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Casenote

PLAINTIFF M68/2015 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ORS [2016] HCA 1

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This case note provides an overview of the key facts and findings of the High Court in *Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors* [2016] HCA 1, and sets out some of the key developments following the case. The plaintiff, an asylum seeker from Bangladesh, had been detained in Nauru at one of Australia's two regional processing centres before being brought to Australia for medical treatment in 2014. She brought this case against the Australian Minister for Immigration and Border Protection, the Commonwealth of Australia and Transfield Services (Australia) Pty Ltd in an effort to prevent her return to Nauru. The main question in the case was whether the Australian government had the power, either in the form of a statutory or non-statutory executive power, to contract for and control the detention of asylum seekers in the offshore detention centre in Nauru. The majority of the court (French CJ, Kiefel, Nettle, Bell, Gageler and Keane JJ) held – in four separate judgments – that the government did have the necessary legal authority to be involved in the detention of asylum seekers in Nauru, although they were divided about whether the Australian government was actually in control of this detention and the basis on which it was lawful. Gordon J was in dissent, finding that the government had significant control over the detention of the plaintiff and had acted beyond its power in doing so.

This case was one of a series of challenges launched on behalf of 267 people, many of whom had been brought back to Australia from offshore detention centres for urgent medical treatment. This group also included 37 babies born in Australia. Following the Court's judgment, the #LetThemStay public campaign was launched in an attempt to keep the group in Australia. As at May 2016, many do remain in Australia, however their continued presence is 'temporary' and they may sent back offshore at any time at the Minister's discretion.

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Introduction to Australia's offshore processing regime

Since 13 August 2012, any person arriving in Australia by sea without a valid visa has been subject to offshore processing (also referred to as 'regional' or 'third country' processing), even if they applied for asylum immediately upon arrival in Australia. Pursuant to the *Migration Act* 1958 (Cth), all asylum seekers arriving in this way must be detained in Australia, and then taken 'as soon as reasonably practicable' to one of two offshore processing countries in the Pacific: the Republic of Nauru (Nauru) or Papua New Guinea (PNG).[1] The terms of Australia's agreements with these countries are set out in two memoranda of understanding signed in August 2013, both of which supersede agreements in largely similar terms that were previously signed with Nauru in August 2012, and PNG in September 2012.[2]

Asylum seekers who are or have been subject to offshore processing are divided into two groups depending on when they arrived in Australia and the agreements that were in place with Nauru and PNG at that time. Those who arrived between 13 August 2012 and 18 July 2013 comprise a first cohort of people, some of whom were sent offshore (while others remained in Australia), and all of whom were eventually brought back to Australia to be processed through a new 'fast track' system and granted temporary protection visas if found to be refugees. By June 2016 fast track processing had only recently begun, and the vast majority of people in this cohort were still waiting either in the community or in detention in Australia to be assessed.

Those who arrived on or after 19 July 2013 comprise a second cohort of people, subject to a new policy introduced by then Prime Minister Kevin Rudd, under which they must all be sent offshore for processing and will never be given an opportunity to settle in Australia.[3] The only exceptions to this policy have been limited and occurred as a result of the Abbott government's political negotiations to secure the votes it needed to pass the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) in late 2014.[4] Apart from these limited cases, there are no exceptions to offshore processing without resettlement in Australia for children (including unaccompanied minors),

pregnant women, survivors of torture or trauma, people with disabilities, the elderly, or anyone else who is particularly vulnerable.

People in this second cohort may be brought back to Australia temporarily in certain circumstances (such as to receive medical treatment or give birth), at which point they are called 'transitory persons'. However all transitory persons must be sent back offshore as soon as the reason for their return to Australia has been resolved.[5] Up to date statistics about the number of people who have been sent offshore since September 2013 are available on the Australian Department for Immigration and Border Protection website.

Almost three years after it was first announced that settlement in Australia would no longer be an option for asylum seekers arriving by sea (and four years after offshore processing recommenced), it remains unclear where the people found to be refugees in Nauru and on Manus Island in PNG will eventually be settled.

Facts

The plaintiff in this case, a citizen of Bangladesh, was on board a vessel intercepted at sea by Australian officers on 19 October 2013. Following her interception the plaintiff was transferred to Christmas Island,[6] and detained there, before being transferred to Nauru on 22 January 2014. There was no dispute in this case as to the legality under Australian law of the plaintiff's detention while in Australia. The transfer to Nauru was carried out by Australian authorities, without the plaintiff's consent, pursuant to Australian law and the Memorandum of Understanding relating to the transfer to and assessment of persons in Nauru ('MOU') signed by Australia and Nauru on 3 August 2013.[7]

Prior to her arrival in Nauru, an Australian officer applied to the Nauruan Secretary of the Department of Justice and Border Control ('the Secretary') for a Regional Processing Centre visa ('RPC visa') in the plaintiff's name, also without her consent.[8] This visa was granted to the plaintiff when she arrived in Nauru on 23 January 2014. Subsequent RPC visas were granted on 23 April 2014 and 23 July 2014, again upon applications by Australian officers in the plaintiff's name and without her consent.

The plaintiff was detained in Nauru at the regional processing centre ('RPC') at Topside, in a compound known as RPC3, until 2 August 2014, when she was transferred back to Australia for medical treatment. Some of the factual conditions of the plaintiff's detention are set out below. She was detained there by the combined effect of the following legal rules:

- her successive RPC visas, which carried a condition that she 'reside' at the RPC;[9]
- her status as a 'protected person' for the purposes of the *Asylum Seekers (Regional Processing Centre) Act* 2012 (Nauru) ('RPC Act'). Section 18C of this act provided that 'a protected person must not leave, or attempt to leave the Centre without prior approval from an authorised officer, an Operational Manager or other authorised persons'. Any protected person found to have left or to be attempting to leave the RPC without relevant approval would commit an offence, and could face up to six months imprisonment; and
- rule 3.1.3 of the Centre Rules, made in July 2014, which provided that asylum seekers 'residing' at the RPC must 'not leave, or attempt to leave, the Centre without prior

approval from an authorised officer, an Operational Manager or other authorised persons, except in the case of emergency or other extraordinary circumstance'.[10]

When the plaintiff was returned to Australia on 2 August 2014 she was approximately 20 weeks pregnant. She had applied to the relevant Nauruan authorities to be recognised as a refugee, but her application was yet to be determined. Back in Australia the plaintiff was detained, and gave birth to a daughter in Brisbane on 16 December 2014.

In June 2015 the Australian Department of Immigration and Border Protection ('the Department') was advised that the plaintiff had been diagnosed with a gastroenterological condition that could be managed at the Nauru RPC. Before she could be transferred back to Nauru, the plaintiff commenced these proceedings in the High Court of Australia, arguing that she had been subjected to restrictions upon her liberty at the Nauru RPC amounting to detention, and that such detention had been contracted for and effectively controlled by Australia without lawful authority.

