee of personal liberty (Art 5) to render the indefinite detention measures lawful. The ECHR right to liberty, adopted under the HRA, contains an express exception for ‘action...with a view to deportation’ (Art 5(1)(f)). The government conceded that indefinite detention of foreign terrorist subjects would not fall within the scope of this express exception and would be inconsistent with the ECHR right to liberty. Having decided that certain foreign terrorist suspects should not be ‘at large’ in the United Kingdom, and anticipating problems with securing their removal, the government therefore entered a derogation from the right to liberty, and relied on the derogation in its defence to challenges under the HRA and ECHR to the ATCSA’s provision for indefinite detention. The litigation therefore focused on the question whether the conditions stated in the ECHR, Art 15 for a lawful derogation were met, and whether the authority was compatible with the ECHR Art 14 prohibition on discrimination.

In the derogation context the primary justification for confining administrative detention measures to non-citizens was that:

> There is a rational connection between their [the foreign terrorist suspects] detention and the purpose which the Secretary of State wishes to achieve. It is a purpose which cannot be applied to nationals, namely detention pending deportation, irrespective of when that deportation will take place.\(^{27}\)

The issue of whether the detention was legitimately for deportation purposes also had implications for a discrimination analysis. If it was not for that purpose, why was it confined to non-citizens? As in the Australian separation of powers jurisprudence, or under Art 5 of the ECHR, the central question became whether detention where there was no real prospect of removal in the reasonably foreseeable future could still be characterized as detention for the purposes of deportation (as held by Lord Woolf CJ in

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\(^{26}\) Though, as noted in Chapter 5, before the ECtHR in *A v United Kingdom* (2009) 49 E.H.R.R. 29, 625 [*A v United Kingdom*], the government argued that even in the absence of the derogation, the measures were compatible with Art 5(1)(f) of the ECHR.

\(^{27}\) *A v Secretary of State for the Home Department* [2004] QB 335 at para 52, Lord Woolf CJ.
the Court of Appeal), or otherwise justified as non-discriminatory (as in Brooke LJ’s argument from international law, drawing on the wartime internment of enemy aliens, also in the Court of Appeal).

The fact that the legal analysis under the derogation provisions converged on the same question that would have arisen under the Art 5 right to liberty is indicative of how the particular deprivation of liberty under consideration, indefinite administrative detention measures confined to non-citizens, implicated broader issues of legality. As discussed in Chapter 3, the best view of the provision made for derogation under the ECHR and HRA is that it opens up space between rights and legality. A government can seek to derogate from a particular rights commitment, but cannot operate outside of the commitment to legality encapsulated in the criteria for lawful derogation. As stated by the Special Immigration Appeals Commission [SIAC], derogating from the prohibition on discrimination under Art 14 ‘would not assist’. This would still leave the issue of whether the measures were ‘strictly required’. If the public emergency did not require a power of indefinite administrative detention for national terrorist suspects and they posed the same threat as irremovable foreign terrorist suspects, how could it be said that measures not deemed necessary in the former case were strictly required in the latter? A commitment to the general application of the law underpinned the close scrutiny, by both SIAC and the House of Lords, of the government’s claim that detention in the circumstances was a reasonable instance of differentiation between citizens and non-citizens.

The different views on whether such detention was properly regarded as ancillary to deportation, as expressed by the Court of Appeal on the one hand, and the majority of the House of Lords on the other, ultimately rested on the view they adopted of a non-citizen’s legal entitlements. It is true that, as discussed in Chapter 3, Lord Woolf CJ’s arguments from deference in matters of national security furnished a stand-alone argument for upholding the indefinite detention provisions. But to present his decision as simply the

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28 A v Secretary of State for the Home Department [2002] H.R.L.R. 45 at para 96: ‘Merely scheduling such a derogation [to the prohibition on discrimination in Art 14] would not assist, however, for in any event there is not a reasonable relationship between the means employed and the aims sought to be pursued.’
product of a deferential approach fails to put to work the section of his judgment addressed to the ‘objective justification’ for the differential treatment of non-citizens, or his adoption of Brooke LJ’s argument from international law to the same effect. His reasoning that judicial deference in matters of national security justified indefinite administrative detention was underpinned by acceptance that extensive differentiation between the fundamental rights of citizens and non-citizens was presumptively reasonable in the areas of national security and immigration (and that measures concerning non-citizens are necessarily in the ‘immigration’ area if the non-citizens are subject to a removal order that the government intends to effect).

In their rights-protecting judgments, seven members of the House of Lords found that the ATCSA’s provision for the indefinite detention of foreign terrorist suspects was disproportionate and discriminatory under the HRA and ECHR.29 How do we explain the disagreement between the House of Lords’ majority and the Court of Appeal? The House of Lords’ majority were less deferential and less inclined to accept the government’s argument that the detention of non-citizens whose right to remain in the United Kingdom has been revoked is automatically ‘immigration’ detention. Their reasoning on the complex of legal issues sought to give real weight to a non-citizen’s right to liberty, which was understood to subsist even though the non-citizen’s right to remain in the United Kingdom had been revoked. The majority’s rights-protecting approach was animated by a greater confidence in the judicial responsibility to ‘delineat[e]…the boundaries of a rights based democracy’.30 This confidence manifested itself in a commitment to the idea that all exercises of state power should be subject to judicial scrutiny for compatibility with rights. In the context of immigration and national security, Lord Bingham stated that ‘the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised.’31 The idea that the judiciary had a legitimate role in scrutinising all legislation and executive action for compatibility with rights was defended in terms of the legislative grants of jurisdiction contained in the

29 With the eighth member of the majority, Lord Hoffmann, finding that there was no public emergency.
31 Ibid. at para 42.
HRA and s 30 of the ATCSA. These conferrals were treated as legislative confirmation of the judicial role at common law ‘of watching over the liberty of everyone within their jurisdiction, regardless of nationality’. 

As discussed in Chapter 3, I agree with the majority of the House of Lords that the derogation was unlawful and that the statutory provisions in question presented an irremediable incompatibility with the Convention right to liberty and prohibition on discrimination (not saved by a lawful derogation). In these circumstances the issuance of a declaration of incompatibility was the appropriate response. The declaration did not afford the applicants a remedy. But it did ensure that the Court’s ruling that the provisions were not compatible with the government’s rights commitments was formally recorded. It also led to the revocation of Part 4 of the ATCSA, and its replacement by the control order regime in the Prevention of Terrorism Act 2005. And the House of Lords ruling was effectively adopted by the ECtHR in A v United Kingdom.

6.1.4 The Canadian Case-Study: Charkaoui.

My third case-study, the Canadian Supreme Court’s judgment in Charkaoui also fits my thesis on the essential difference between rights-precluding and rights-protecting judgments. Rights-precluding judgments proceed from the premise that upon revocation of a non-citizen’s right to remain, his or her right to personal liberty ceases to have any real influence in adjudication on the legality of his or her detention. In this case, it is important to state why I characterise Charkaoui as a rights-precluding judgment. The Court in Charkaoui adopted a ‘case by case’ approach, ruling that an open-ended authority to detain for the purposes of facilitating removal did not in itself infringe a non-citizen’s right to liberty, but that it might in some future case. In Chapter 4, I argued that by postponing a determination on the legality of the indefinite administrative detention of non-citizens, the Court in effect condoned the status quo. In this section I review this argument, and argue that the judgment condoning the status quo was tantamount to a

32 ATCSA, supra note 25.
33 Belmarsh, supra note 30 at para 178, Lord Rodger.
34 Prevention of Terrorism Act (U.K.) 2005, c. 2.
judgment that the issuance of a removal order against a non-citizen effectively negates his or her right to liberty.

(a) Constitutional minimalism undervalues a non-citizen’s Charter rights.

The question in *Charkaoui* was whether a provision for open-ended administrative detention of non-citizens who are subject to a deportation order could be reconciled with the *Charter* right to personal liberty on the basis that the detention was imposed ‘in accordance with the principles of fundamental justice’ (s 7) or ‘can be demonstrably justified in a free and democratic society’ (s 1). According to the Court’s approach the essential point was that the detention would be consistent with the *Charter* right to liberty if it could be characterised as being for the purpose of deportation. As under the ECHR, the issue of whether detention was legitimately for deportation purposes also had implications for a discrimination, or equality, analysis. If the administrative detention of non-citizens was not for the purposes of deportation, why was it confined to non-citizens? In the absence of a satisfactory answer to this question, the measures would contravene the equality right in s 15 of the *Charter*.

In *Charkaoui*, the Court held that detention of a non-citizen subject to a deportation order in circumstances where there was no real prospect of removal in the reasonably foreseeable future did not in itself infringe s 7 of the *Charter*. It was clear that the legality of detention rested on the view that, even in these circumstances, it might be said that the detention was for the purpose of deportation. As regards the substantive treatment of the detainees, that is, the prospect of deportation to torture and the reality of indefinite administrative detention, the Court adopted a form of constitutional

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36 See the court’s emphasis on the need for the detentions to remain ‘hinged’ to the state’s purpose of deportation: *Charkaoui v Canada (Minister of Citizenship and Immigration)* [2007] 1 S.C.R. 350 [*Charkaoui*] at para 131 and 131, 126. See also the way in which the Court distinguished *R v Lyons* [1987] 2 S.C.R. 309, in which the Court indicated that ‘a sentence of indeterminate detention, applied with respect to a future crime or a crime that had already been punished, would violate s 7 of the Charter’: See *ibid.* at para 106 and 107. The ground for distinguishing *Lyons* was simply that it was not in the ‘immigration context’. 
In the influential accounts of ‘constitutional minimalism’ offered by Sunstein and Katyal in the United States counterterrorism context, the approach is defined by a preference for narrowness over breadth and shallowness over depth. The reasoning on the substantive Charter challenges in Charkaoui met these criteria. On the narrowness criterion, the Court adopted a ‘one case at a time’ approach to the key substantive points at issue. It held out the prospect that a court may, in a future case, determine that the ‘hinge’ between detention and deportation has been broken. Its reasoning on this points was shallow in Sunstein’s sense, in that it did not develop the basis for its conclusion that detention remained for the purpose of deportation in the cases before it and did not make clear how it would be determined when this purpose ceased to authorise detention.

A key motivation for the theory of constitutional minimalism is that it avoids ‘freezing’ constitutional standards in place. This concern is seen as particularly salient in the area of national security, where any substantive constitutional arrangement has to thread its way between the risks of unduly hampering the executive’s response to security threats on the one side and lending sanction to unnecessary executive powers on the other. For Sunstein and Katyal, it was the desire to avoid imposing the constraints of constitutional invalidity on the political branches (and future courts) that motivated avoidance of substantive positions on constitutional rights and a reliance on procedure.

In Chapter 4, one of my central criticisms of Charkaoui was how much the Court decided without discussion or supporting reasoning. This objection can be recast as stating that minimalist judgments, such as Charkaoui, may actually do more than minimalist theory

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37 Kent Roach has also analysed Charkaoui against the minimalist position see Kent Roach, ‘Charkaoui and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures’ (2008) 42 S.C.L.R. (2d) 281 [Roach, ‘Charkaoui and Bill C-3’] at 307-8.
39 Sunstein, ibid, at 48.
40 On the use of ‘hinge’ see Charkaoui, supra note 36 at para 131.
claims. Minimalism is motivated by the desire to keep legal questions open, so preserving greater space for democratic deliberation. But as applied to Charkaoui, this seems descriptively inadequate.\footnote{Kent Roach makes a related point against minimalism in his review of Charkaoui, arguing that the decision’s ‘one case at a time’ approach did not ‘maximize the space for legislative policy making’, leaving the legislation intact but uncertain in its operation: Roach, ‘Charkaoui and Bill C-3’, supra note 37 at 307-308. My focus here is on the way the decision constrains future legal argument.} Charkaoui established that detention pending deportation may continue for over five years without constitutional objection, and that open-ended powers of administrative detention of non-citizens were not per se discriminatory or otherwise unconstitutional. It lent its support to the view that legal responsibility for these issues could be deferred, to be addressed by the courts on a case by case basis. These rulings do not truly leave the legal issues ‘open’. They constitute positions that will form the starting point for future legal argument in Canada. For example, an argument that the detention of non-citizens subject to a removal order, in circumstances where there is no real prospect of removal in the reasonably foreseeable future, cannot be detention for the purposes of deportation and so \textit{prima facie} infringes s 7 or s 15, is presently unavailable in the Canadian constitutional context, following Charkaoui. And, critically, this position was arrived at while leaving the merits of the appellants’ substantive Charter challenges largely unaddressed. What constituted a sufficient ‘hinge’ between detention and deportation remained obscure.

