

Casenote

PLAINTIFF M96A/2016 v COMMONWEALTH OF AUSTRALIA & ANOR [2017] HCA 16

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This case note provides an overview of key facts and findings of the High Court of Australia in *Plaintiff M96A/2016 v Commonwealth of Australia* [2017] HCA 16. The case concerns the Commonwealth's detention of asylum seekers transferred to Australia from Nauru to receive medical treatment. More information about the processing of asylum seekers in Nauru is available through the Kaldor Centre [factsheets](#).

Facts

The plaintiffs are a mother and daughter from Iran. They arrived in Australia at Christmas Island by boat in August 2013, and thereby became 'unauthorised maritime arrivals' under s 5AA of the *Migration Act 1958* (Cth) ('the Act'). They were detained in Australia and subsequently taken to Nauru for 'regional processing', pursuant to s 198AD(2) of the Act.

On 1 November 2014, the plaintiffs were brought to Australia as 'transitory persons' under s 198B of the Act, so that they could both receive medical treatment. Upon arrival in Australia, the plaintiffs were placed in detention, initially in Darwin and later in the Melbourne Immigration Transit Accommodation. The basis for the plaintiffs' detention while in Australia was said to be ss 189 and 196 of the Act.

On 6 December 2016 the plaintiffs were released from detention after the Minister made a residence determination, under s 197AB of the Act, permitting them to reside at a specified place subject to conditions.

Key issue

The plaintiffs' sole claim was that, during the time that they were in Australia for the temporary purpose of receiving medical treatment, there was no legal basis for their detention.

They did not seek to challenge the lawfulness of their initial detention at Christmas Island, their removal to Nauru and subsequent transfer back to Australia, or Australia's regional processing policies more broadly. They also did not seek to challenge the validity of the

Commonwealth's power to remove them from Australia once they no longer needed to be in the country for a temporary purpose.

Summary of the relevant law

The plaintiffs' detention was governed by a scheme comprised of several provisions in the Act:

- s 42(1) creates a general rule that a non-citizen must not travel to Australia without a valid visa. However, this does not apply where a non-citizen is brought to Australia under s 198B;
- s 198B states that an officer has the power to bring non-citizens who qualify as 'transitory persons' to Australia for a 'temporary purpose'. 'Temporary purpose' is not defined;
- ss 189(1) and 196(1) relate to the detention of 'unlawful non-citizens' within Australia:
 - s 189(1) states that an officer must detain 'unlawful non-citizens'. Unlawful non-citizens are defined as non-citizens who arrive in Australia without a valid visa (ss 13, 14);
 - s 196(1) states that an unlawful non-citizen detained under s 189 must be kept in immigration detention until they are removed from detention, taken to a regional processing country, deported, or granted a visa; and
- ss 198AD and 198(1A) govern the removal of transitory persons from Australia:
 - when a transitory person who is detained in Australia under s 189 no longer needs to be in Australia for the temporary purpose, an officer has a duty to take that person to a regional processing country as soon as reasonably practicable, regardless of whether the temporary purpose for the person's return to Australia has been achieved (s 198AD, read with s 198AH); and
 - for all other transitory persons not covered by the above provisions, s 198(1A) states that an officer has a duty to remove them as soon as reasonably practicable after they no longer need to be in Australia (again, regardless of whether the temporary purpose for their return to Australia has been achieved).

Plaintiffs' case

The plaintiffs accepted that the Commonwealth had power under s 198B to bring them to Australia for the temporary purpose of medical treatment. They argued, however, that once this power had been exercised, ss 189 and 196 did not authorise the Executive to keep them in immigration detention.

The plaintiffs argued that their detention was invalid for two reasons:

- a) the purpose of their detention – to obtain medical treatment – was not constitutionally permissible. In making this argument, the plaintiffs asserted that the only lawful purposes for detention were the three purposes identified by a majority of the High Court in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* ('Plaintiff S4'), namely:

- i) the purpose of removal from Australia;
 - ii) the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; and
 - iii) the purpose of determining whether to permit a valid application for a visa;¹ and
- b) the duration of their detention was not capable of objective determination by a court at any material time. In making this argument, the plaintiffs again relied on *Plaintiff S4*, where the majority said: ‘The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced by the courts, and, ultimately, by this Court’.²

Judgment

All seven judges found that the plaintiffs’ detention was lawful. Accordingly, the action was dismissed. There were two judgments: a joint judgment by Kiefel CJ, Bell, Keane, Gordon & Edelman JJ, and a separate judgment by Gageler J, who affirmed the joint judgment, and made some additional observations.