The Minister for Immigration and Border Protection ('the Minister') and the Commonwealth of Australia were the first and second defendants (collectively, 'the Commonwealth parties'). The third defendant was Transfield Services (Australia) Pty Ltd ('Transfield'),[11] an Australian company that had been contracted by the Australian government to provide garrison and welfare services at the Nauru RPC since 2012.[12]

By way of relief the plaintiff sought an injunction and writ of prohibition. These orders would have prohibited the Minister and other Australian officers from taking steps to remove her to Nauru if she would be detained there. The plaintiff also sought orders restraining the Australian government from making any further payments to Transfield under its contract, and a declaration to the effect that the Commonwealth parties' involvement in her detention in Nauru had been (and if committed in the future would be) unlawful under Australian law. At no stage did the plaintiff seek damages for wrongful imprisonment.

Evolution of the case between commencement and hearing

The case as originally filed

The development of this case was somewhat extraordinary, with both the facts and the law in question undergoing fundamental changes in the five months between the plaintiff's original case being filed in May and heard by the High Court in October 2015.

The issue at the core of this case was always whether the Australian executive government was authorised to contract for and in effect control the detention of asylum seekers overseas. This authorisation could have been pursuant to a valid statutory conferral of power or because the power fell within the non-statutory executive power that forms part of the executive power in section 61 of the Constitution. Having argued that there was no relevant legislative authority, the plaintiff's case focused originally on an argument that the Commonwealth parties had acted beyond the scope of their non-statutory executive power in continuing to detain the plaintiff after she had been removed from Australia, and in entering into a contract with Transfield and spending public moneys for that purpose.

First development: insertion of s198AHA into the *Migration Act*

On 30 June 2015, the *Migration Amendment (Regional Processing Arrangements) Act* 2015 (Cth) entered into force, after passing both houses of parliament in record time with bipartisan support. This Act inserted s198AHA into the *Migration Act,* with retroactive effect from 18 August 2012. This new section granted broad power to the Australian government to enter into an arrangement with a 'person or body' for the purpose of 'regional processing', and to take 'any action' in relation to this regional processing arrangement.

The insertion of s198AHA into the *Migration Act* shifted the focus of this case from whether the impugned conduct was unlawful by reason of it not being supported by or based on a valid exercise of the non-statutory executive power under s61, to a case primarily concerned with the construction, scope and validity of the new statutory provision. Indeed the majority judges, having reached their respective conclusions about s198AHA, ultimately found it unnecessary to make a separate determination on the non-statutory executive power issue.

Second development: full open centre arrangements

The end of detention on Nauru

In early October 2015, immediately before the start of the hearing, the Nauruan government announced that the RPC would become a fully open centre 'to allow for freedom of movement of asylum seekers 24 hours per day, seven days per week'.[13] This announcement expanded an initial 'open centre arrangement' that had been introduced earlier in 2015, whereby asylum seekers detained at the RPC could be granted permission to leave on certain days, between certain hours and subject to certain conditions.[14] After the introduction of full open centre arrangements in October, the Nauruan regulations that required asylum seekers not to leave the RPC without permission were repealed, although asylum seekers were still required to 'reside' there.[15] The Nauruan government indicated that it intended to legislate for the full open centre arrangements at the next sitting of parliament.[16] However at the date of the hearing this had not yet occurred, and it remained a criminal offence for an asylum seeker to leave the RPC without prior approval from an authorised officer, an Operational Manager or another authorised person.[17]

Standing

The introduction of these open centre arrangements raised fresh questions about whether the plaintiff had standing to bring her case. From the outset, the Commonwealth parties had argued that the plaintiff lacked standing to challenge her *past* detention, because a declaration on this matter would produce no foreseeable consequences for her.[18] A few days before the hearing, when it appeared the plaintiff would no longer be detained in the future if returned to Nauru, the Commonwealth parties filed supplementary submissions maintaining their position with respect to the plaintiff's claims about past detention, as well as contending that there was now nothing left in the proceedings with respect to the claims about future detention either.

All the judges held that the plaintiff did have standing to seek the declaration regarding the lawfulness of her past detention by the Commonwealth parties. French CJ, Kiefel and Nettle JJ noted that the declaration would resolve the question of whether this conduct had been

authorised by Australian law, and that this was 'not a hypothetical question' as it would 'determine the question whether the Commonwealth is at liberty to repeat that conduct if things change on Nauru and it is proposed, once again, to detain the plaintiff at the Centre'.[19] Bell J also noted that Nauru could choose at any time to revert to a scheme under which asylum seekers taken to it by Australia were detained, and thus that the declaratory relief sought by the plaintiff involved 'the determination of a legal controversy' in respect of which the plaintiff had a 'real interest'.[20] Keane J based his finding that the plaintiff had standing on the ground that interference with a person's liberty is 'sufficient to confer standing to seek a declaration of the legal position from a court even though no other legal consequences are said to attend the case' (while also noting that it was difficult not to be 'impressed with the view that really what is at issue is whether what has been done can be repeated').[21] Finally, Gageler and Gordon JJ rejected the Commonwealth parties' submission that the declaration would have no foreseeable consequences for the plaintiff, with Gageler J finding that she had a 'sufficient interest' in the case and Gordon J concluding that the declaration was indeed 'directed to a live legal question'.[22]

Judgment

PART A: OVERVIEW

This section provides an overview of the parties' main arguments and the key findings in the judgment. It is followed by a more in-depth analysis of the Court's findings.

The main arguments

For the Commonwealth government to enter into a contract and spend money or detain an individual, there must be a source of legal authority to do so. The plaintiff, having claimed that the Commonwealth parties 'procured, caused and effectively controlled' her detention in Nauru, submitted that this conduct was unlawful on the basis that it was neither authorised by any valid Australian law, nor based upon a valid exercise of the government's non-statutory executive power in s61 of the Constitution. The Commonwealth parties denied that the plaintiff had been in their custody during her detention in Nauru, but argued in any case that s198AHA was a valid statute authorising their impugned conduct (including their involvement in the plaintiff's past detention).

The plaintiff contended that s198AHA did not provide the relevant authority because it did not apply to the arrangements in question as a matter of construction. Alternatively, the plaintiff argued that this section was an invalid exercise of legislative power because: (i) it was not supported by a head of federal legislative power; and/or (ii) it was in breach of the constitutional separation and protection of federal judicial power, and more specifically the principles that limit the executive's power to detain identified and established by the High Court in the case of *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 (*Lim*).

The construction argument

As a matter of construction, the plaintiff argued that s198AHA did not apply to the MOU because it applied only to arrangements entered into by Australia with 'a person or body',

and the Government of Nauru was neither. All seven judges dismissed this argument summarily by reference to general principles of statutory interpretation and s2C(1) of the *Acts Interpretation Act* 1901 (Cth), which provides that expressions used to denote a 'person' include a body politic.[23]

Identifying a head of federal legislative power

The plaintiff argued that s198AHA was not supported by a head of federal legislative power under the Constitution. The Commonwealth parties relied mainly on the aliens power (s51(xix)), the external affairs power (s51(xxix)) and the Pacific islands power (s51(xxx)). In relation to the aliens power in particular, she argued that s198AHA did not single out 'aliens' in its text or in its practical operation, and as such that any connection with the enumerated subject matter was 'too remote or insubstantial'. Six judges (Gordon J dissenting) dismissed this argument and declared s198AHA to be a law with respect to aliens. Gageler J also found that it was a law with respect to external affairs under s51(xxix). Read more below.