The ‘one case at a time’ approach adopted by the Court expressed an impoverished understanding of a rights based democracy. In particular, it failed to insist that powers affecting non-citizens subject to a deportation order were tailored to ensure respect for Charter rights (critically the right to liberty under s 7 or the equality right under s 15). It did not require that the legislature take responsibility for ensuring that the power it conferred on the executive was compatible with the Charter rights of non-citizens subject to deportation orders.\footnote{For an argument that where a statute confers a discretion to engage in activities that may breach constitutional rights, that provision should itself be struck down as failing to take adequate measures to ensure Charter rights, see Sujit Choudhry & Kent Roach, ‘Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability’ (2003) 41 Osgoode Hall L.J. 1.} Rather the Court allowed for the continuance of a statutory power that it foresaw might unjustifiably infringe rights, indicating that the courts would attend to such violations if and when they occurred. In this way, the Court relieved the
legislature of responsibility for protecting rights, and left the onus on those adversely affected to bring a challenge through the courts.

One final point that needs to be made in response to the minimalist arguments is that worries about rulings unduly fettering the executive have less force in Canada as compared to the United States. As developed in Chapter 4, the Charter’s notwithstanding clause (s 33) allows for a ‘safety valve’ should the Parliament come to the conclusion that particular legal rights prevent a necessary response to a public emergency. This can be seen to operate as a constitutional clear statement rule. This provides a mechanism by which the effect of rights-protecting decisions of the courts can be suspended should those rights, so interpreted, be deemed unduly restrictive by the Parliament. There is thus less need than in the United States context to advocate caution in adopting substantive positions on rights on the ground that these positions may hamper the government response to future emergencies.

(b) The procedural solution puts non-citizens’ Charter rights at risk.

In Charkaoui, the Canadian Supreme Court adopted a ‘procedural solution’. It focussed on the adequacy of the review procedures in the security certificate regime, and stated that enhanced procedural protections ‘answered’ the Charter challenges to the substantive treatment. The Court showed judicial candour in its reasoning on the procedural aspects of the security certificate regime, moving directly and transparently from an enunciation of certain substantive values to its ruling on how the procedural provisions contravened the Charter. Those values were encapsulated in the ‘venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case’.48

44 Moreover, any declaration made under the notwithstanding clause ceases to have effect after five years, ensuring that at least one federal election, with the possibility of a differently constituted Parliament, has intervened before a decision is due on the declaration’s renewal.
45 A similar argument could be mounted in the United Kingdom context with reference to the derogation provisions under the ECHR and HRA: see Chapter 3.
46 See Chapter 4, section 4.3.2.
47 Charkaoui, supra note 36 at para 131.
48 Charkaoui, supra note 36 at para 61.
The problem was that the Court then relied on its procedural rulings to avoid having to engage with the merits on the treatment allowed under the provisions: whether the detention in itself infringed the right to liberty and/or whether it was justified in the circumstances, whether it amounted to cruel and unusual treatment or punishment, or whether it was discriminatory. The Court rejected challenges on the foregoing grounds with little discussion of why the status quo was warranted, beyond the underdeveloped claim that these concerns were ‘answered’ by the enhanced procedural protections it held to be required.

Subsequent legal developments, outlined in chapter 5, further complicate the picture. In the light of subsequent events, the Court’s decision to rely on procedure can look like a wise and far-sighted choice. The attention to procedures in Charkaoui appears to have inaugurated a cycle of procedural developments characterized by a steady ratcheting up of procedural protections.\textsuperscript{49} Government statements accompanying the exit of two detainees from the regime under which five were held suggested that enhanced procedural protections were beginning to render the continued operation of the security certificate procedure unviable.\textsuperscript{50} The cessation of the regime would have been the aim of a direct, confrontational, condemnation of its substance. This result now appears to be occurring through attention to procedure.

A positive evaluation of the procedural course taken by the Court holds that the deferral of any potential relief for the detainees was justified by other gains. More substantially, it can draw on a number of propositions that support the adoption of a procedural solution. First, good process probably was more likely to lead to good results. Second, this result was achieved without unnecessary confrontation, through the relatively technical paths of procedure, an area in which lawyers can claim expertise.\textsuperscript{51}

\textsuperscript{49} On the theme of ‘cycles of legality’ in the national security context see David Dyzenhaus, ‘Cycles of legality in emergency times’ (2007) 18 PLR 165.
\textsuperscript{50} See Chapter 5, section 5.4.
\textsuperscript{51} For an evaluation of ‘the allure of legal process’ in these terms see Jenny S. Martinez, ‘Process and Substance in the “War on Terror”’ (2008) 108 Colum. L. Rev 1013 at 1025.
In relation to the first proposition, the main point is that insofar as there was a hope that the procedures would generate a particular result, here setting limits on the duration of security certificate detention and/or restraint, there was a potential tension between the substantive outcome hoped for and the decision to rely on procedures. The Court took a risk. The procedures may have led in another direction. As matters have transpired, it is clear that in a number of cases court instigated amendments to the procedures have exposed serious weaknesses in the government case. But statements by the lawyers in the *Almrei* reasonableness decision in December 2009 have highlighted the contingency of the result,\(^52\) emphasising how much depended on the judge, and particular features of the evidence in their client’s case. In the *Almrei* 2009 reasonableness decision, deficiencies in the government case became evident with the assistance of a non-government expert. The lawyers could foresee other cases in which deficiencies in the evidence would only become evident with the involvement of the certified individual. Current barriers to communication between the certified individual and those in receipt of confidential material render any such involvement highly problematic. In short, the lawyers did not express confidence that the procedures would necessarily result in an effective challenge to the government’s case in other matters.\(^53\)

But it is the second proposition, the safety of the technical merits of procedure, of which we should be most wary. Insofar as the turn to procedure was driven by the desire to avoid substantive conflict, this can readily lead to a deferral of judicial responsibility for clearly putting on the public record what a commitment to rights (including the rights of non-citizens who are subject to deportation orders) demands, precisely when such a commitment is most in need of clarification and support.

Finally, an assessment of the procedural solution offered in *Charkaoui* should allow that the Court simply judged that this was a matter on which it could afford to stand aside and let things run their course. Even in the absence of any intervention by the Supreme

\(^{52}\) *Re Almrei* 2009 FC 1263 [*Almrei* 2009 reasonableness decision].

\(^{53}\) See Cristin Schmitz, ‘Security certificates quashed by court’ *The Lawyer’s Weekly* (25 December 2009), online: <http://www.lawyersweekly.ca/index.php?section=article&articleid=1069>, quoting from Gord Cameron (a special advocate in the matter) and Lorne Waldman (*Almrei’s* lead public counsel).
Court, the security certificate regime may have been viewed as unsustainable. The justification of detention as ‘pending deportation’ wears less and less well as the years roll by. As stated in the Canadian Federal Court judgments allowing for release on conditions, the danger posed by these individuals was also deemed to diminish over time. No new individuals had been certified for many years. The additional procedural requirements imposed by the Court may have been seen as all that was required, conferring an additional reason for not resorting to, and possibly revoking, a regime that was already on its last legs.

6.2 Subsequent developments in the United Kingdom and Canada.

As discussed in chapter 5, there has been a convergence between the Canadian security certificate regime, now put into effect through conditions imposed on release, and the British control order regime. The Canadian shift to release on conditions constitutes a control order regime in all but name. The convergence between the jurisdictions has also been manifest in the slow ratcheting up of procedural protections in both regimes. As discussed, these procedural developments will at least provide a disincentive against undue reliance on the respective regimes. The convergence does not extend to the class of persons subject to the respective regimes. The Canadian security certificate regime remains confined to non-citizens, while the British control order regime is applicable to citizens and non-citizens alike. I have argued that the Canadian regime is best regarded as a preventive detention regime, as the British regime is expressly stated to be. Proceeding from this characterization, the Canadian regime is discriminatory against non-citizens, and the British regime is not.

54 For an academic assessment that continuation of the security certificate regime as a system of conditions imposed on release from detention ‘pending deportation’ was unsustainable see Roach, ‘Charkoui and Bill C-3’, supra note 37 at 332-336.

55 See chapter 4, section 4.2.3.

56 As noted in Chapter 4 (section 4.2.3) the practice of conditions on release, developed by the Federal Court, was noted with approval by the Supreme Court in Charkaoui, and subsequently given express legislative endorsement in ‘Bill C-3’. See Immigration and Refugee Protection Act, S.C. 2001, c. 27, as am. by S.C. 2008, c.3 [Bill C-3] [IRPA-2008], s 82(5).

This combination, a convergence in the extent and nature of treatment and procedures applied to those subject to the regime, and a divergence as to whether the regime extends to citizens, undermines an important rationale for the general application of the law. The rationale is that by extending burdens on non-citizens to citizens we guard against the invidious dynamic of sacrificing ‘their’ liberty for ‘our’ safety. This rationale was clearly promoted by Katyal in his 2007 article, ‘Equality in the War on Terror’.\(^{58}\) His argument, prominent in the United States jurisprudence and commentary,\(^{59}\) was that those concerned with restraining government power over non-citizens in the counterterrorism area should focus on ensuring that the law is general in application as between citizens and non-citizens. This was contrasted with attempts to rule that particular substantive conduct is in and of itself illegal.

Katyal argued for the general application of the law on an instrumental basis, holding that this would enable non-citizens to achieve a measure of ‘virtual representation’ in the legislature.\(^{60}\) The general application of the law ensures that it is in the self-interest of members of electorate to avoid unduly harsh and disproportionate laws. He contrasted an emphasis on equal protection with any legal strategy that would require the constitutionalization of a particular substantive standard of protection. He was motivated by the idea, which he took from Bickel’s account of the passive virtues, that ‘it is too difficult and too soon for courts to decide whether all of the federal government’s post-September 11, 2001 policies are substantively correct’.\(^{61}\) This being the case, a procedural solution recommended itself. Katyal reasoned that ‘when the contours of personal liberty are not clear, insistence upon equality of treatment will often be a way to achieve an optimal result’.\(^{62}\)

\(^{58}\) Supra note 38.

\(^{59}\) For a response to Katyal that convincingly treats him as representative (and constitutive) of a prominent position in U.S. academia and legal practice see Martinez, supra note 51 at 1066-1071. Katyal was lead counsel for the detainee in *Hamdan v Rumsfeld*, 542 US 507 (2004). At the time of writing, April 2010, he is Principal Deputy Solicitor General of the United States.

\(^{60}\) Katyal, ‘Equality’, supra note 38 at 1382.

\(^{61}\) Ibid. at 1365. For a fuller treatment of Katyal’s employment of Bickel’s passive virtues see Neal Katyal, ‘Comment – *Hamdan v Rumsfeld*: the Legal Academy Goes to Practice’ (2006) 120 Harv. L. Rev 65 at 84 ff.

\(^{62}\) Katyal ‘Equality’ ibid. at 1368. For a similar view of equal protection, see Sunstein, ‘Minimalism at War’, supra note 38 at 53 and 73-75.
The application of the British control order regime to citizens and non-citizens has not resulted in it being developed in a way that is clearly superior, from a rights perspective, to the Canadian security certificate regime, confined to non-citizens. The presence of ‘virtual representation’ in the United Kingdom does not appear to have made much of a difference when assessed against the Canadian situation. One explanation is that the majority of the voting public continue not to see themselves as a target, with the result that the law’s general application is ineffective as a political constraint on government conduct. As expressed by David Cole ‘[i]t is generally only when their effects touch a sufficiently large number of citizens that the governments’ initiatives are recognized as overreactions and curbed.’

Taking this last observation seriously, it militates against exclusive or undue reliance on equal protection to better the legal position of non-citizens. Some of the actions purportedly authorised against non-citizens, indefinite preventive detention or restraint amongst them, should be subject to legal condemnation on openly substantive grounds.

