

Re Wooley: Ex Parte Applicants m276/2003 by their next friend GS
[2004] HCA 49

The issue in the case was the legality of using s189 of the *Migration Act*, which provides for the mandatory detention of 'unlawful non-citizens' to detain children.

The applicants contended that the provisions of the *Act* under which they are detained were INVALID, and sought orders for habeus corpus, prohibition and injunction to end the detention. They relied on 3 arguments: interpretation of the statute so as not to include children, the argument that the legislation was constitutionally invalid, and that Australia's status as a signatory to the UN *Convention on the Rights of the Child* precluded the authorisation of the detention of children. The High Court dismissed all of the arguments.

1. The Meaning of the Legislation

- The court held that there was no basis for a distinction between children and adults in the Act. There was no ambiguity in the legislation, and a reading down of the provisions not to include children would contradict clear legislative intention. (something the courts are not constitutionally allowed to do – they interpret law, but cannot make it)
- The legislation cannot be found to be invalid on the basis of policy objections to mandatory detention.
 - Nothing can be read into the Act to provide that children are not to be detained.

2. If the Legislation applies to children, is it Constitutionally Valid?

- The applicants contended (based on an argument run unsuccessfully in *Chu Kheng Lim v Minister for Immigration* (1992)) that mandatory immigration detention was a form of punishment by the executive, which is a violation of Ch III of the Constitution, which provides for the separation of powers. Punitive detention is not the role of the executive, but that of the courts. In *Chu Kheng Lim* it was found that immigration detention was not punitive in nature, thus did not constitute a violation of the separation of powers. In this case, the applicants narrowed their arguments to contend that the detention of *children* was punitive, on the grounds that children could not voluntarily end their detention like adult detainees (detainees are allowed to elect to be returned to their country of origin under the *Migration Act*)
- The Court rejected this characterisation of children as a separate class for whom detention was punitive. They said that the decision in *Chu Kheng Lim* did not create any classes of unlawful non-citizen for whom the law applied differently. The character of the power to detain (non-punitive detention by the executive) does not change because of different circumstances of detainees.

3. International Law

- International law is not legally relevant to the meaning of the act or character of immigration detention for constitutional purposes.

The application was dismissed unanimously by the court.