Application of the Lim *principles to s198AHA*

The bulk of the judges' reasons in this judgment dealt with the question of whether s198AHA was in breach of the separation and protection of federal judicial power guaranteed in the Constitution. Part of this guarantee is known as the *Lim* principles. According to these principles, the adjudication and punishment of criminal guilt is an exclusive judicial function. While there are exceptions, generally speaking, involuntary detention of a citizen is punitive and therefore can only be ordered by the courts. Non-citizens may be detained for the purpose of expelling or deporting them or investigating and determining immigration claims for admission to Australia. Such detention may only be for a period that is reasonably necessary for deportation or for processing such claims.

The respective findings of the judges on this point turned on the conclusions they each reached about the level of Australian involvement in the plaintiff's former detention in Nauru (which are explored in depth below). French CJ, Kiefel, Nettle and Keane JJ, concluded that the plaintiff had been detained by the executive government of Nauru, not by the Australian government. Since the *Lim* principles only apply to detention in the custody of the Australian executive government, these judges found them not to be relevant in this case. To the extent that Australia had otherwise been involved in the plaintiff's detention, and statutory authority was necessary for that lesser degree of involvement, these judges held that such authority was provided by s198AHA. They did note, however, that this section does not confer on the Australian government an unfettered power to cause or spend public moneys on detention offshore. Instead, under s198AHA, the Commonwealth parties are only authorised to participate in an offshore detention regime if, and for so long as, it serves the purpose of processing the claims of those who are detained.

In separate judgments, Bell and Gageler JJ took a different approach. Both held that Australian involvement in the plaintiff's detention in Nauru had reached the level of control necessary to engage the constitutional limits identified or established in *Lim.* They concluded, however, that these limits had not been breached in this case. Gordon J dissented, finding that the Commonwealth parties' involvement in the detention did breach

the *Lim* principles. The findings of the majority judges on this point, and Gordon J's dissent, are explored below.

Section 61 of the Constitution and non-statutory executive power

Section 61 of the Constitution vests federal executive power. This power includes statutory powers conferred on the executive as well as non-statutory executive powers, including the prerogative powers of the Crown and other powers that are necessary for the Commonwealth to function as a nation state. The plaintiff's original argument, which she maintained after the introduction of s198AHA, was that in the absence of clear statutory authorisation, s61 of the Constitution could not authorise the Commonwealth parties' conduct in detaining her in Nauru. The six majority judges, having found that s198AHA provided the requisite statutory authority to support the Commonwealth parties' conduct, concluded that it was not necessary to consider the hypothetical question whether, absent that authority, these parties would otherwise have been authorised by s61 or as a matter of non-statutory executive power to participate in Nauru's detention of the plaintiff.[24] Gordon J also found it unnecessary to make a separate determination on this point.[25]

Consideration of Nauruan law

If necessary, depending on its other findings, the plaintiff invited the court to consider whether she had been lawfully detained under Nauruan law, and in particular whether the relevant laws were valid in light of article 5(1) of the Nauruan Constitution (which provides that no person shall be deprived of his or her personal liberty, except as authorised by law in certain enumerated cases).[26] She submitted that it was necessary to agitate this question because the Commonwealth parties' primary defence to all of her claims was that her detention had been in accordance with and required by the laws of Nauru.[27] She also argued as a matter of construction that the authority to take action conferred on the Commonwealth parties by s198AHA should not be construed as referring to detention which is unlawful under the law of the country where it is occurring.[28]

The Court was reluctant to pronounce on the constitutional validity of a law of another country. On the basis of their earlier findings and the case presented, French CJ, Kiefel, Nettle and Bell JJ concluded that it was not necessary to make such a pronouncement.[29] Gageler J merely noted that the constitutional validity of the relevant laws were 'controversial'.[30] Gordon J insisted that the proceedings should be concerned only with the conduct of the Commonwealth parties, and that it was 'neither relevant nor appropriate for this Court to pass any judgment upon what the Government of Nauru has done or proposes to do'.[31] Keane J went into greatest depth, relying on international comity and judicial restraint, as well as a textual analysis of s198AHA, to support his finding that the outcome of the case did not rest on any finding as to validity of Nauruan law, and that the Court should not engage in such a task.[32]

Submissions on the Financial Framework (Supplementary Powers) Act *1997*

This case originally raised questions about how Australia was funding offshore processing in Nauru, and in particular the operation and validity of s32B of the *Financial Framework (Supplementary Powers) Act* 1997 (Cth). Because the six majority judges concluded that s198AHA was valid and provided the necessary authority, they found it unnecessary to

make a separate determination on this issue. Gordon J also concluded that it was unnecessary for her to address this issue because the provisions of this law 'cannot and do not repair the more fundamental deficiency' identified in her analysis of s198AHA.[33]

PART B: DISCUSSION OF ISSUES

Identifying a head of federal legislative power

The plaintiff argued that s198AHA was not supported by a head of legislative power under the Constitution. In relation to the aliens power in s51(xix), the plaintiff submitted that the definition of 'regional processing functions' in s198AHA was 'too broad to apply only to functions in relation to aliens', and that the breadth of that definition coupled with the breadth of the powers that section purported to confer meant that it did not have discriminatory operation in respect of aliens.[34] Since s198AHA does not single out 'aliens' in its text or in its practical operation, any connection with the enumerated subject matter was said to be 'too remote or insubstantial'.[35]

Six judges (Gordon J dissenting) dismissed this argument and declared s198AHA to be a law with respect to aliens. Noting that this section is concerned with the regional processing functions of a country designated by the Minister for that purpose, and that the actions and payments it authorises are closely connected to the removal of asylum seekers ('aliens') from Australia and the processing of their protection claims in Nauru, the majority were satisfied that there was a sufficient connection between the subject matter of aliens and s198AHA.[36] Keane J added that it was 'well settled' that s51(xix) does not require the law to operate *only* on aliens.[37] Gageler J noted that the reach of the aliens power 'is not subject to any territorial or purposive limitation' and held that it is sufficient for the 'substantial practical operation' of a law to 'discriminate in a manner which is peculiarly significant to aliens'.[38]

Gageler J also went one step further, finding that insofar as s198AHA authorises the Australian government to take action outside Australia in relation to an arrangement between it and the government of a foreign country, it is also a law with respect to external affairs under s51(xxix).[39]

The majority's application of the *Lim* principles to s198AHA

Australia's involvement in the plaintiff's detention in Nauru

The extent of Australia's involvement in the detention of asylum seekers transferred offshore has been a contentious issue since the current processing arrangements were established in 2012. This issue arises in two related but distinct contexts: first, when considering whether Australia is sufficiently involved in (or exercising sufficient control over) detention such as to engage its obligations towards asylum seekers and refugees under international law; and secondly, when considering whether Australia's involvement could form the basis of a claim against the government under domestic law, or – as argued in this case – offends the exclusive vesting of judicial power to detain in the courts established under Chapter III of the Australian Constitution.