Indefinite, and possibly permanent, detention that effectively rests on an individual’s deemed dangerousness undermines the fundamental principle that, outside of narrowly defined categories, persons can be detained for significant periods of time only on conviction of a criminal offence.

The preceding observations are not, and are not intended as, an argument against the general application of the law. They simply caution against undue reliance on the standard instrumental argument for the general application of the law. Principled arguments against subjecting foreign terrorist suspects to lower fundamental rights protections because they are foreign are unaffected. Primary among such principled arguments is the proposition that all within the jurisdiction are entitled to the equal

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64 Katyal’s approach would seem to require an adoption of SIAC’s position that the legal objection would fall away if the indefinite detention measures were extended to citizens. The House of Lords did not, contrary to SIAC, hold that its legal objections would be met by extending the measures to citizens, but ruled that indefinite detention was a disproportionate response to the threat. It thus arguably went beyond Katyal in deciding that the detention measures were ‘substantively incorrect’. An interesting complication is that the primary evidence of disproportionality was the lack of equality i.e. the fact that the government had not deemed such detention necessary in relation to citizens posing a threat. The contrast between ensuring the law is general in application, and ruling on particular substantive treatment can be difficult to maintain.
protection of the law, where that protection is understood with reference to the idea of the legal subject as rights bearer. These rights may be infringed by legitimate government purposes, but they are not revokable.

6.3 Influence of non-national law.

6.3.1 Use of comparative authorities.

The judicial decisions at the centre of the thesis do not exist in isolation from each other. *Al-Kateb* was delivered in August 2004, the House of Lords *Belmarsh* decision in December of that year, and *Charkaoui* in February 2007. As discussed, critical passages of the judgment in *Charkaoui* are framed as a response to *Belmarsh*. Furthermore, all three authorities make reference to the earlier decision of the United States Supreme Court in *Zadvydas*, delivered in June 2001. *Hardial Singh* is likewise a constant presence in the case law. The cross-referencing shows no sign of abating, with both the decision in *MB* and that of the Grand Chamber of the ECtHR in *A v United Kingdom* referring to *Charkaoui*.

An extensive use of comparative law has grounded the bold claim that national courts have been united in their response to counterterrorism. In a series of publications over recent years, the noted international lawyer Eyal Benvenisti claimed that courts from prominent democratic states had reacted consistently to counterterrorism measures,

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65 See Chapter 4, section 4.3.4.
66 *Zadvydas v Davis*, 533 U.S. 678 (2001) [*Zadvydas*]. The reference to *Zadvydas* in *Belmarsh* does little real work in the reasoning, receiving only a glancing reference at para 69 of Lord Bingham’s judgment. *Zadvydas* is referred to in every substantive judgment in *Al-Kateb*, supra note 10 see in particular at para 145, 159 and 193, Kirby J (in dissent, endorsing the majority position in *Zadvydas*); at para 283-286 and 290, Callinan J (in the majority, endorsing the dissenting position in *Zadvydas*). As discussed in section 4.3.3., *Zadvydas* is referred to in *Charkaoui*, supra note 36 at para 124.
67 *R v Governor of Durham Prison, ex parte Singh* [1984] 1 All ER 983 [*Hardial Singh*]. See *Al Masri*, supra note 2 at para 97-101 (and 102-108 on the *Hardial Singh* principles operation in other cases), 118, 129 and 133; *Al-Kateb*, supra note 10 at para 3, Gleeson CJ; para 53, McHugh J; para 160, Kirby J; para 240-241, Hayne J; para 296, Callinan J (all bar Kirby J doubting its relevance). The United Kingdom’s intention to override *Hardial Singh* (and more centrally *Chahal v United Kingdom* (1997) 23 EHRR 413 [*Chahal*]) motivated the derogation order at the centre of the Belmarsh proceedings. See also *Charkaoui*, supra note 36 at para 124 (as discussed in section 4.3.3).
68 *Secretary of State for the Home Department v MB* [2008] 1 AC 440 [*MB*] at para 30; *A v United Kingdom*, supra note 35 at para 111.
coordinating outcomes across national jurisdictions. This claim was conjoined with another, namely that the availability of identical or similar norms (grounded in international human rights law) had facilitated this coordination effort. The claim of a coordinated judicial response was not simply a methodological one. It was presented as benefitting individual liberties, domestic democratic processes, and the rule of law in the global sphere.

My review of the case studies raises doubts about the suggested phenomenon of a ‘globally coordinated move’ on the part of the ‘national courts from prominent democratic states’. Moreover, my counterexamples are drawn from key cases that Benvenisti enlists as examples of this inter-judicial coordination effort, Charkaoui and the House of Lords decision in Belmarsh. Instances of reliance on comparative authority in Charkaoui, while not simply decorative, did not maintain the level of consistency between national courts needed to support claims of an ‘inter-judicial coordination effort’ in response to state counterterrorism measures. In chapter 4, I argued


70 Benvenisti, ‘United We Stand’, ibid. at 273; Benvenisti, ‘Reclaiming Democracy’, ibid. at 252; Benvenisti and Downs, ibid. at 66-7. This second claim about international law is considered in the following section, section 6.3.2.

71 Benvenisti, ‘United We Stand’, supra note 69.

72 Benvenisti, ‘Reclaiming Democracy’, supra note 69.

73 Benvenisti and Downs, supra note 69. The Benvenisti and Downs article referred to, in Issue 1 of Volume 20 of the European Journal of International Law was followed by three commentaries and a ‘rejoinder’ by the authors in Issue 4 of that volume. The most salient comment for the present discussion was Tom Ginsburg’s scepticism about the claim that we were witnessing a coordinated judicial response, rather than just a set of common responses to a set of common circumstances: Tom Ginsburg, ‘National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs’ (2009) E.J.I.L. 1021 at 1023-1025. In their response to Ginsburg, Benvenisti and Downs rephrase the question by asking whether national courts can solve the collective action problem, not whether they are.

74 Benvenisti ‘United We Stand’, supra note 69 at 254.

75 Benvenisti and Downs, supra note 69 at 72.

76 Benvenisti ignores Australia, effectively treating it as an outlier. While this is a fair characterization of the majority position in Al-Kateb, it also serves to highlight the shallowness of the comparison engaged in, in which dissents, for example, are disregarded. Dissents are not necessarily without comparative influence, as shown by the influence of the dissents in Zadvydas on the majority in Al-Kateb (an instance of judicial influence that runs counter to Benvenisti’s account).
that the Canadian Supreme Court’s attempt to distinguish *Belmarsh* was unpersuasive,\textsuperscript{77} and that its claim to consistency with *Hardial Singh* and *Zadvydas* was unsustainable. In relation to the latter, it will be recalled that the criterion for necessary connection between detention and removal was weakened dramatically in *Charkaoui*, with the ‘reasonable foreseeability’ of removal, integral to *Hardial Singh* and *Zadvydas*, dropping out of the equation.\textsuperscript{78}

The dubious nature of the Canadian Supreme Court’s claims to compatibility, or consistency, with these authorities constitute counter-examples to Benvenisti’s working assumption that where a comparative authority was relied upon, this was indicative of an ‘inter-judicial coordination effort’ in response to state counterterrorism measures. In presenting his evidence for judicial cooperation, Benvenisti wrote that he:

> can offer only a broad and sketchy outline of the emerging jurisprudence. [The examination] aims, of course, at demonstrating the probability of the thesis, rather than analysing the specific areas in depth. Therefore it focuses more on the means of communication – the increased use of comparative constitutional law and the creative use of international law – than on the specific content of the norms. Further and more intensive research is necessary to explore these and possibly other areas of judicial cooperation more deeply.\textsuperscript{79}

The earlier examples from *Charkaoui* take up his invitation to further research, looking beyond the mere fact of judicial reliance on comparative authority to determine whether such usage indicates consistent outcomes, rising to inter-judicial coordination. On the basis of the limited examples considered in relation to *Charkaoui* in chapter 4, it appears that Benvenisti’s claim of inter-judicial coordination is at least in need of qualification. Judicial claims to consistency with comparative authorities cannot be taken at face value.

Benvenisti’s claims for interjudicial coordination in the counterterrorism area were too strong. But his articles on the theme did pick up on a real development, observable in case law studied in this thesis. As stated by Mosley J in the most recent decision I consider, Mr Almrei’s reasonableness decision under the Canadian security certificate regime, handed down on 14 December 2009, ‘much has changed in the past eight years,

\textsuperscript{77} Section 4.4.6.
\textsuperscript{78} Section 4.4.4.
\textsuperscript{79} Benvenisti, ‘Reclaiming Democracy’, *supra* note 69 at 253.
including the Supreme Court’s decision in Charkaoui and the House of Lords decision in the Belmarsh case in which they resiled from the Rehman dictum where the question to be determined is legal as opposed to political. 80 At least within the United Kingdom and Canada, there has been a discernible shift in the attitudes toward judicial review in the area of national security, away from extreme deference to the executive where national security concerns are invoked. The standard example is that offered in the quote, the shift between Rehman and Belmarsh. 81 This shift has a Canadian counterpart. In the 2009 Almrei reasonableness decision, Mosley J concluded that the deference to executive risk assessments recommended by the Supreme Court in Suresh had been eschewed in Charkaoui, and was not appropriate with regard to the ministerial decision before him. 82 This Canadian trajectory, away from extreme deference to the political branches in matters of national security, is best regarded as having continued past Charkaoui, as discussed in chapter 5. That this shared shift in judicial ethos is itself the subject of judicial observation and endorsement, as in the 2009 Almrei reasonableness decision, indicates that this changed understanding of the deference appropriate to the executive in national security has become part of the judiciary’s self-understanding. As such it can be expected to influence the way in which they perform their role.

In summary, Benvenisti’s thesis of interjudicial coordination has a basis in a real phenomenon. What he did not sufficiently account for is the extent to which something as nebulous as a shared judicial ethos may crystallise in a set of norms whose application and scope diverges considerably across national jurisdictions. Whether one sees fragmentation or convergence depends on how fine-grained one’s analysis is, whether one focuses on particular rights, or the general effect. 83 As detailed in Chapter 5, there has been a convergence between the British and Canadian regimes. Nonetheless, the

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80 Almrei 2009 reasonableness decision, supra note 52 at para 103.
82 Almrei 2009 reasonableness decision, supra note 52 at para 103-105.
83 For a similar response to Benvenisti on this point see Jacob Katz Cogan, ‘National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs’ (2009) 20 E.J.I.L. 1013. Benvenisti and Downs do not respond to this issue in their ‘rejoinder’ in the same volume.
Canadian regime is still restricted to non-citizens, and Charter jurisprudence contains no categorical prohibition on indefinite immigration detention, or deportation to torture.

These matters appear to be of diminished practical importance at present. But, to sound a cautionary note, the implications of the Suresh exception (the absence of an absolute prohibition on deportation to torture) for the reasoning in Charkaoui illustrated how the absence of one legal principle can deprive others of support. Whether a given argument works or a position can be sustained depends on what other decisions have already been made in the law. The failure to take a principled position on an issue can have a domino effect, leading to the unravelling of surrounding principles.84 As detailed in Chapter 4, the Suresh exception supported the claim in Charkaoui that there remained a ‘hinge’ between detention and deportation sufficient to justify the former.85 The failure to take a stand on deportation to torture enabled the argument for the legality of indefinite detention of non-citizens subject to removal orders. The failure to take a stand on indefinite detention may in turn enable arguments for other measures best recognized as an unjustifiable infringement of rights.

6.3.2 Influence of international law.

In examining the influence of international law across the case studies, the most notable feature is the diversity of ways in which it featured in, or was excluded from, the legal analysis. Benvenisti argued that the availability of identical or similar norms from international human rights law had facilitated a coordination effort between national courts.86 He underestimated the range of ways in which international and domestic law interact, and the transformations that result from that interaction.87

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84 For an exploration of the way in which undermining one legal principle (for example the prohibition on deportation to torture), serves to undermine surrounding legal principles that rely on it for support see Jeremy Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’ (2005) 105 Colum. L. Rev. 1681 in particular at 1736.
85 See in particular at section 4.3.4.
86 Benvenisti, ‘United We Stand’, supra note 69 at 273; Benvenisti, ‘Reclaiming Democracy’, supra note 69 at 252; Benvenisti and Downs, supra note 69 at 66-7.
(a) Australia.

