

On 10 June 2026, the High Court handed down the decision of *Abdel-Hady v Commonwealth of Australia* [2026] [HCA 17](#). It is an important decision that leaves the Commonwealth open to tort and damages claims from people who have been indefinitely and unlawfully detained in onshore immigration detention.

Background

Abdel-Hady is an unlawful non-citizen who was detained in immigration detention in 2017 shortly after his visa was cancelled. In 2021, he commenced a legal proceeding seeking, amongst other things, damages for false imprisonment on the basis that he was indefinitely detained. In doing so, he sought to re-open the 2004 case *Al-Kateb v Godwin* (***Al-Kateb***) which effectively held that indefinite immigration detention was lawful and that the Migration Act authorised the detention of an unlawful non-citizen who was detained for removal even though there was no real prospect of removal occurring in the foreseeable future.

On 28 July 2022, the Commonwealth accepted Abdel-Hady was unfit to travel because of a medical condition and therefore could not be removed to Austria, his country of origin. On 8 November 2023, the High Court handed down *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (***NZYQ***) a decision that overturned *Al-Kateb* and found that indefinite immigration detention was unlawful and the Migration Act did not validly authorise officers to keep *NZYQ* in detention. On 13 February 2024, Abdel-Hady was granted a bridging visa and released from immigration detention.

In Abdel-Hady's matter, the Commonwealth admitted that the detention of Abdel-Hady between 28 July 2022 to 13 February 2024 was not authorised under the Migration Act, therefore accepting that the elements of false imprisonment had been established.

However, the Commonwealth sought to rely on the 'common law defence,' i.e. that the Commonwealth and its officers were relying on the High Court's decision in *Al-Kateb* when detaining Abdel-Hady between 28 July 2022 and 8 November 2023 (until *NZYQ* overturned *Al-Kateb*).

What is this decision about?

The High Court considered whether the Commonwealth and its officers have a 'common law defence' to the liability for falsely imprisoning Abdel-Hady for the period between 28 July 2022 and 8 November 2023.

High Court Decision

On 10 June 2026, the High Court made a unanimous decision that there was no common law defence for the Commonwealth for falsely imprisoning Abdel-Hady between 28 July 2022 and 8 November 2023.

The majority, consisting of Gageler CJ, Gleeson J and Beech-Jones J found that to recognise the common law defence would transform the responsibility of a detention officer to comply with the law that limits their powers into an 'immunity' from the consequences of their actions on a person. They also found that critically, a court does not declare the law for the future and any disputed rights or obligations will only ever be fully and finally revealed in retrospect. They also found that if an earlier case is erroneous and it is necessary to overrule it, such as *Al-Kateb*, it is perverse to maintain that it was correct, when it has been acknowledged not to be the law.

This decision has significant consequences for any person who has been detained in immigration detention where there was no real prospect of removal to another country because:

- they are stateless
- they are found to be owed protection
- they cannot be removed due to a practical barrier (e.g. they are physically or mentally unfit for removal)

Any person within this cohort may be able to initiate proceedings against the Commonwealth for damages under false imprisonment because they were unlawfully detained. This decision finds that the Commonwealth cannot rely on *Al-Kateb* as a defence for why they were indefinitely detaining people.

We encourage any person within this cohort to seek legal advice to see what options are available to them.