Although the Court made findings on the issue in this case, it is relevant to note that the matter was put to it by way of a special case, meaning that the parties agreed to a set of

stated facts and questions of law in advance which were then put to the Court to resolve. The parties did not tender evidence in chief to support their assertions of fact, neither party was given the opportunity to seek discovery or cross-examine witnesses, and the Court was not called upon to make specific findings of fact as to the nature and level of Australian involvement in the RPC (beyond what was necessary to deal with the case).

Factual vacuums make it hard to establish an arguable case upon which proceedings can be commenced.[40] Given the secrecy and lack of transparency around Australia's offshore processing regime, a proper interrogation of evidence may have been the only way to establish conclusively the level of Australian involvement in the detention of asylum seekers and refugees offshore. In the absence of such an interrogation, the Court's statements on this matter must be understood as limited to that which was put to them on an agreed basis between the parties in a single case, which ran from filing to completion relatively quickly. These findings may not reflect the reality of who was in control of detention on the ground in Nauru.

(a) The parties' submissions

The plaintiff originally claimed declaratory relief on the basis that the Commonwealth parties *themselves* had detained her in Nauru, however her arguments at the hearing were framed in slightly different terms. The plaintiff accepted that her past detention had been governed by Nauruan law, but argued that Australia had participated in this detention in a practical sense, such that it had in fact been 'funded, authorised, caused, procured and effectively controlled by and was at the will of' the Commonwealth parties.[41] It was this high level involvement, according to the plaintiff, which was not authorised by statute or otherwise.

Successive Australian governments have steadfastly insisted that offshore processing (and the detention of asylum seekers for that purpose) is wholly a matter for the government of the country in which they are held. The Commonwealth parties adopted a slightly different position in this case, accepting that they had 'agreed to and provided material support necessary to the establishment and maintenance of the detention regime' at the Nauru RPC.[42] They consistently maintained, however, that the plaintiff had at all times been detained by Nauru under Nauruan law, and that they neither procured that detention nor would have sought it had it not been enforced by Nauru.[43]

(b) The Court's findings

In their separate judgments, Bell, Gageler and Gordon JJ looked at the question of control in a substantive rather than formulistic way. They concluded that, despite being detained under Nauruan law, the plaintiff had *in fact* been detained in Nauru by the Australian government.

These judges based their findings on a number of facts, including that:

- Australian officers applied for RPC visas in the plaintiff's name and paid the relevant visa fees, without her consent, and with knowledge that she would be required to remain at the RPC pursuant to her visa conditions and the RPC Act;
- Australian officers had taken the plaintiff to Nauru and service providers contracted by the Australian government had escorted her to the RPC against her will (with

assistance from Nauruan officials), where Australian officers had then handed over the relevant documents to complete her transfer;

- the Department was responsible for providing security infrastructure at the RPC, including perimeter fencing, lighting and entry gates;
- under the terms of its contract with the Australian government, Transfield was required to and did restrict the plaintiff's liberty. In particular, Transfield was required to provide a range of security services at the RPC, including ensuring that the security of the RPC perimeter was maintained at all times. These security functions were to be carried out in accordance with Department policies and procedures, as notified to Transfield by the Department from time to time;
- Transfield obtained approval from the Australian government to subcontract the provision of security and other services to Wilson Security. Wilson Security employees were appointed as 'authorised officers' for the purpose of the RPC Act (with powers to decide whether people detained at the RPC could leave or not).[44] The plaintiff was held in a compound surrounded by a high metal fence through which entry and exit was possible only through a checkpoint that was permanently staffed by Wilson Security employees, who monitored entry and exit;
- the Department had step-in rights under the Transfield contract, which allowed the Secretary of the Department, at his or her absolute discretion, to suspend the performance of any service performed by Transfield and arrange for the Department or a third party to take over and perform the suspended service; and
- Australia played a significant role in the governance structures overseeing the implementation of the MOU and the operation of the RPC, including a Ministerial Forum, a Joint Advisory Committee and a Joint Working Group. Australia also appointed a Department officer as a Programme Coordinator, who was stationed in Nauru and responsible for managing all Australian officers and ensuring that service providers delivered services to the appropriate standards.[45]

Based on these facts, Bell J held that the plaintiff's detention 'was, as a matter of substance, caused and effectively controlled by the Commonwealth parties'.[46] Gageler J held that Wilson Security staff 'exercised physical control over the plaintiff' so as to confine her to the RPC, and that they had done so 'in the course and for the purpose of providing services which the [Australian government] had procured to be performed under the Transfield contract'.[47] As such, Wilson Security staff had 'acted, in the relevant sense, as de facto agents of the [Australian government] in physically detaining the plaintiff in custody'.[48] Gordon J concluded that Australia 'did not discharge the Plaintiff from its detention' after taking her to Nauru, and that it 'intended to and did exercise restraint over the Plaintiff's liberty on Nauru, if needs be by applying force to her'.[49]

French CJ, Kiefel and Nettle JJ reached a different conclusion. While noting that Australia's involvement was 'materially supportive, if not a necessary condition, of Nauru's physical capacity to detain the plaintiff',[50] they ultimately found that the plaintiff had been detained by the executive government of Nauru, under Nauruan law. These judges were persuaded by the Commonwealth parties' submission that they could not have compelled or authorised Nauru to make or enforce the laws that required the plaintiff to be detained, if that country

had not done so itself.[51] Accordingly, Australia's participation in the plaintiff's detention, while 'indisputable', did not reach the level of authorising or controlling it in the *Lim* sense.[52]

Keane J was the most reserved in his findings on this point. Having accepted that the plaintiff's detention was under the legal authority of Nauru, the most he would find was that 'it might be said' Australia had procured, funded or caused the detention.[53] He too was persuaded by the Commonwealth parties' submission that they neither would nor could have compelled Nauru to detain the plaintiff, it that country had not decided to do so itself.[54]

The Lim *detention principles*

In the 1992 judgment of *Lim,* Brennan, Deane and Dawson JJ (Mason CJ agreeing) started from the general proposition that public officials have no power to detain non-citizens, whether in the country lawfully or otherwise, except under and in accordance with some positive authority conferred by law:

> Since the common law knows neither *lettre de cachet* nor other executive warrant authorizing arbitrary arrest or detention, any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision.[55]

Acknowledging that Chapter III of the Constitution constitutes 'an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested', Brennan, Deane and Dawson JJ noted it was 'well settled' that the grants of legislative power set out in s51 of the Constitution do not permit parliament to confer on any organ of the executive government any part of the judicial power of the Commonwealth.[56]

The judges went on to identify what constitutes judicial power, and held that 'there are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character'.[57] Detention by the State is generally penal or punitive in character and, as such, 'exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[58]