The difference between the Australian rights-precluding and rights-protecting authorities as outlined in section 6.1.2, is manifest in the respective rejection and use of international law by judgments falling into these categories. As with its dismissal of a common law presumption in favour of liberty, the majority in Al-Kateb placed an ambiguity requirement in the way of recourse to international law. McHugh J, as a member of the majority, accepted that the position at Australian law was that statutes should be interpreted and applied in conformity with international law, so far as the language of the statute permits. He stated, with some reluctance, that this rule of construction was ‘too well established to be repealed now by judicial decision’. However, for the reasons developed above in relation to the common law presumptions, the majority concluded that the statute authorised indefinite detention, leaving no role for international law.

The analogy with common law presumptions should not be pressed too far. In relation to international law, ambiguity was required. The difference between the models centred on whether an ambiguity was created through the operation of common law or constitutional considerations. The different position of common law presumptions and international law was clearest in the ‘rights-protecting’ judgments. In those judgments, there was no reliance on international law to read an unexpressed exception into the statutory language. Rather, international law was held to fortify the conclusion, arrived at by way common law presumptions and/or the presumption that legislation is to be read compatibly with the Constitution, that the detention power was subject to an implied temporal limitation. The relegation of international law in the Australian rights-protecting authorities to a secondary role, supporting conclusions already arrived at by other means, reflected a jurisdiction in which recourse to international law remained

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88 Al-Kateb, supra note 10 at 65. He noted the rule had been recently reaffirmed by the other leading member of the majority, Hayne J in Kartinyeri v The Commonwealth (1998) 195 CLR 337. The debate between McHugh and Kirby JJ centred on whether international human rights law was a proper influence on interpretation of the Constitution. As noted in section 2.5.5., McHugh J also expressed his view that it would be preferable if the rule on statutory interpretation changed, so that there was no such presumption that legislation be read conformably with international law.

89 The joint judgment in Lim held that courts ‘should in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty’: Lim, supra note 13 at para 38,
deeply contested, as evidenced in McHugh J’s response to Kirby J’s advocacy of international law.90

There were also other ways in which international human rights norms filtered into the legal analysis in the protecting judgments, sometimes without express acknowledgment.91 The international law materials were influential in their emphasis on the need for proportionality between the state goal of deportation (the legality of which was not in dispute) and the duration of detention ancillary to that goal.92 International human rights law is best understood as having not only buttressed, but also shaped, common law and constitutional doctrine, in terms of such a proportionality analysis.

(b) The United Kingdom.

Under the HRA, there is necessarily a supra-national aspect to the jurisprudence. The Convention rights are drawn from the ECHR, and s 2 of the HRA provides in part that a court determining a question which has arisen in connection with a Convention right ‘must take into account’ any judgment of the ECtHR relevant to the proceedings. Of more immediate relevance to the Belmarsh litigation, which centred on the derogation provisions, the parties proceeded on the basis that the validity of the derogation in domestic law depended on whether the derogation to which it gave effect was lawful under Art 15 of the ECHR.93

Further, European jurisprudence both led to, and shaped, the statutory provisions and derogation at issue in Belmarsh, most notably with reference to the rulings of the ECtHR

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90 Discussed in Chapter 2, section 2.4.5.
91 See the discussion of Gleeson CJ’s dissent in Al-Kateb, Chapter 2, section 2.4.3. In both Al Masri, and Kirby J’s dissent in Al-Kateb, reference to international human rights law was express. However, for example, in Al Masri it was clear that international human rights law did not just ‘buttress’ conclusions arrived at on the basis of common law and constitutional sources, but also solidified confidence in the existence and strength of the common law right to liberty. For a study charting similar judicial moves in the United Kingdom context prior to the advent of the HRA see Murray Hunt, Using Human Rights Law in English Courts (Oxford: Hart Publishing, 1997).
92 As discussed, in the Australian authorities where proportionality is applied by means of ‘reasonably necessary’ test, it is not applied to the prior question of the need for detention to secure the non-citizen’s availability for removal (or during processing), but only to the duration of detention authorised.
93 See Chapter 3, section 3.11 introduction.
in *Chahal* on immigration detention and deportation to torture.\(^94\) Further, the ECtHR jurisprudence provided the points of principle by which SIAC and the courts in the United Kingdom were able to navigate in the *Belmarsh* litigation. Most notably, they reasoned on the basis of an absolute prohibition on deportation to torture. The importance of this point of principle was highlighted by the implications of its absence in the Canadian context, as shown by the influence of the *Suresh* exception on the reasoning on immigration detention in *Charkaoui*.\(^95\)

Of the judgments considered in this thesis, the one that most transparently and extensively gave effect to international human rights law was that of Lord Bingham in *Belmarsh*. The materials he drew on extended well beyond the bounds of what was required under the HRA. The central contribution of international law to his judgment was to highlight the wrong of discrimination and more particularly to deny any presumptive reasonableness to differential treatment of non-citizens. Turning to the proportionality analysis, here the relationship between international law and proportionality was different from that noted in the Australian authorities. In *Belmarsh*, the proportionality test was taken not from public international law, but from the Commonwealth jurisprudence of the Privy Council,\(^96\) as informed by other comparative authorities.\(^97\) Here, in effect, proportionality was applied to the international law materials. The general tenor of the international law materials, questioning the ‘reasonableness’ of the differential treatment of non-citizens, was solidified and enhanced by the application of a proportionality test derived from the common law cases. Taking the Australian and British rights-protecting authorities together, the thesis testifies to the ability of international and domestic law to exert a mutual beneficial influence, strengthening a common legal commitment to scrutinize claims that the differential treatment of non-citizens is justified.

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\(^{94}\) And again, in Chapter 5, the procedural rulings of the ECtHR in *A v United Kingdom*, supra note 35 were determinative of the procedural requirements on control orders required in *Secretary of State for the Home Department v AF* [2009] UKHL 28.

\(^{95}\) Most recently discussed at the end of section 6.3.1.

\(^{96}\) *De Freitas v Permanent Secretary of Ministry of Agriculture, Lands and Housing* [1999] 1 AC 69.

\(^{97}\) Notably the *Oakes* test: *R v Oakes* [1986] 1 SCR 103.
The United Kingdom authorities also disclosed a contrary tendency to draw on international law to advance the government argument for the legality of the indefinite administrative detention of non-citizens, most notably in the judgment of Brooke LJ of the Court of Appeal. As recorded in Chapter 3, this attempt was roundly rejected by Lord Bingham, and the argument mounted from international law appeared thin. The government’s attempt to circumvent the ruling of the House of Lords by re-litigating matters before the ECtHR also indicated an awareness that international legal avenues could be used to circumvent rights protecting decisions of its domestic courts.

(c) Canada.

Benvenisti claimed that the availability of identical or similar norms (grounded in international human rights law) has facilitated coordination between national courts in the counterterrorism area. The Suresh exception, and its continued authority, constituted a clear counterexample. The rejection of an absolute bar on deportation to torture under the Charter in Suresh is inconsistent with the evolving jurisprudence of the ECtHR, as constituted by Chahal, and reaffirmed in Saadi. Suresh furnished an example of two jurisdictions, Canada and the members of the Council of Europe, failing to coordinate around a common norm drawn from international human rights law, here the United Nations Convention against Torture. Charkaoui arguably marks a continuation of this divergent trajectory, with the absence of an absolute prohibition on deportation to torture for

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98 While they had little effect on jurisprudence covered in this thesis, the growing number of counterterrorism commitments in international law is likely to lead to increasing government use of international law arguments in such settings: Kim Lane Scheppelle, ‘The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency’ in Sujit Choudhry, The Migration of Constitutional Ideas (Cambridge: Cambridge University Press, 2006) 347.

99 As well as providing an interesting wrinkle on traditional conceptions of the separation of powers. For a discussion of government resort to international law to alter the separation of powers, and more specifically of international law to ‘launder’ an ‘executive power grab’ see Craig Forcese, ‘Hegemonic Federalism: the Democratic Implications of the UN Security Council’s “Legislative” Phase’ (2007) 38 VUWL 175 at 194.

100 Benvenisti, ‘United We Stand’, supra note 69 at 273; Benvenisti, ‘Reclaiming Democracy’, supra note 69 at 252; Benvenisti and Downs, supra note 69 at 66-7.

101 Suresh v Canada (Citizenship and Immigration) [2002] 1 S.C.R. 3 [Suresh].

102 Chahal, supra note 67.


supporting the legality of indefinite detention of non-citizens subject to a deportation order, in contrast to the position reaffirmed in *A v United Kingdom.*

As discussed in Chapter 4, *Suresh* showed the way in which a national constitutional rights regime can be used to dilute the force of international human rights law. The categorical rejection of deportation to torture at international law simply became a factor in *Charter* interpretation, to be balanced against national security. Then in *Charkaoui,* the Court effectively treated the *Charter* as a complete and self-sufficient source of law on the relevant fundamental rights and made marginal use of human rights jurisprudence sourced outside the national constitution. The Canadian jurisprudence demonstrated how a national rights framework may come to obstruct or complicate reference to international human rights jurisprudence.

### 6.4 National security concerns and understandings of immigration.

The reasoning in the rights-protecting and rights-precluding authorities proceeded from different conceptions of the immigration power, which in turn reflected different understandings of the position of non-citizens. In this section, I first look at a clear case study of how national security introduces instability into legal reasoning on the detention of non-citizens subject to a removal order, the decision of the United States Supreme Court in *Zadvydas,* a comparative authority that played a prominent role in both *Al-Kateb* and *Charkaoui* (6.4.1.). The re-characterization of earlier rights-protecting authorities, including *Zadvydas,* in judgments that go on to hold that indefinite detention is authorised is then examined (6.4.2). The common factor in both discussions is recourse to an expanded conception of the immigration power, centred on protecting the citizenry from foreigners.

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105 *A v United Kingdom,* supra note 35. This decision is discussed in section 5.2.

106 As developed in relation to Suresh, supra note 101 (Chapter 4, 4.2.2.) this had implications for another aspect of Benvenisti’s thesis, namely that the ‘most far reaching explanation’ for the courts assumption of an authority to intervene is their role as expert balancers.

107 *Zadvydas,* supra note 66.
6.4.1 Detention under a ‘terrorism exception’?

An intriguing window into the ambivalent relationship between immigration and security is provided by judgments that I have characterized as rights-protecting, but which allow that the parameters on detention might in future be expanded to accommodate national security concerns. In his dissent in Al-Kateb, Gleeson CJ was explicit that his reasoning did not address the issue of ‘the power of a court to impose conditions or restraints in the case of a person who is shown to be a danger to the community, or to be likely to abscond’. 108 More pointedly, in Zadvydas, the majority made clear that their support for an implied temporal limitation on immigration detention might not extend to terrorism or other ‘special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to national security’. 109 In other words, the majority countenanced an exception to the position it had developed, under which a non-citizen against whom a deportation order had been issued could be detained for purposes other than securing his or her presence for removal [the terrorism exception].

The majority judgment in Zadvydas neatly illustrated the tensions that security concerns can introduce into discussions of immigration detention. The Zadvydas majority has been criticised for the incoherence the terrorism exception introduced into its analysis, most immediately by Kennedy J in dissent. 110 He characterized the majority as follows: ‘[t]he rule the majority creates permits consideration of nothing more than the reasonable foreseeability of removal’. 111 The issue raised by the majority’s reference to the terrorism exception was whether, when push comes to shove, courts will expand their understanding of the purposes of immigration detention, such that a non-citizen deemed dangerous can be held in immigration detention despite the fact that there is no real prospect of removal in the reasonably foreseeable future. This was effectively what the

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108 Al-Kateb, supra note 10 at para 29, Gleeson CJ; and see at para 140, Gummow J, in relation to the power to make detention orders under the defence power such as those considered in Little v Commonwealth (1947) 75 CLR 94.

109 Zadvydas, supra note 66 at 696.


111 Zadvydas, supra note 66 at 714.
Supreme Court of Canada did in *Charkaoui* and was the approach adopted by Lord Woolf CJ in the Court of Appeal’s *Belmarsh* decision.