The joint judgment reaffirmed Brennan, Deane and Dawson JJ’s statement in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, that Parliament has power to make laws for the expulsion and deportation of non-citizens, and for their restraint in custody, but only if ‘the detention which they require and authorize 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’.³ The joint judgment went on to say that this statement required two things: identifying the purpose of the detention, and considering the time necessarily involved in the particular case to deport the non-citizen, or to receive, process and determine an application for permission to remain in Australia.⁴

The purpose of the plaintiffs’ detention

Regarding the purpose of their detention, the plaintiffs asserted two things: (i) that the purpose of their detention was identical to the temporary purpose (obtaining medical treatment) for which they were brought to Australia; and (ii) that the only constitutionally permissible purposes for executive detention of an alien were the three purposes identified in *Plaintiff S4* (removal from Australia, processing a visa application and determining whether to permit a visa application).

By contrast, the defendants argued that the purposes of detaining the plaintiffs were to segregate them from the Australian community, which they had no right to enter without a visa, while the temporary purpose was pursued, and to ensure that they would be available for removal once they no longer need to be in Australia.⁵ The defendants also submitted that the lawful detention purposes identified in *Plaintiff S4* were not an exhaustive list, such that new purposes might be identified.

The Court accepted the defendants' view of the purpose of the plaintiffs' temporary detention. It held that the purpose was the same purpose that underpinned all instances involving the detention of unlawful non-citizens: to facilitate their ultimate removal from Australia.⁶ The joint judgment noted that the difference between the purpose of detention and the temporary purpose for which the plaintiffs were brought to Australia is highlighted by two factors:

- the fact that detention need not aid the temporary purpose (indeed, in the plaintiffs' case, where the temporary purpose was obtaining medical treatment, detention could in fact be antithetical to achieving it);⁷ and
- the fact that the statutory scheme did not make the duration of detention coterminous with fulfilment of the temporary purpose.⁸

As the Court's view of the purpose of detention fell within the three permissible categories of detention identified in *Plaintiff S4*, it was unnecessary to determine whether these categories were exhaustive.⁹ Similarly, the Court elected not to rule on whether the compatibility of executive detention with the separation of judicial power in Chapter III of the Constitution depends on whether or not the detention can be said to be for the purposes of punishment.¹⁰

The duration of detention

The Court affirmed that in order for executive detention to be compatible with the constitutional separation of judicial power, there must be objectively determinable criteria for detention.¹¹ It found that such criteria were present, as the statutory scheme prescribed various preconditions, each of which had the effect of ending detention.¹² Accordingly, the Court dismissed the plaintiffs' claim that their detention was invalid due to its duration being uncertain.¹³

The defendants submitted that the question of when a transitory person no longer needs to be in Australia for a temporary purpose is to be determined by the evaluative judgment of an officer, exercisable in accordance with general principles of administrative law.

This question did not ultimately need to be determined in the case (as the plaintiffs did not contend that it would make any material difference to the outcome). On this basis, the joint judgment declined to address the question.¹⁴ However, Gageler J considered the point. He rejected the defendants' submission, finding that the point at which a person no longer needs to be in Australia for a temporary purpose must be answered by a court.¹⁵

This finding was based on statutory interpretation principles. Gageler J noted that there are established drafting techniques that are used when Parliament intends for a power or duty to come into play when the officer exercising it holds a particular state of mind. He noted that these techniques were used elsewhere in the Act, but not in the relevant sections pertaining to transitory persons and temporary purpose.¹⁶

Further reading

The judgment in this case is available from the High Court website at <<http://eresources.hcourt.gov.au/downloadPdf/2017/HCA/16>>. The submissions and transcripts of hearing are also available at <http://www.hcourt.gov.au/cases/case_m96-2016>.

Kaldor Centre, *Case note: Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors* [2016] HCA 1, (2016), 13 July, <<http://www.kaldorcentre.unsw.edu.au/publication/plaintiff-m682015-v-minister-immigration-and-border-protection-ors-2016-hca-1>>.

Madeline Gleeson, *Offshore processing: Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea*, (2015), 8 April, <<http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview>>.

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Endnotes

¹ (2014) 253 CLR 219 at 231 [26].

² *Ibid*, at 232 [29].

³ Plaintiffs' submissions, [24], citing *Chu Kheng Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ).

⁴ [2017] HCA 16 at [21]

⁵ Defendants' submissions, [49]; Hearing, 2083-2087.

⁶ [2017] HCA 16 at [27].

⁷ *Ibid* at [24]-[25].

⁸ *Ibid* at [26].

⁹ *Ibid* at [22].

¹⁰ *Ibid*.

¹¹ *Ibid* at [31].

¹² *Ibid* at [32].

¹³ *Ibid* at [32], [46].

¹⁴ *Ibid* at [32].

¹⁵ *Ibid* at [42].

¹⁶ *Ibid* at [39]-[41].