The detention of non-citizens may constitute an exception this general rule in certain circumstances. The joint reasons in *Lim* noted that Parliament's power to make laws with respect to aliens under s51(xix) of the Constitution extends to authorising the executive to detain a non-citizen for the purposes of, and to the extent necessary for, the non-citizen's expulsion or deportation from Australia.[59] The power to detain in these circumstances constitutes an incident of the executive power to receive, investigate and determine an application by a non-citizen for an entry permit and (after determination) to admit or deport that person.[60] Having taken its character from the executive power to which it is incidental, the power to detain in these circumstances does not offend the exclusive vesting of judicial power in the courts under Chapter III, since the detention is neither punitive nor judicial in nature.[61]

As a result of these findings, the joint reasons in *Lim* held that a statutory provision providing for the detention of non-citizens by the executive will be valid if the detention it requires or

authorises is 'limited to what is reasonably capable of being seen as necessary' for the purposes of deportation, or to enable an application for an entry permit to be made and considered.[62] If detention is not so limited, the authority purportedly conferred upon the executive will not be incidental to the executive powers to exclude, admit and deport non-citizens, and thus the detention will be punitive in nature and contravene Chapter III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.[63]

(a) The parties' submissions

In this case, the 'true principle' for which *Lim* stands was subject to dispute between the parties. The judges gave different reasons for their findings on the *Lim* arguments, depending on which country they had concluded was detaining the plaintiff in Nauru.

The plaintiff submitted that the main proposition in *Lim* – that executive officers purporting to 'authorise or enforce' the detention in custody of a person without judicial mandate must have positive authority for such conduct conferred by a valid statutory provision – extends to situations in which detention is 'not actually implemented' by these officers.[64] The Commonwealth parties rejected this argument, contending that it sought to draw more from *Lim* than the propositions for which it stands, and, in doing so, sought to 'advance a limitation well beyond that which the Constitution contains'.[65]

(b) The Court's findings

French CJ, Kiefel, Nettle and Keane JJ did not accept the plaintiff's arguments on this point. Having concluded that the plaintiff was detained by Nauru, not Australia, French CJ, Kiefel and Nettle JJ described the plaintiff's reliance upon *Lim* as 'misplaced'.[66] They rejected the plaintiff's submission that *Lim* extends to situations in which detention is 'not actually implemented' by the Australian government and its officers, holding instead that '*Lim* has nothing to say about the validity of actions of the Commonwealth and its officers in participating in the detention of an alien by another State'.[67] For similar reasons Keane J held that 'the limitation on Commonwealth executive power discussed in *Lim* is not engaged in the circumstances of this case'.[68] These four judges did, however, note other limitations on the Australian government's power to take action in relation to offshore detention.

Bell, Gageler and Gordon JJ, having concluded that the Australian executive caused and was in control of the plaintiff's detention, took a different approach. All three judges held that the *Lim* principles did apply (although only Gordon J held that the plaintiff's detention infringed them), and in doing so reaffirmed the proportionality aspect of the *Lim* principles.

Bell J prefaced her analysis by noting that the object of the constitutionally mandated separation of judicial from executive power is the protection of individual liberty.[69] She then focused on the nature and purpose of the power purportedly conferred by s198AHA, restating the principle in *Lim* that a law authorising the detention in custody of an alien without judicial warrant will only be valid if the detention is 'limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[70] If detention is so limited it will be an incident of executive power; if not, the detention will be punitive in character and

unlawful.[71] Bell J accepted the plaintiff's submission (relying on her joint reasons with Hayne J in *CPCF v. Minister for Immigration and Border Protection & Anor*), that these constitutional limitations apply regardless of whether the detention takes place in Australia or a regional processing country.[72]

Having set out the principle as such, Bell J concluded that the plaintiff's detention in Nauru did not infringe it. She found that s198AHA did not confer an unrestrained authority to detain on the Commonwealth parties because the relevant authority 'is limited to action that can reasonably be seen to be related to Nauru's regional processing functions'.[73] However, Bell J did note that the Commonwealth parties' participation in the detention of asylum seekers in Nauru would cease to be lawful if it were to continue 'for a period exceeding that which can be seen to be reasonably necessary for the performance of those functions'.[74]

In reaching this conclusion Bell J rejected the plaintiff's submission that the purpose of her detention had been to deter others from irregular migration to Australia, and as such that it was punitive in nature. While the removal of asylum seekers to Nauru for processing advanced this purpose, Bell J was not satisfied that detention once there did so too.[75]

Gageler J reached a similar outcome, based also on a reaffirmation of *Lim,* but approached the question very differently. He started by looking at Chapter II of the Constitution, entitled 'The Executive', and undertaking an extensive consideration of the nature, scope and limitations of Commonwealth executive power – especially the power to authorise or enforce a deprivation of liberty.[76]

Gageler J accepted the major premise of the plaintiff's argument with respect to Chapter III of the Constitution: namely, that executive detention of a non-citizen outside Australia pending assessment of his or her claim for refugee status will not be inherently incompatible with the constitutionally mandated separation of powers, but that the legislative authority to do so will only be valid if it is for no longer than is reasonable necessary for the administrative processes required to carry that purpose into effect.[77] In accepting this argument, Gageler J restated the test he had set out previously in recent judgments: a law conferring a power of executive detention will only escape characterisation as punitive (and therefore as inherently judicial) if the duration of detention meets two conditions: first, it must be 'reasonably necessary to effectuate a purpose which is identified in the statute conferring the power to detain and which is capable of fulfilment'; and second, it must be 'capable of objective determination by a court at any time and from time to time'.[78]

Gageler J was satisfied that s198AHA met these conditions. In relation to the first, he read s198AHA as limiting the executive government's power to detain 'to detention that is in connection with the role of the regional processing country as specified in the arrangement'. In relation to the second condition, Gageler J was satisfied that the duration of detention in Nauru would be 'capable of objective determination by a court by reference to what remains to be done by the regional processing country to fulfil its role as specified in the arrangement' with Australia.[79]

The limits of the power conferred by s198AHA

Despite having concluded that s198AHA provided the Commonwealth parties with the relevant authority to cause or spend public moneys on detention offshore, French CJ, Kiefel, Nettle and Keane JJ all noted the existence of certain restraints on this power to act.

French CJ, Kiefel and Nettle JJ held that the Commonwealth parties' power to exercise physical restraint over the liberty of a person in Nauru was limited by the scope and purpose of s198AHA. Since that section, as supported by the 'aliens' head of legislative power, was incidental to the implementation of regional processing functions for the purpose of determining claims to refugee status, they ruled it necessary for the exercise of the powers conferred by that section also to serve that purpose. Thus, the Commonwealth parties could only participate in an offshore detention regime 'if, and for so long as, it serves the purpose of processing'. According to the joint reasons: 'If, upon a proper construction of s198AHA, the section purported to authorise the Commonwealth to support an offshore detention regime which went beyond what was reasonably necessary for that purpose, a question might arise whether the purported authority was beyond the Commonwealth's legislative power with respect to aliens.'[80]

Keane J followed a similar logic, reasoning that the authority conferred by s198AHA was 'confined to causing detention or making payments related to the implementation of the MOU or the regional processing functions of Nauru', and that this authority would expire if Nauru's regional processing functions were to come to an end.[81] In identifying the relevant purpose of s198AHA, Keane J focused more on the Commonwealth parties' ability to deport asylum seekers than the processing of their claims in Nauru. He held that s198AHA authorised the Commonwealth parties to detain asylum seekers in Nauru because, and only if, that restriction was reasonably capable of being seen as a necessary condition of Nauru's readiness, willingness and ability to receive asylum seekers for regional processing.[82]

Gordon J in dissent

Like Bell and Gageler JJ, Gordon J held that the plaintiff in this case had been detained by Australia in Nauru. From there, however, her analysis took a different path, focusing primarily on the validity of s198AHA. Whereas the other judges dealt relatively briefly with the question of whether this provision was supported by a head of legislative power under s51 of the Constitution, Gordon J took more time with it, exploring the aliens, immigration, external affairs and Pacific islands powers in turn.