Kennedy J’s dissent in *Zadvydas* showed one way in which the tension could be resolved, by treating immigration detention as an aspect of a broader protective power that can be invoked independently of the prospects for removal. He reasoned that ‘the motivation to protect the citizenry from aliens determined to be dangerous is central to the immigration power itself’. In the context of his judgment, this was not to make the uncontroversial point that the risk posed by a non-citizen can ground deportation where no equivalent action can be taken against a citizen posing a similar risk. Rather, he made the highly controversial claim that the risk posed by a non-citizen can justify his or her detention irrespective of the prospects for removal when there was no equivalent power to detain a citizen posing the same risk.

His reasoning aligned with the majority in *Al-Kateb* in making explicit that non-citizens did not possess a right to liberty: ‘[t]he reason detention is permitted at all is that a removeable alien does not have the same liberty interest as a citizen does…[the majority in *Zadvydas*] cannot bring itself to acknowledge this established position’. Again, Scalia J, also in dissent, approvingly quoted the statement from *Shaughnessy v Mezei* that an alien has no ‘right to remain against the national will. Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government’.

Kennedy J arguably stepped beyond the position articulated in the majority judgments in *Al-Kateb*, when he cut the thread tying immigration detention to the requirement of ongoing purposive activity directed towards removal. In arguing in favour of continuing authority to detain where removal is frustrated, he stated:

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112 *Ibid.* at 713, Kennedy J.
113 *Ibid.* at 717, Kennedy J.
115 Similarly Scalia J treats a final order of removal as dispositive of any right to liberty on the part of the alien, stating that such an order ‘has totally extinguished whatever right to presence in this country he [an alien] possessed’: *Zadvydas, ibid.* at 704 (emphasis in original).
The risk to the community exists whether or not the repatriation negotiations have some end in sight; in fact, when the negotiations end, the risk may be greater. The authority to detain beyond the removal period is to protect the community, not to negotiate the aliens’ return. The risk to the community survives repatriation negotiations.\textsuperscript{116}

This was a candid statement of the primacy of protective purposes in legal thinking supportive of the indefinite administrative detention of non-citizens.

There is another way of resolving the inconsistency noted by Kennedy J between the \textit{Zadvydas} majority’s conception of immigration detention as defined by the reasonable foreseeability of removal on the one hand and its allowance for a terrorism exception on the other. And that is to reject the terrorism exception. The majority of the House of Lords adopted this second course in \textit{Belmarsh}. They held that the indefinite detention of foreign terrorist suspects, in circumstances where they posed no greater risk than nationals, was both disproportionate and discriminatory. The achievement of the House of Lords in \textit{Belmarsh} was to directly address the ambivalent relationship between immigration and national security and treat them as distinct areas of legal regulation.

\textbf{6.4.2 From constitutional limits to a cost-benefit analysis.}

The previous section depicts national security concerns as pushing for an expansion in the scope of immigration detention. The other side of this dynamic is that claims for an expanded conception of immigration detention with reference to national security, when successful, can be understood to have been pushing at an open door. An understanding of immigration detention broad enough to accommodate the security concerns raised was readily available. I briefly expand on this point in this section, before developing an account of the underlying legal position of non-citizens subject to a removal order in Part II.

Where there has been a shift in the case law, from an insistence on temporal limitations (the rights-protecting approach) to allowing for indefinite detention, the new legal position has been reconciled with the old by draining the requirement that detention be for a ‘reasonable’ period of meaningful content. In effect, immigration detention of any

\textsuperscript{116} \textit{Ibid.} at 708, Kennedy J.
duration becomes presumptively ‘reasonable’. This issue was examined in Chapter 4 in looking at the Canadian Supreme Court’s claim that its reasoning in Charkaoui was consistent with that in Hardial Singh and Zadvydas.\textsuperscript{117} The Canadian Supreme Court re-characterized the constitutionally motivated time limits arrived at in the two earlier comparative authorities in terms of an almost endlessly pliable concept of ‘reasonableness’. John Finnis described the open-ended concept of the ‘reasonableness’ of ongoing detention pending deportation employed by the Court in Charkaoui well. He wrote:

To grant that the phrase “within a reasonable period” imports a “temporal restriction” is by no means to concede that, in the concrete circumstances of an ongoing threat involving the deportee and ongoing efforts to deport, there is some identifiable length of time beyond which detention has exceeded “a reasonable period”. In circumstances of such a kind, such detention might reasonably last even, in principle, indefinitely: see Charkaoui\textsuperscript{118}

To which one might respond, what kind of temporal restriction is that? Both Finnis and the Court in Charkaoui failed to take seriously the fact that in those earlier authorities the ‘reasonable foreseeability of removal’ was seen a criterion limiting the duration of detention pending deportation, and required by constitutional principle.\textsuperscript{119} As outlined in the discussion of Zadvydas in the preceding section, the majority judgment in that decision sent mixed messages. In Charkaoui, the Court effectively chose to follow the suggestion contained in the reference to the terrorism exception,\textsuperscript{120} that the limitation of ‘reasonable foreseeableability’ could be disregarded in the terrorism context. In Charkaoui, the earlier authorities of Zadvydas and Hardial Singh were presented as having done no more than make a practical assessment of what was ‘reasonable’ at the time, of limited relevance in the light of changed circumstances, notably an increased threat to security. What in the original decisions had been stated as generally applicable limits on the duration of detention pending deportation, were re-characterized as judicial assessments

\textsuperscript{117} See Chapter 4, Section 4.3.3.
\textsuperscript{119} In Hardial Singh, supra note 67, it was ‘constitutional’ in the sense that it drew on a common law presumption in favour of liberty to read the statute as subject to an unexpressed temporal limitation.
\textsuperscript{120} I say ‘effectively’ as the Canadian Supreme Court made no reference to the terrorism exception discussion in Zadvydas, simply treating the decision as a whole as standing for a wide conception of reasonableness (where this in fact better represents the dissenting judgments in Zadvydas). See further Chapter 4, section 4.3.3.
confined to the particular case. This shift proceeded on the basis that immigration detention is, and was, in some fundamental sense, a power for the protection of the citizenry, and that the citizenry’s protective needs will shift over time. The view of citizenship that informs this understanding of immigration detention is the subject of Part II.

Part II.

In Part II of the Conclusion, I engage with the most fully developed justification for the rights-precluding position in the literature, contained in a 2007 article by legal philosopher John Finnis, ‘Nationality, Alienage and Constitutional Principle’. Finnis offered a moral/political rationale for the legal hierarchy between citizens and non-citizens expressed in the rights-precluding approach. He argued that the precluding model rests on the view that a citizen’s right to be protected against risk trumps a non-citizen’s right to liberty, and mounted a defence of that position. A lower tolerance for the risks posed by non-citizens was ultimately justified on the basis that it was necessary to define a group, citizens, between whom could develop the solidarity that enables the social goods of the modern liberal democratic state. He stated:

Much recent political theory shows how equal laws, public probity, impartial government, social justice and democratic deliberation towards the undertaking of collective commitments and obligations and international action all depend upon – and in turn foster – a generalised trust sufficient to outweigh competing bonds of kin, caste, religion or ethnicity, a level of trust and common sympathies attainable only within bounded political communities, nation states. The distinction between nationals and aliens is an indispensable framework for articulating, expressing, ratifying and demanding such willingness to share, such awareness of being part owner of a shared inheritance and future, such integration in and assimilation to this nation state rather than some other.

121 A not dissimilar move is effected by the Al-Kateb majority’s treatment of the constitutional limits indicated in Lim: see section 2.5.2.
122 Finnis, supra note 118.
123 Ibid. at 444. An issue not taken up in this thesis is the extent to which there is any empirical foundation for the views Finnis expresses in this quote. Finnis does not offer any. Melissa Williams’ comments are apposite, a ‘further difficulty in these arguments is that they present the necessity of shared identity for democratic citizenship as a normative-theoretical claim derived from a conceptual analysis of citizenship, when it fact it only makes sense as an empirical claim – or, rather, several empirical claims bundled together.’: see Melissa S Williams, ‘Nonterritorial boundaries of citizenship’ in Seyla Benhabib, Ian Shapiro and Danilo Petranovic, eds, Identities, Affiliations and Allegiances (Cambridge: Cambridge University Press, 2007) 226 [Williams] at 235.
The concept of citizenship contained in the quote is doubly exclusionary. ‘[i]t designates non-members by defining members’ and ‘it...recognizes an association that is expected to exercise power in the interests of members with less concern for the interests of non-members’.

Exclusionary citizenship was taken to create the framework for national community characterised by a ‘willingness to share’ and to mandate the indefinite detention of irremoveable non-citizens who posed a risk to the citizenry.

Finnis’ paper was, centrally, an argument for the existence of a ‘constitutional principle’, which he labelled ‘nationality-differentiated risk-acceptability’. This constitutional principle was argued to justify the legal position that I have called the rights-precluding model. He argued that the principle served to justify the reasoning of the majority in Al-Kateb and, though it was less central to his account, that of the Canadian Supreme Court in Charkaoui. The principle’s formulation came to rest in his statement that:

the nation does not have to accept from foreigners the same degree of risk as it accepts from its nationals (who by reason of their nationality are undeportable), and may obviate the risk from foreigners by their deportation and detention ancillary to deportation.

Critically, detention ancillary to deportation was unambiguously taken to extend to indefinite immigration detention.

6.5 Finnis’ constitutional principle.

There were three components to Finnis’ argument for his constitutional principle: that it had explanatory force in relation to current law (the legal argument); that it had historical support (the historical argument) and; that there was a compelling normative case for the principle (his rationale for the rights-precluding model). The first two arguments are outlined and critically considered in this section. His rationale for the principle is then considered separately in section 6.6.

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125 Finnis, supra note 118 at 438.
6.5.1 Nature of a ‘constitutional principle’.

Finnis’ legal argument is already familiar to the reader. He offered a careful account of the rights-precluding model, making use of Al-Kateb in developing his position. He argued that authority for detention of non-citizens subject to a deportation order required only that the government ‘keep trying’ to remove the relevant non-citizen. His contribution was to offer the best justification for the precluding model, and to clarify its operation. In this section I focus on the latter contribution. I have argued that in Al-Kateb, the majority judgments were animated by the view that the field of immigration was governed by a set of presumptions that did not operate in the general law: expansive conceptions of executive power, minimal judicial review and the attenuated operation of constitutional norms protective of the individual. These presumptions were effectively the background premise from which the majority reasoned. They were, however, only implicit in the reasoning. Finnis foregrounded a plausible candidate for such a background premise in the form of his constitutional principle of nationality-differentiated risk-acceptability.

The constitutional status of the principle was central to Finnis’ account. He stated that ‘constitutional principles and rights prevail over ordinary norms of statutory interpretation; the presumption that statutes do not overturn these rights and principles qualifies the ordinary subordination of common law to parliamentary authority’. In other words, constitutional principles were equivalent to fundamental common law rights. They were presented as functioning in the same way as such rights in statutory interpretation, anchoring strong presumptions that ‘qualify the ordinary subordination of common law to parliamentary authority’. The difference was that what was being asserted was not a right or liberty of the individual, but a right on the part of a state (the right to exercise a power to exclude, admit and deport aliens).

126 The best fit with Finnis’ position in the jurisprudence reviewed in the thesis is the argument of the United Kingdom before the ECtHR in A v United Kingdom, supra note 26, discussed in Chapter 5, section 5.2.
127 Finnis, supra note 118 at 422.
128 Ibid. at 417.
129 For judicial agreement with Finnis’ contention that competing constitutional fundamentals are involved in cases of indefinite administrative detention of non-citizens see Laws J: ‘First, we are dealing, as I said at
Finnis made explicit that the reason for insisting on the status of ‘constitutional principle’ was to ensure equivalence between the state right asserted and fundamental common law rights of individuals:

But unless [it] is understood to be a constitutional principle, or the instrument of constitutional principle, the power [to admit, exclude and expel aliens] will crumble, eroded by newly enforceable constitutional principles of equality before the law, and by rights as ancient as liberty (immunity from coercion or imprisonment) or as newly fecund as “to respect for [one’s] private life”.

The power to admit, exclude and expel aliens needed to have the status of constitutional principle if it was to avoid erosion by the current constellation of fundamental rights.131

His account can be employed to modify my characterization of the majority reasoning in Al-Kateb in a way that helps us to better understand what drives the judgments. In my description of the judgments, I have portrayed Gleeson CJ’s dissent as the standard bearer for the legal influence of unwritten constitutionalism. Conversely, I have characterised the majority as being motivated by concerns particular to immigration to exclude common law principle. The majority required an ambiguity on the face of the statute before it would have recourse to the relevant common law presumptions. I argued that this position was best explained by the majority’s view that the issuance of a removal order extinguished a non-citizen’s right to liberty, and accordingly common law principle had no role to play. Finnis’ account suggests how this last point, the view that non-citizens did not possess a right to liberty once a removal order had been issued,132 might itself be plausibly regarded as a strand of common law constitutionalism. On this view, it is not so much a question of the presence or absence of common law constitutionalism

the outset, with the tension between two constitutional fundamentals: the abhorrence of executive detention and the State’s duty to safeguard its citizens and its own integrity”: see A v Secretary of State for the Home Department [2004] EWCA Civ 1123 at para 234. In this decision, handed down on 11 August 2004, Laws J proceeded on the basis that the derogation at issue in the Belmarsh litigation met the criteria under Art 15 of the ECHR.

130 Finnis, supra note 118 at 417.

131 The first two principles nominated by Finnis as eroding his constitutional principle, namely ‘equality’ and ‘liberty’ were central to the reasoning in Belmarsh. In relation to the third, the right ‘to respect for [one’s] private life’, Art 8 of the ECHR on respect for private and family life has been repeatedly been successfully invoked to resist deportation: Elspeth Guild, The Legal Elements of European Identity: EU Citizenship and Migration Law (The Hague: Kluwer Law International, 2004), chapters 4 and 7.

132 The point is in fact more general, in that revaluation of non-citizen’s rights authorised by Finnis’ principle is not confined to the right to liberty.
from the interpretive framework that is at issue between the precluding and protecting accounts, but its content.

6.5.2 Historical derivation of the principle.

Finnis sought to give his constitutional principle solid historical grounding, showing how it cohered with, and grew out of, the common law legal orders in question. In doing so, he acknowledged a prominent common law tradition with which his constitutional principle had to contend. He noted that ‘foreigners within the realm (speaking always of non-enemy aliens) enjoy the subject’s common law right to freedom from every act of a government servant or agent which if done by a private person would be a tort.’. On this characterization of the common law position, the question was not, does the non-citizen have a right to remain, but ‘did the respondent/defendant have legal authority to remove him?’ Finnis allowed that positive statutory authority was at one point in time required for any such action, referring to Dicey’s position that if foreign anarchists suspected of plotting to blow up the Houses of Parliament could not be put on trial, there was ‘no means of arresting them, or of expelling them from the country’.

He then stated ‘[b]ut when Dicey last passed this passage for the press in 1908, the law had begun to leave him behind.’ With the twentieth century, Finnis’ constitutional principle rose to prominence. The legal form this principle took was unclear. It appeared to be latent in a prerogative of expulsion, and had, over the last century, been given powerful support by statute. Indeed, the relevant twentieth century statutory developments were treated as themselves a source of constitutional principle.

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133 Finnis, supra note 118 at 419. For a discussion of the contemporary legal significance of this principle see Karen Knop, ‘Citizenship, Public & Private’ (2008) 71 Law & Contemp. Pros. 309 [Knop]. Statements that the non-citizen (or more specifically, the non-enemy alien) was not an outlaw were intended to encapsulate this principle. Such statements were the express starting point for the substantive reasoning in both Chu Kheng Lim and Al Masri.


135 A. V. Dicey, Introduction to the Study of the Law of the Constitution (1st ed, 1885) at 239-240; (7th ed, 1908) at 226-227, quoted in Finnis, supra note 118 at 419.

136 Finnis, supra note 118 at 420.
In relation to the argument from the prerogative, Finnis maintained that the Privy Council decisions of *Attorney-General for Canada v Cain*\(^\text{137}\) and *Johnstone v Pedlar*\(^\text{138}\) had supplied ‘constitutional foundations’ for the expulsion of suspected foreign terrorists. These authorities either left open, or adverted to, the possible existence of a relevant prerogative power. He supplemented his case for a prerogative of expulsion with reference to Holdsworth.\(^\text{139}\) The central theme of his account was that, since the beginnings of the twentieth century there had been an increasingly vigorous assertion of a ‘power of the State’ to expel, and that the rise of this power had clarified or confirmed what was previously ambiguous, namely that the presence of a non-citizen within the jurisdiction was conditional on their proper conduct. A non-citizen was liable to removal or exclusion for ‘recalcitrant failure to assimilate his conduct, in matters of weight, to the particular conceptions of common and public good that are embodied in our constitution and law’.\(^\text{140}\) On Finnis’ account, the presumption had shifted from the need for statutory authority to remove (in the absence of which forcible removal would be false imprisonment) to a presumption of authority to remove.

The argument from legislation held that twentieth century immigration statutes defined a ‘constitutional scheme’ with ‘two legal constitutional principles, each resting on a moral constitutional principle’.\(^\text{141}\) The first of these legal constitutional principles was that non-enemy aliens present within the realm have all the rights and obligations of citizens, subject to their vulnerability of removal; the second was that a citizen could not be excluded from the realm. The moral constitutional principle on which they rested was the constitutional principle of nationality-differentiated risk-acceptability.

Finally, Finnis suggested that the detention of foreign terrorist suspects should be conceptualized in terms of the wartime detention of enemy aliens. He did not claim that

\(^{137}\) [1906] A.C. 542 [*Attorney General for Canada v Cain*].  
\(^{138}\) [1921] 2 A.C. 263 [*Johnstone v Pedlar*].  
\(^{139}\) Holdsworth, Hist.x, 393-400, quoted in Finnis, *supra* note 118 at 420 n.17.  
\(^{140}\) Finnis, *supra* note 118 at 418.  
\(^{141}\) *Ibid.* at 422.
the foreign terrorist suspects in *Belmarsh* were ‘enemy aliens’. He did, however, suggest a possible analogy between the indefinite administrative detention of foreign terrorist suspects and the wartime internment of foreign nationals. In his final footnote on detention, appended to a statement that the constitutional principle warrants non-citizens being ‘kept apart from the community by humane detention or control’, Finnis wrote:

> The liability of enemy aliens – a category not considered in this article, and hitherto conceived of as nationals of a state at war with ours – to statutorily authorised detention in time of war might be understood as a form which that liability to removal reasonably takes when circumstances prevent (or make unreasonable) actual removal.

This characterization prepares the way for wartime internment as a precedent for detention of non-citizens subject to removal orders. This was a recurrent tendency in the rights-precluding judgments. Both McHugh J in *Al-Kateb*, and Brooke LJ of the Court of Appeal in *Belmarsh*, drew on wartime internment to justify the legality of the indefinite administrative detention of non-citizens.

### 6.5.3 Criticisms of Finnis’ arguments.

Finnis derived a general principle of nationality-differentiated risk acceptability from the existence of powers of expulsion and immigration detention in relation to non-citizens on the one hand, and the prohibition on the banishment of citizens on the other. The principle was then fed back into the analysis to licence expansive readings of the relevant powers over non-citizens. A basic problem with this reasoning is that the generalisation he arrived at to explain those legal positions, his principle, had at least one competing justification that also claimed to explain the same set of facts: that offered

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142 Finnis noted, with reference to Coke, that ‘the supposed incapacity of aliens to pursue personal actions at law was limited, … to enemy aliens: subjects of a state at war with the crown’: *ibid.* at 419. For a contemporary reaffirmation of the incapacity of enemy aliens to pursue personal actions, with an emphasis on the view that ‘there is no warrant for extending it [the status of enemy alien] to modern armed conflict not involving war in the technical sense.:’ see *Amin v Brown* [2005] EWHC (Ch) 1670 at para 46. For a discussion to the effect that the modern restrictions on ‘war in the technical sense’ effectively preclude the use of the category of ‘enemy alien’ see Knop, ‘Citizenship’ *supra* note 133.


144 See the discussion in Chapter 3, section 3.11.2

145 A similar pattern of argument was found in the *Al-Kateb* majority’s reasoning for ‘segregation from the community’ as a distinct rationale for immigration detention: see Chapter 2, section 2.5.2.
under the rights-protecting model. The competing explanation might be stated this way: The nation does not have to accept from foreigners the same degree of risk as it accepts from its nationals, and may obviate the risk from foreigners by their deportation, to the extent that another country can be found to which it is appropriate to remove the non-citizen, and this removal, and processes ancillary to it, do not disproportionately impinge on the non-citizen’s fundamental rights. Finnis’ concern was that under the weight of these qualifications, the power to admit, exclude and expel aliens ‘will crumble’. But he did not offer any reason why we should think of the power as brittle in this way. The better view is simply that the power has to accommodate the principle of legality.146

Turning to his historical argument, as outlined above, Finnis’ derivation of his constitutional principle appeared to have two bases, an argument from the prerogative, and an argument from legislation. The relationship between the two arguments was puzzling. The prerogative is displaced by legislation. What appeared to link the two arguments was the idea that legislation inherited and continued a set of understandings about the appropriate division of constitutional responsibilities in immigration. It inherited these understandings from an era that viewed the state as being largely unconstrained in the conditions it could set on a non-citizen’s presence and its corresponding powers of exclusion and expulsion. Keeping in play the idea that the right of exclusion or expulsion may be, or even just may have been, a prerogative power lends it weight,147 making it seem like part of the order of things, since time immemorial.148 Further, it links up immigration with the major prerogative powers of defence and foreign policy, colouring it as an area in which extensive deference to the executive is appropriate.149

146 This response to Finnis was developed in conversation with Audrey Macklin.
149 The view of immigration as bound up with foreign affairs featured in Australian government submissions in Al Masri, supra note 2 and was endorsed by members of the majority in Al-Kateb, supra note 10. See also Vincenzi, supra note 134 at 95-96.
An initial problem with Finnis’ argument is that the case for the existence of any prerogative of expulsion or exclusion in the last three hundred years is weaker than he suggested. The decisions he held provided the ‘constitutional foundations’ for the expulsion of foreign terrorists, Attorney-General for Canada v Cain and Johnstone v Pedlar, are best regarded as simply having announced a new exclusionary principle that had not previously existed at common law. One review that carefully examined these two authorities concluded:

the position from an historical examination of the cases appears to be that there are no cases supporting the existence of this supposed prerogative for more than 200 years after the revolutionary settlement of 1688. Then, in 1891, came Musgrove v Chun Teeong Toy, and, in 1906, Attorney-General for Canada v Cain. All of the dicta supporting the prerogative [and this includes the relevant dicta from Johnstone v Pedlar], in so far as any authority is provided, are based, either directly or indirectly, upon those two cases or upon Blackstone.

This matters because ‘prerogatives, by their very nature, must be both of ancient origin and in receipt of continuing judicial recognition’. Finnis also cited Holdsworth in

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150 Finnis stated ‘The issues, decided and undecided, rest today where the Privy Council left them in 1906 and 1921: there is constitutional authority, whether by prerogative or not, to exclude an alien in the interests of the community’s well-being’: Finnis, supra note 118 at 420. This seems even handed, and yet the preponderance of scholarly opinion is against the existence of any such prerogative. Finnis does not refer to this scholarship, and he is highly selective in the cases and authorities to which he draws attention. The deeper problems are those discussed in the text, why we should accept that the principle has the content he ascribes to it, and why should we accept that, if it has that content, it should be resistant to qualification and change.

151 Supra note 137.

152 Supra note 138.


154 Vincenzi, supra note 134 at 105. See also at 97-98, 101-104 where Vincenzi highlights the shaky legal foundations of Musgrove v Chun Teeong Toy [1891] AC 272 [Musgrove v Toy], Attorney-General for Canada v Cain, supra note 137, and Johnstone v Pedlar, supra note 138. At 105-107, Vincenzi presents nineteenth century judicial and extra-judicial statements sceptical of Blackstone’s views of the prerogative and on the exclusion and expulsion of aliens from that period. For Australian commentary on Musgrove v Toy in the wake of Ruddock v Vadarlis (2001) 110 FCR 491, see Chapter 2, section 2.1.