Gordon J framed her analysis around the principle that the legislative powers conferred by s51 are circumscribed by Chapter III, meaning that they do not permit the conferral upon any organ of the executive government of any part of the judicial power of the Commonwealth.[83] She noted that the limitations imposed by this constitutional separation of powers continue even if the impugned conduct occurs outside Australia.[84]

In her analysis, Gordon J used the *Lim* principles to determine the extent of the power to detain that can be conferred on the executive under the aliens power. She noted that, on the basis of *Lim,* a purported executive power to detain aliens will be valid only where it is reasonably capable of being seen as necessary for one of two exceptional purposes: to

effect the deportation of an alien from Australia, or to enable an application for an entry permit to be made and considered. In this case, Gordon J concluded that the plaintiff's continued detention in Nauru, after her removal to that country had been completed, went beyond what was reasonably necessary for either of these purposes.[85]

The Commonwealth parties' submissions that detention under s198AHA simply 'completes' the process of removal from Australia, or that it is authorised if it is a condition of the willingness and ability of Nauru to receive the plaintiff for processing, were rejected. Gordon J reiterated that these parties cannot do abroad what they are constitutionally refrained from doing in Australia, and noted that the executive government cannot 'agree the Parliament of Australia into power' by entering into an agreement with a foreign state.[86]

On the question of whether the court should create a new category of permissible executive detention of aliens beyond the two stated in *Lim,* Gordon J was of the opinion that it should not. On the basis of her preceding analysis, she held that there was no basis as a matter of fundamental principle, necessity or otherwise to craft any new exception to the *Lim* rule.[87]

As a final point to her analysis of the aliens power, Gordon J noted that the this power may not be engaged by s198AHA at all, since it 'imposes special disabilities on aliens which are unconnected with their entitlement to remain in Australia … and which are in no way connected with regulation of past or future entry into Australia, or with facilitating or requiring their removal or departure from Australia'.[88] Ultimately, however, she found it unnecessary to make a conclusive determination on this point, since she had already decided that the aliens power was relevantly confined by Chapter III.

Gordon J used a similar line of reasoning in relation to the immigration,[89] external affairs[90] and Pacific islands[91] powers. She held these powers to be equally bounded by Chapter III, including the *Lim* principles. As such, she found s198AHA to be invalid because it impermissibly restricted or infringed Chapter III of the Constitution.

On the basis of these findings, Gordon J held that no separate question arose about executive power under s61 of the Constitution.[92]

Subsequent developments

This case was linked to a series of challenges launched on behalf of 267 people, many of whom had been brought back to Australia from offshore detention centres for urgent medical treatment. This group also included 37 babies born in Australia. Despite the court's judgment, many of these people were subsequently permitted to remain in Australia, living freely in the community on a temporary basis (at the Minister's discretion).[93] This outcome was believed to be the result of the #LetThemStay public campaign that was launched after the judgment in February 2016. As part of this campaign, church leaders took the extraordinary step of offering 'sanctuary' to people facing deportation, state Premiers came out in public support of allowing the group to settle in the Australian community, and the United Nations warned the Australian government that deporting the group would risk breaching Australia's obligations under international law.[94]

Further reading

1. David Hume, 'Plaintiff M68-2015 – offshore processing and the limits of Chapter III', 26 February 2016, *Australian Public Law,* <https://auspublaw.org/2016/02/plaintiff-m68-2015/>
2. Scott Stephenson, Michael Crommelin and Cheryl Saunders, 'Judgments in Plaintiff M68-2015 v Commonwealth', *Opinions on High,* Melbourne Law School, 29 February 2016, <https://blogs.unimelb.edu.au/opinionsonhigh/2016/02/29/stephenson-crommelin-saunders-m68/>
3. Human Rights Law Centre, 'High Court rejects challenge to offshore detention', 3 February 2016, <http://hrlc.org.au/high-court-rejects-challenge-to-offshore-detention/>

The submissions, transcripts of hearings and full judgment in this case are available from the High Court of Australia at <http://www.hcourt.gov.au/cases/case_m68-2015>.

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Endnotes

[1] *Migration Act* 1958 (Cth), ss. 189, 198AD(2).

On 10 September and 9 October 2012, then Minister for Immigration and Citizenship, Chris Bowen, designated Nauru and PNG respectively as 'regional processing countries' under section 198AB(1) of the *Migration Act.* The instruments of designation and accompanying documents tabled in the Australian Parliament are available from the Australian Human Rights Commission at <https://www.humanrights.gov.au/sites/default/files/Docs%20tabled%20with%20Instrument%20of%20Designation.Nauru_.pdf> (Nauru) and <https://www.humanrights.gov.au/sites/default/files/Docs%20tabled%20with%20Instrument%20of%20Designation.PNG_.pdf> (PNG).

[2] 'Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues', 3 August 2013; 'Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues', 6 August 2013; 'Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues', 29 August 2012; 'Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues', 8 September 2012.

The 2013 memorandum of understanding with PNG is also supported by a Regional Resettlement Arrangement dated 19 July 2013. All agreements are available at <http://www.kaldorcentre.unsw.edu.au/bilateral-agreements-offshore-processing>.

[3] Prime Minister Kevin Rudd announced the policy on 19 July 2013 together with PNG Prime Minister Peter O'Neill at a joint press conference in Brisbane. For more information see: Kevin Rudd, Peter O'Neill et al, 'Transcript of Joint Press Conference', Brisbane, 19 July 2013, <http://pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/transcript-joint-press-conference-2.html>; Kevin Rudd, 'Transcript of broadcast on the Regional Resettlement Arrangement between Australia and PNG', video transcript, 19 July 2013, <http://pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/transcript-broadcast-regional-resettlement-arrangement-between-australia-and-png.html>; Kevin Rudd, 'Australian and Papua New Guinea

Regional Resettlement Arrangement', media release, 19 July 2013, <http://pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/australia-and-papua-new-guinea-regional-settlement-arrangement.html>

In a 'special one-off arrangement' in December 2014, the Australian government approved a rare exception to this policy for thirty one babies born in Australia and their families, all of whom had been transferred back to Australia from Nauru for the births before 4 December 2014. All babies born in Australia after this date to asylum seeker families that arrived in Australia by sea after 19 July 2013 have been subject to removal offshore. For more information see: Stephanie Anderson, 'Asylum seeker babies to stay in Australia under Muir deal', *News,* SBS, 18 December 2014, <http://www.sbs.com.au/news/article/2014/12/18/asylum-seeker-babies-stay-australia-under-muir-deal>; Scott Morrison, 'Babies born to IMAs transferred from Nauru to remain in Australia', press release, 18 December 2014, <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm220187.htm>