155 Vincenzi, supra note 134 at 105. Finnis quoted a statement from the 1906 Privy Council decision of Attorney-General for Canada v Cain that is in turn, in its entirety, a quote from Vattel. In a detailed historical analysis of the statements of Vattel and other publicists of international law, and how they were used in the foundational United States authorities on immigration law of the late nineteenth and early twentieth century, Nazfiger concluded that ‘the proposition that a state has the right to exclude all aliens is of recent origin’, and where recited often amounted to no more than an unsupported maxim: Nazfiger, supra note 148 at 807. The foundational United States authorities criticised by Nazfiger were in turn notably influential in the development of Australian immigration jurisprudence, which quoted from them extensively: see for example Robtelmes v Brenan (1906) 4 CLR 395 [Robtelmes]. An extended quote from Robtelmes was in turn endorsed near the start of Hayne J’s judgment in Al-Kateb.
support of a prerogative of exclusion and expulsion. He did not record that ‘many important constitutional writers have denied or doubted the existence of any prerogative in relation to friendly aliens, including Coke, Hale, Brougham, … Erskine May, Clarke, Craies, Oppenheim and de Smith’. Turning to Finnis’ argument from statute, his exercise of deriving broad ‘legal constitutional principles’ from an extensive, complex, and frequently amended statutory scheme was fraught with difficulty. But there was a more basic problem. The reason why these statutes should have determined, or continue to determine, the content of unwritten constitutionalism was left undeveloped. The point can be made by a comparison between Finnis and the central object of his criticism, the majority of the House of Lords in Belmarsh.

Like Finnis, Lord Bingham allowed a ‘historic right of sovereign states over aliens entering or residing in their territory’, stating ‘[h]istorically, this was the position’. Lord Bingham continued: ‘[b]ut a sovereign state may by international treaty restrict its absolute power over aliens within or seeking to enter its territory, and in recent years states have increasingly done so’. Both Finnis and Lord Bingham overplayed the contrast between ‘the historical position’ and the legal position established under international treaty obligations. The difference is that where Lord Bingham reported his understanding of the historical position, and supplied reasons for its adjustment and change, Finnis exerted himself to establish a reasoned foundation for its reinvigoration.

156 Finnis, supra note 118 at 420 n. 17.
157 Vincenzi, supra note 149 at 105. The ellipse is for Dicey, whom Finnis does acknowledge as holding a contrary view. On the other side of the debate, Vincenzi noted that Haycraft allowed for the fullest prerogative, and Chitty accepted a prerogative confined to expulsion. The reference to ‘friendly’ aliens follows the common law distinction between enemy and non-enemy, or friendly, non-citizens.
159 Belmarsh, supra note 30 at para 69, Lord Bingham.
160 Further, in doing so, Finnis glossed over the potential, and highly relevant, complexities of ‘the historical position’. Even during the heyday of expansive executive discretion over immigration in the first
Attitudes toward the prerogative change, the nature (and existence) of constitutional principles shifts. What is needed is an argument as to why change should be embraced or resisted. Finnis’ rationale for the constitutional principle of nationality-differentiated risk-acceptability, discussed in the next section, was his argument against the current trajectory of change.

6.6 Finnis’ rationale for the rights-precluding approach.

6.6.1 Citizenship as membership.

(a) Solidarity between citizens.

In describing Finnis’ rationale for the principle of nationality-differentiated risk-acceptability I said that he justified a sharp legal division between citizens and non-citizens on the basis that it was needed to secure solidarity between citizens. ‘Equal laws, public probity, impartial government, social justice, and democratic deliberation’ were all taken to depend on a level of generalised trust. He argued that this trust was best secured between a bounded, and exclusive, citizenry.

In talking of a ‘willingness to share’, and elsewhere of the need to ‘call upon their members sense of identification with fellow members’, it was apparent that Finnis wanted to ‘harness the motivational power of shared identity to the ends of the democratic state’. This national community was seen to be in competition with the bonds of ‘kin, caste, religion or ethnicity’. Allegiance to the national community had to outweigh these competing loyalties, lest the nation state be pulled asunder and ‘the level of trust and common sympathies attainable only within bounded political communities’ be lost. And this was where citizenship came in. It was the obvious

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half of the twentieth century, it was far from clear that commentators of that period shared Finnis’ confidence that a right of deportation was accompanied by extensive powers of immigration detention. On the courts hostility to interference with personal liberty under immigration statutes see for example John Willis, ‘Statute Interpretation in a Nutshell’ (1938) 16 Can. Bar Rev. 1 at 22-23; and Moffatt Hancock, ‘Discharge of Deportees on Habeas Corpus’ (1936) 14 Can. Bar Rev. 116.

161 Finnis, supra note 118 at 444.
162 Williams, supra note 123 at 233.
163 Finnis, supra note 118 at 444.
164 Ibid. at 444.
candidate for the ‘shared identity’ of those in the modern nation state, in some sense above the other, divisive, candidates for identity.

In this section I develop a central problem with Finnis’ rationale for his constitutional principle. The principle was directed at ensuring the solidarity necessary to social goods. But when one attends to the practical consequences of his constitutional principle, as he himself outlined them, there is a strong argument that his principle inevitably serves to undermine the ‘generalised trust’ he prized.

(b) Why citizenship as the criterion of membership?

A principle of nationality-differentiated risk-acceptability and the attendant ‘reasonableness’ of differential application of constitutional rights as between citizens and non-citizens proceed from the idea that only citizens are full members of the polity, with everyone else a guest, on sufferance. An initial point is that citizenship is a highly formal criterion for membership. The equation of membership with citizenship does violence to the way in which the community, understood in any realistic sense, exists. I am not a Canadian citizen, but I have a daughter who is. How would her Canadian citizenship be valued if the rest of her family were deported? A second objection is that the idea of citizenship as membership is a dubious reading of the law. Outside the realm of immigration and the franchise, little distinction is in fact made between the rights of citizens and aliens.

However, the formalism of citizenship might have attendant benefits that outweigh its costs. The apparent rigidity of the citizen/non-citizen distinction might be a source of strength, placing a significant restraint on the government’s discretion to deport those it deems undesirable. This, after all, is the central benefit (for citizens) that flows from Finnis’ constitutional principle of nationality-differentiated risk acceptability –

165 Finnis’ discussion of the fact that his constitutional principle ‘authorises and justifies extensive consequential (side-effect) disruption of such non-nationals’ Art 8 interests in private and family life’ is relevant: see ibid. at 441.

166 This is the conclusion reached after a comprehensive survey in Kim Rubenstein, Australian Citizenship Law in Context (Sydney: Lawbook Co, 2002), chapters 5 and 6.
‘foreigners can be deported; nationals cannot’.\textsuperscript{167} The downside of this principle for members of the ‘out’ group might be offset by the benefits for those forming the ‘in’ group.\textsuperscript{168}

In what follows I argue that treating citizenship as defining the scope of constitutional protections threatens to deliver the inflexible harshness of a formalist approach without securing any attendant strength of protection for those (or all of those) who are designated citizens. The formal status of citizenship turns out to be more manipulable than those relying on their citizenship for protection might hope, and manipulable with reference to government conceptions of the ‘public good’. The manipulability of citizenship with reference to this criterion is closely related to the attempt to have citizenship serve as a form of shared identity. For citizenship to provide a shared identity, it must be given some content, and this is where the detail, and normative consequences, of Finnis’ argument become disquieting. He provided a compelling example of how ‘the activity of specifying the content of citizen identity lures us, seemingly irresistibly, to look for those whose identity has the wrong content in order to protect the political culture from dilution or worse.’\textsuperscript{169}

Before proceeding, it is as well to clarify my own commitments. I agree with Finnis that the state remains vital to redistributive welfare and democratic politics. However, I do not think either he, nor others advancing a ‘rights-precluding’ approach, are persuasive in their view that a state will lose control over its borders, or be unable to address the threat of terrorism, if close scrutiny for violation of constitutional norms is extended to immigration, and to arguments for the differential treatment of non-citizens.

\textsuperscript{167} Finnis, supra note 118 at 442.
\textsuperscript{168} An additional response, that any line between members and non-members is liable to give rise to accusations that it is over or underinclusive in relation to various cases on either side of the line, is unconvincing. There are categorisations of the ‘in’ group that would do less violence to the lived experience of the community than citizenship. Permanent residence could, for example, replace citizenship as the category protected against expulsion.
\textsuperscript{169} Williams, supra note 123 at 234.
6.6.2 Circumventing the protection of formal status: Citizenship stripping.

(a) Use of citizenship as a weapon, and the limits on this tactic.\textsuperscript{170}

The power to deprive a British citizen of that status was, in amendments that came into force in April 2003, extended from those who had acquired citizenship by naturalization or registration, to those who had acquired it by birth.\textsuperscript{171} Further amendments, coming into force in June 2006, allowed for the deprivation of British nationality, or rights of abode, on the ground that such action would be conducive to the ‘public good’.\textsuperscript{172} ‘Public good’ replaced the previous, narrower, criterion that the person concerned had done something ‘seriously prejudicial to the vital interests of the United Kingdom or a British Overseas territory’.\textsuperscript{173} ‘Public good’ is also the relevant statutory phrase employed in relation to deportation and exclusion, actions which are presumably intended to follow on deprivation of citizenship.\textsuperscript{174} The upshot is that anyone who is presently a citizen of the United Kingdom can be stripped of that status and deported, provided that doing so does not render him or her stateless. In this way, the prohibition on banishment, one of the rules that Finnis stated to flow from his constitutional principle, can be circumvented. The distinction between nationals and non-nationals, central to the Finnis article, is not fixed, but is, to an extent, at the mercy of the government’s conception of the ‘public good’.

The provision for deprivation of British nationality observes the international prohibition on the creation of statelessness, and accordingly is only applicable to those with more

\textsuperscript{170} For a characterisation of the citizenship measures detailed as a ‘weapon’ see Clive Walker, ‘The Treatment of Foreign Terrorist Suspects’ (2007) 70 MLR 427 [Walker, ‘Foreign Terrorist Suspects’] at 439. That article further discusses a number of the provisions detailed under this heading at 439-441.

\textsuperscript{171} British Nationality Act 1981, c 61 [BNA], s 40(2) as substituted by the Nationality, Immigration and Asylum Act 2002, c 41, s 4(1) which came into force on 1 April 2003. Provided such deprivation does not render the individual stateless: BNA, s 40(4). This qualification is discussed in the text below.

\textsuperscript{172} BNA, ibid., s 40(2), as amended by the Immigration, Asylum and Nationality Act 2006, c 13 [IAN], s 56 (re nationality), and Immigration Act 1971, c 77, s 2A as inserted by IAN, ibid., s 57 (re right of abode).

\textsuperscript{173} The formulation ‘conduct seriously prejudicial to the vital interests of the State Party’ was taken from the European Convention on Nationality (Strasbourg, 6 September 1997) E.T.S No 166.

\textsuperscript{174} Immigration Act 1971, c 77 s 3(5)(a). For a discussion of the grounds for deportation or expulsion with reference to the expanded list of ‘unacceptable behaviours’ related to terrorism, implemented in August 2005 see Walker, ‘Foreign Terrorist Suspects’, supra note 170 at 434. He notes that an earlier version of the guidelines included as an unacceptable behaviour ‘expressing what the Government considers to be extreme views that are in conflict with the UK’s culture of tolerance’, but this was subsequently dropped: Ibid.
than one nationality. This means that the citizenship stripping provisions will primarily impact on British citizens whose immigrant background is in the more recent past. This limit on the citizenship stripping provisions also means that the true limit on the government’s power of expulsion is not its inability to deport those who are currently citizens, but its inability to deport those citizens who cannot be stripped of their citizenship. The limit on the government’s power of expulsion is international law’s prohibition on statelessness.

Finnis presented his account as one of the reciprocal obligations between a state and its members. But it would be equally accurate to characterize him as having offered an account of what a state can get away with in respect of (shifting) those currently its members, without falling foul of an orderly international filing system of which it is a part. The limit (statelessness) was transformed into an account of membership by way of the idea that each state has a distinct population for which it is primarily responsible.

It was this vision, of each state as having a distinct population, with no overlapping, and each individual having a clear hierarchy of allegiance, with all other loyalties subsidiary to loyalty to the state, that animated Finnis’ account. He extolled the virtues of ‘integration in and assimilation to this nation state rather than some other’. It was a jealous citizenship that he had in mind. His concern for allegiance to the state, and his alarm at competing sources of affiliation, led him to an exclusive concept of citizenship under which every inhabitant on earth has his or her allocated place, and was only secure in that allocated place. His account was indifferent as to whether one finds oneself

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175 Section 56 amends s 40 of the BNA, supra note 171, subsection 4 of which states ‘The Secretary of State may not make an order [to deprive a person of citizenship status] if he is satisfied that the order would make a person stateless’.
177 Finnis, supra note 118 at 444.
178 I agree with Finnis that ‘statelessness is an anomaly, a disability, and presumptively an injustice, to be systematically minimised.’: Ibid. at 442. See further Stephen H Legomsky, ‘Why Citizenship?’ (1994) 35 Virginia J of Int’l L. 279 at 300. Where I disagree is in the emphasis placed on the exclusivity and primacy of allegiance to ‘one’ state.
a citizen of a relatively rights respecting liberal democracy, or of an oppressive regime.\(^{179}\)

But the issue on which I want to focus is the way in which this vision threatens the very ‘generalised trust’ that Finnis saw the distinction between nationals and non-nationals as serving.

(b) **Equality of citizenship?**

Early in his article, Finnis outlined the application of his constitutional principle to citizens, stating that ‘the political community…cannot shift to other communities the risks presented by one of its own nationals’.\(^{180}\) To this reassuring statement (for citizens) he footnoted the comment ‘[d]ual nationality would be accommodated by a more precise statement of this principle’.\(^{181}\) As I raised earlier, stating the principle ‘more precisely’ seems likely to have the consequence that all those citizens who are dual nationals are, like non-citizens, also vulnerable to deportation. There is simply an intervening step, the deprivation of citizenship. With this qualification, the group whose safety and solidarity is secured by the prohibition on banishment has shrunk to those who possess United Kingdom nationality alone. Dual nationals, disproportionately more recent immigrants, are now vulnerable to being placed outside the circle of membership. We are left with concentric circles of membership: non-citizens, dual nationals, and then sole nationals, with only the last protected from expulsion.

Reflection on the position of dual nationals gains urgency from the recent statutory changes made to citizenship law in the United Kingdom. In his concluding paragraph, Finnis alluded to:

> the deeper challenge to constitutional order and theory posed by nationals who regard their nationality as a form of alienage because, doubtless like some if not all the detainees in *A v Home Secretary*, they believe their true Nation lies altogether beyond – but is ordained to have dominion over – the bounds and territories, and the constitutional principles and rights, that frame and structure our nation’s common good.\(^{182}\)

\(^{179}\) Or of a country where the state is unable to secure the rule of law.

\(^{180}\) Finnis, *supra* note 118 at 422.

\(^{181}\) *Ibid.* at 422 n.30.

\(^{182}\) *Ibid.* at 445. The source of Finnis’ attributions to the *Belmarsh* detainees is not provided.
In the context of the current British citizenship stripping provisions, Finnis’ musings on those ‘who regard their nationality as a form of alienage’, reads as a self-fulfilling prophecy, a threat and an intimation of what is going to happen to them. The idea of ‘competing bonds of kin, caste, religion or ethnicity’ was here boosted to the level of a looming existential threat. Following the trail of comments and footnotes left by Finnis, one is left with the uncomfortable sense that just under the surface of his argument was the conviction that ‘Islamism’ is contrary to the ‘common good’, and that its adherents could have no place in the polity. The valorization of the bonds of citizenship, introduced by Finnis in inclusive terms as ‘enabling a willingness to share’, of serving the interests of integration, becomes in operation a tool of exclusion. Those who are deemed to show a ‘recalcitrant failure to assimilate [their] conduct, in matters of weight, to the particular conceptions of common and public good that are embodied in our constitution and law’ are expelled from the national community, provided that in doing so, they are not rendered stateless.

The practical operation of Finnis’ constitutional principle as detailed above, illustrates the very real dangers of treating membership of the community and entitlement to key rights as conditional on the observance of the public good. More generally, it shows how the idea that government power should be exercised in the interests of ‘members’, with less

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183 To the phrase ‘constitutional principles and rights’ quoted in the text, Finnis footnoted a reference to the Cairo Declaration on Human Rights in Islam, highlighting provisions giving precedence to Shariah law, and a passage from his article ‘Religion and State: Some Main Issues and Sources’ (2006) 51 Am. J of Jurispr 107 [Finnis, ‘Religion and State’] at 122-127. In the referenced pages from ‘Religion and State’, confident of his grasp and evaluation of Islamic theology and practice, diversity and influence, he stated at 123: ‘Radicalized, in ways that have not convincingly be shown to be unfaithful to the core texts or traditions of Islam’s purported divine communication, these two forms [Sunni and Shi’ite] can together be called Islamism...’ (see also for example at 109 n 2). Finnis made repeated reference to the expulsion of ‘functionaries’ (at 125-126) and ‘adherents’ of such a religion, concluding the relevant section with the statement:

‘If a religion treats coercion of its own adherents, or potential adherents, or of anyone else as permissible, let alone mandatory, it is a standing incitement to violate the rights of others and public order, and those who adhere to it faithfully are rightly liable, in principle, to be kept or, where morally possible, removed as far as is necessary from political communities that acknowledge the right to religious freedom’ (at 127).

There was no mention here of citizenship as a barrier to such removal.

In ‘Nationality, Alienage and Constitutional Principle’, Finnis, after stating that deportation of all alien blacks, females or homosexuals would be discriminatory, only conceded that deporting ‘all...alien Muslims would be presumptively unreasonable discrimination’ [my emphasis], and footnoted page 127 of the ‘Religion and State’ article to this comment: see Finnis, supra note 118 at 441 n. 98.

184 Finnis, supra note 118 at 418.
concern for the interests of non-members, threatens to undermine a key justification for Finnis’ constitutional principle, that it helps to constitute and maintain a community marked by ‘generalised trust’.

6.6.3 Jumping the citizen/non-citizen divide.

As is exemplified by the last paragraph of Finnis’ article, the differential treatment of the fundamental rights of non-citizens is not simply directed at their legal status as foreigners, but at their status as carriers of foreign ideas, purported to be incompatible with the health of the body politic. Finnis’ stated concern was to rehabilitate the legal significance of the distinction between citizen and non-citizen. However, this goal was undermined by his anxieties about competing allegiances. These anxieties led him to advocate circumventing the protections of citizenship by stripping a dual national of that status and deporting him or her.

However, once the idea has taken root that those with threatening ideas have forfeited their membership in the polity, as reflected in their entitlement to fundamental rights, there is no reason for the consequences to be confined to dual nationals. The historical tendency for oppressive measures, initially employed against non-citizens, to subsequently be employed against citizens, has not been a theme of my thesis, but needs to be adverted to.

6.7 Conclusion.

The central theme of the comparative work done in this thesis is that differences in judicial mindset, rather than any difference in legal structure, have been determinative of the legality of the indefinite detention of non-citizens who are subject to a removal order. Within the legal structures of each jurisdiction the question arose as to whether the administrative detention of non-citizens, in circumstances where there was no real prospect of removal in the reasonably foreseeable future, constituted detention for the

185 See supra note 182.
186 A historical account of the tendency for oppressive measures to ‘cross the citizen-non-citizen divide’ is contained in David Cole, Enemy Aliens, supra note 63 at Part 2.
purposes of deportation. Where it was held that it was for the purpose of deportation, authority for detention was upheld. Where it was held that it was not for this purpose, detention was found to be unauthorised or incompatible with rights. Implicit, and sometimes explicit, in these different understandings of the nature of the detention of a non-citizen subject to a removal order were different views of the legal position of non-citizens. In the case law of each jurisdiction, the distinction between the legal models centred not on fundamentally different understandings of the legal context in general, but rather on fundamentally different understandings of the rights of non-citizens. The rights-protecting judges reasoned on the basis that there was a right while the rights-precluding judges did not.

Finnis provided a developed account of the way in which the rights-precluding model is a function of the view that non-citizens are conditional subjects. On this view of the reciprocal relations between state and non-citizen, the state is entitled to revoke the liberty of a non-citizen when it has made a valid decision for his or her removal. To subject immigration, and more particularly the detention of a non-citizen subject to a deportation order, to the normal constitutional constraints threatened the enterprise of constructing a stable community of character, marked by generalized trust and common sympathies.

The competing vision of the relationship between state and non-citizen that informs the rights-protecting model sees individual rights as presumptively applying to all official action. Immigration is not tasked with preserving or defining any particular group identity. It has a range of regulatory purposes, social, economic and moral. But in pursuing these purposes, the government is subject to constraints of legality no different in kind from those that operate in less contested areas of domestic administration, and is equally subject to close judicial scrutiny where grave rights infringements are involved.

The understanding that citizenship defines a circle of those entitled to the benefit of full constitutional protections has, as attested to in this thesis, the ability to render what would otherwise be regarded as grave infringements of rights, such as indefinite administrative
detention, untroubling when applied to non-citizens. There is a need to de-link conceptions of who is a rights holder from citizenship. The widespread interest in the cases on indefinitely irremovable foreigners is in no small part attributable to the way in which the legal claims of the detainees push for a de-centring of rights, so that they are not the sole preserve of the citizen. In the jurisprudence, this de-centring was encouraged, resisted, or simply observed. I favour the first response. Enjoyment of fundamental rights, interests and protections, should extend to all within the jurisdiction. Non-citizens should not be categorically denied these protections, and nor should doctrines of institutional deference drain them of all meaning. This position is both promoted as part of international human rights law, as most clearly evidenced in Lord Bingham’s judgment in Belmarsh, and has deep resonances in the common law, as expressed in Gleeson CJ’s dissent in Al-Kateb, and other rights-protecting authorities referred to throughout the thesis. As demonstrated in the rights-protecting authorities canvassed in this thesis, there is no reason why international human rights law and the common law should not mutually strengthen each other in their commitment to subject the differential treatment of non-citizens to close scrutiny, shaping and drawing on constitutional doctrine in the process.

I have argued for one particular proscription on the extent of reasonable differentiation between citizen and non-citizen: that the detention of a non-citizen subject to a removal order must be proportionate to the goal of securing his or her presence at the time of removal, and more specifically, that there must be a real prospect of removal within the reasonably foreseeable future, where this criterion for detention is subject to meaningful

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187 On a similar point see Audrey Macklin, ‘Can We Do Wrong to Strangers?’ in David Dyzenhaus and Mayo Moran, eds., Calling Power to Account: Law Reparations, and the Chinese Canadian Head Tax Case (Toronto, U of T Press, 2005) 60. The judgment of Hayne J in Al-Kateb, supra note 10 serves as an example of blithe indifference to the fate of the non-citizen.


189 An issue that I have hedged in this thesis is whether ‘within the jurisdiction’ just means ‘within the territory of’, or whether it extends to ‘subject to the power of the government of’. In this thesis I have been exclusively concerned with non-citizens within the territorial bounds of the states studied. The issue of whether and if so how the law follows the government outside the territory is a topic for another study.
judicial review.\textsuperscript{190} Beyond that, I have not provided, or intended to provide, any particular guidelines as to the nature and extent of differential treatment between citizens and non-citizens. Rather, my intent with the thesis was to dislodge the ‘easy thought-blocking, definitional weight that the citizenship-as-membership perspective throws up against constitutional questions.’\textsuperscript{191} Freed of that perspective, we can begin to develop more nuanced conceptions of membership and a more expansive conception of law’s protection.

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\textsuperscript{190} I do not mean to exclude front-line review by non-judicial tribunals, as long as the operation of such bodies is in turn subject to meaningful judicial review. Further, such judicial review should be sensitive to the expertise and role of any such review tribunal, in a way that the House of Lords in Secretary of State for the Home Department \textit{v} Rehman [2003] 1 AC 153 (discussed in Chapter 3, section 3.6) was not.

\textsuperscript{191} Aleinikoff, ‘Membership’, \textit{supra} note 124 at 27.
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