[4] Exceptions to the rule that everyone in this second cohort must be transferred offshore and never be resettled in Australia were made for people who arrived in Australia by boat between 19 July and 31 December 2013 but had not yet been transferred offshore, and for the families of thirty one babies who were born in Australia before 4 December 2014 after their mothers were transferred back from Nauru. For more information, see: Scott Morrison, 'Reintroducing TPVs to resolve Labor's asylum legacy caseload, Cambodia', press conference, Canberra, 26 September 2014, <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm218131.htm>; Scott Morrison, 'Babies born to IMAs transferred from Nauru to remain in Australia', media release, 18 December 2014, <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm220187.htm>; Commonwealth of Australia, *Parliamentary Debates* (Senate), 4 December 2014, p. 10,313 (Glenn Lazarus) <http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansards/031d80d7-61ca-407e-9e56-9e2d9d467e42/toc_pdf/Senate_2014_12_04_3109_Official.pdf>.

[5] Under the *Migration Act,* an officer may bring a 'transitory person' back to Australia from an offshore processing country 'for a temporary purpose', however they must be transferred back offshore 'as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose'. Transitory persons cannot apply for a visa while in Australia unless given written permission from the Minister for Immigration and Border Protection to do so: *Migration Act,* ss. 46B, 198(1A), 198AH, 198B.

[6] Christmas Island is Australian territory located in the Indian Ocean, 380 kilometres south of the Indonesian island of Java. The nearest point on the Australian mainland is Northwest Cape, a peninsula in the northwest of Western Australia, which is approximately 1565 kilometres southeast of Christmas Island.

[7] The MOU provides that Australia 'may transfer' and Nauru 'will accept' asylum seekers who travelled irregularly by sea to Australia or were intercepted by Australian authorities in the course of trying to reach Australia by irregular maritime means; are authorised by Australian law to be transferred to Nauru; and have undergone 'short health, security and identity checks' in Australia (articles 7, 9). Nauru assures Australia that it will not expel or return an asylum seeker transferred under the MOU to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership or a particular group or political opinion; or send an asylum seeker to another country where there is a 'real risk' that he or she will be subjected to torture, cruel, inhumane or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty (article 19). Nauru also assures Australia that it will make an assessment, or permit an assessment to be made, as to whether or not an asylum seeker meets the definition of a refugee set out in the 1951 Convention relating to the Status of Refugees, as amended by its 1967 Protocol (article 19). Australia undertakes to bear all costs 'incurred under or incidental' to the MOU, and to 'assist' Nauru in settling in a 'third safe country' any person determined to be in need of international protection that Nauru does not allow to settle locally, and in returning any person found not to be in need of international protection to their country of origin or another third country where they have the right to enter and reside (articles 6, 13, 14). The MOU is available at <http://www.kaldorcentre.unsw.edu.au/sites/default/files/australia-nauru-mou-2013.pdf>

The MOU is supported by Administrative Arrangements for Regional Processing and Settlement Arrangements in Nauru, signed by Australia and Nauru on 11 April 2014, which 'provide guidance for the transfer of asylum seekers to Nauru, management of the centre and refugee status determination processes': Australian Department of Immigration and Border Protection, submission 31 to Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, May 2015, p. 9 (available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions>).

[8] Section 10 of the *Immigration Act* 2014 (Nauru) provides that a person who is not a citizen of Nauru must have a valid visa to enter or remain in Nauru. Under reg 9 of the Immigration Regulations 2013 (Nauru), in force at the date of the plaintiff's transfer to Nauru, an application for an RPC visa had to be lodged with the relevant Nauruan

authorities before the asylum seeker to whom it related entered Nauru. Applications for RPC visas could only be made by an Australian officer, and the visas would be valid for a maximum period of three months. Nauruan authorities could grant subsequent RPC visas, also for maximum periods of three months each, and also on the request of an Australian officer. Each three-month RPC visa carried a fee of $3,000 (Schedule 2, part 1), payable by Australia when a demand for its payment was made by Nauru (reg 5(7)). On 30 January 2014, shortly after the plaintiff was transferred to Nauru, the Immigration Regulations 2014 (Nauru) came into effect, providing for the grant of RPC visas in relevantly identical terms.

[9] Immigration Regulations 2013, reg 9(6)(a); Immigration Regulations 2014, reg 9(6)(a).

[10] The Centre Rules were published in the Republic of Nauru Government Gazette on 16 July 2014, pp. 2-7 (available at <http://ronlaw.gov.nr/nauru_lpms/files/gazettes/76554e71ea2ca72dc7fc11747ef60d3c.pdf>).

[11] Transfield was renamed Broadspectrum Limited in 2015 after Transfield Holdings, a privately held company owned by the sons of Transfield's founder Franco Belgiorno-Nettis, withdrew Transfield's rights to use the Transfield name, reportedly because of the controversy over the company's contracts in Nauru and on Manus Island: Jenny Wiggins and Michael Smith, 'Transfield Services to change name to Broadspectrum as founders sever ties', *Sydney Morning Herald,* 25 September 2015, <http://www.smh.com.au/business/transfield-services-to-change-name-to-broadspectrum-as-founders-sever-ties-20150924-gjum0b.html>

[12] The Department concluded a series of heads of agreement and contracts with Transfield from 2012 onwards. For the purpose of this proceeding, only the contract dated 24 March 2014, and the payments made under that contract, were in issue. At no time was Nauru a party to the contract with Transfield for the provision of services at the RPC. Transfield subcontracted the security services aspects of its contract to another Australian company, Wilson Security Pty Ltd, which was not a party to the proceedings.

[13] Republic of Nauru, Government Gazette, No. 142, G. N. No. 634/2015, 2 October 2015, <http://ronlaw.gov.nr/nauru_lpms/files/gazettes/138257d9f8e4223789b5f93e466d76aa.pdf>, p. 1.

[14] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 (*Plaintiff M68*)*,* Gordon J at [339]-[343].

[15] On 4 October 2015 the Immigration (Amendment) Regulations No. 3 2015 (Nauru) repealed regs 9(6)(b) and (c) of the Immigration Regulations 2014, thereby removing two of the conditions that had previously been attached to a RPC visa (namely, requirements that the holder of a RPC visa remain at the PRC until and after being granted a health and security clearance certificate, except in the case of an emergency or in limited circumstances with the permission of a service provider).

[16] Republic of Nauru, Government Gazette, 2 October 2015, p. 1.

[17] RPC Act, s 18C.

[18] *Plaintiff M68,* submissions of the first and second defendants, filed 18 September 2015, <http://www.hcourt.gov.au/assets/cases/M68-2015/PlfM68-2015_Def1-2.pdf> [26]-[32].

[19] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [23].

[20] *Plaintiff M68,* Bell J at [64].

[21] *Plaintiff M68,* Keane J at [235].

[22] *Plaintiff M68,* Gageler J at [112]; Gordon J at [350].

[23] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [43]-[44]; Bell J at [73]-[74]; Gageler J at [177]; Keane J at [246]; Gordon J at [363]-[364].

[24] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [41]; Bell J at [66]; Gageler J at [187]; Keane J at [265].

[25] *Plaintiff M68,* Gordon J at [368]-[373].

[26] For a parallel case on this issue in the PNG context, see: Namah v Pato [2016] PGSC 13; SC1497 (26 April 2016) <http://www.paclii.org/pg/cases/PGSC/2016/13.html>.

[27] *Plaintiff M68,* transcript of proceedings, 7 October 2015, [2015] HCATrans 255 at [1565] (Merkel QC).

[28] *Plaintiff M68,* plaintiff's amended submissions, filed 23 September 2015, <http://www.hcourt.gov.au/assets/cases/M68-2015/PlfM68-2015_Plf-Amend.pdf> [97]; *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [47].

[29] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [47]-[52]; Bell J at [102].

[30] *Plaintiff M68,* Gageler J at [106].

[31] *Plaintiff M68,* Gordon J at [276]. See also [413]-[414].

[32] *Plaintiff M68,* Keane J at [248]-[258]. See also French CJ, Kiefel and Nettle JJ at [52].

[33] *Plaintiff M68*, Gordon J at [367].

[34] *Plaintiff M68,* plaintiff's amended submissions, [91]. For the plaintiff's other arguments concerning the external affairs and Pacific islands powers, see [86]-[90].

[35] *Plaintiff M68,* transcript of proceedings, 7 October 2015, [2015] HCATrans 255 at [2390] (Lenehan).

[36] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [42]; Bell J at [75]-[77]; Gageler J at [182]; Keane J at [259].

[37] *Plaintiff M68,* Keane J at [259] (emphasis in original).

[38] *Plaintiff M68,* Gageler J at [182].

[39] *Plaintiff M68,* Gageler J at [182].

[40] David Hume, 'Plaintiff M68-2015 – offshore processing and the limits of Chapter III', *AusPubLaw Blog,* 26 February 2016, <https://auspublaw.org/2016/02/plaintiff-m68-2015/>

[41] *Plaintiff M68,* transcript of proceedings, 7 October 2015, [2015] HCATrans 255 at [740] (Merkel QC).

[42] *Plaintiff M68,* transcript of proceedings, 8 October 2015, [2015] HCATrans 256 at [4020]-[4025] (Gleeson SC).

[43] *Plaintiff M68,* submissions of the first and second defendants, [69].

[44] On 17 October 2015, after the case had been heard in full, the defendants disclosed additional documents to the plaintiff documenting the fact that staff members of Wilson Security had been sworn in as reserve officers of the Nauru Police Force Reserve in July 2013.This fact could potentially have been relevant to the court's consideration of whether the Australian government itself was detaining asylum seekers in Nauru, or the extent of the Australia's involvement in the detention of asylum seekers in and by Nauru.

On 28 January 2016 the parties sought to reopen the proceedings for the limited purpose of amending the special case to make reference to these new facts. The proposed consent order was refused. In their joint judgment, French CJ, Kiefel and Nettle JJ concluded (at [53]) that this new information 'would not affect the outcome' of their findings.

[45] *Plaintiff M68,* Bell J at [79]-[93]; Gageler J [167]-[173]; Gordon J at [269], [296], [352]-[356].

[46] *Plaintiff M68,* Bell J at [93].

[47] *Plaintiff M68,* Gageler J at [172]-[173].

[48] *Plaintiff M68,* Gageler J at [173].

[49] *Plaintiff M68,* Gordon J at [355].

[50] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [39].

[51] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [35].

[52] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [39], [41].

[53] *Plaintiff M68,* Keane J at [239].

[54] *Plaintiff M68,* Keane J at [240].

[55] *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1; [1992] HCA 64 (*Lim*), Brennan, Deane and Dawson JJ at [8].

[56] *Lim,* Brennan, Deane and Dawson JJ at [21].

[57] *Lim,* Brennan, Deane and Dawson JJ at [22].

[58] Brennan, Deane and Dawson JJ held: 'Where Parliament seeks to confer an authority to detain on the executive, the question of whether detention has a punitive character (and thus is of an exclusively judicial nature) will be a matter of substance rather than form. That is, a statutory provision seeking to invest the executive government with an arbitrary power to detain will be invalid 'notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt': *Lim* at [23].

[59] *Lim,* Brennan, Deane and Dawson JJ at [29]-[30].

[60] *Lim,* Brennan, Deane and Dawson JJ at [30].

[61] *Lim,* Brennan, Deane and Dawson JJ at [30].

[62] *Lim,* Brennan, Deane and Dawson JJ at [32].

[63] *Lim,* Brennan, Deane and Dawson JJ at [32].

[64] *Plaintiff M68,* Plaintiff's amended submissions, [37(b)].

[65] *Plaintiff M68,* submissions of the first and second defendants, [53].

[66] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [40].

[67] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [41].

[68] *Plaintiff M68,* Keane J at [241].

[69] *Plaintiff M68,* Bell J at [97].

[70] *Lim,* Brennan, Deane and Dawson JJ at [32], cited in *Plaintiff M68,* Bell J at [98].

[71] *Plaintiff M68,* Bell J at [98].

[72] *Plaintiff M68,* Bell J at [99]; Plaintiff's amended submissions, [37(c)]; citing *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 per Hayne and Bell JJ at [149]-[150].

[73] *Plaintiff M68*, Bell J at [101].

[74] *Plaintiff M68*, Bell J at [101].

[75] *Plaintiff M68*, Bell J at [100].

[76] *Plaintiff M68*, Gageler J at [115]-[166].

[77] *Plaintiff M68,* Gageler J at [183]-[184].

[78] *Plaintiff M68*, Gageler J at [184].

[79] *Plaintiff M68*, Gageler J at [185].

[80] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [46].

[81] *Plaintiff M68,* Keane J at [262]. See also [247].

[82] *Plaintiff M68,* Keane J at [260]-[261].

[83] *Plaintiff M68,* Gordon J at [378].

[84] *Plaintiff M68,* Gordon J at [390], [395].

[85] *Plaintiff M68,* Gordon J at [376]-[393].

[86] *Plaintiff M68,* Gordon J at [394]-[396].

[87] *Plaintiff M68,* Gordon J at [401].

[88] *Plaintiff M68,* Gordon J at [402].

[89] *Plaintiff M68,* Gordon J at [403].

[90] *Plaintiff M68,* Gordon J at [404]-[411].

[91] *Plaintiff M68,* Gordon J at [412].

[92] *Plaintiff M68,* Gordon J at [368]-[373].

[93] Thomas Oriti, 'Let Them Stay labelled a success, more than half of 267 asylum seekers in community detention', *AM,* ABC, 2 April 2016, <http://www.abc.net.au/news/2016-04-02/let-them-stay-labelled-success-asylum-seeker-community-detention/7294456>

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