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Casenote

PLAINTIFF S156/2013: THE CONSTITUTIONALITY OF OFFSHORE PROCESSING ON MANUS ISLAND

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Key points

- Legislation authorising the removal of asylum seekers from Australia to another country, even where they are subsequently detained and potentially at risk of *refoulement* in breach of Australia's legal obligations, is within the aliens power of the Australian Constitution
- In designating a 'regional processing country', the Minister is not required to consider any factors other than those mandated by the Act, namely the regional processing country's giving of assurances as to *non-refoulement* and refugee status determination
- In particular, the Minister does not need to have regard to UNHCR's advice on the matter, the regional processing country's international or domestic law, or its capacity to implement those obligations
- The Parliament has succeeded in its intention to 'restor[e] to the executive the power to manage one of a government's core functions - control of a nation's borders' (as stated by the then Immigration Minister following the High Court's previous decision in the *Malaysia Declaration* case
- Australia's migration legislation may therefore no longer 'respond' to its international obligations under the Refugee Convention.

Case note

On 18 June 2014 Australia's High Court unanimously dismissed a challenge to the legality of the legislation underpinning offshore processing. The High Court upheld the constitutionality of the legislation, the validity of the Minister's designation of Papua New Guinea (PNG) as a regional processing country, and the Minister's direction as to where asylum seekers were to be transferred (Nauru and PNG).

The legal history of offshore processing

The legal history of the legislation challenged in *Plaintiff S156* is complex. It begins with the suite of legislation passed by the Howard Government to enact the 'Pacific Solution'

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following the Tampa affair in 2011. Relevantly, *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) introduced section 198A, which provided that the Minister could declare in writing that a specified country:

i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection;
ii) provides protection for persons seeking asylum, pending determination of their refugee status;
iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
iv) meets relevant human rights standards in providing that protection.

If the Minister made such a declaration, then 'offshore entry persons' could be taken to a specified country. On 2 October 2001 Nauru was declared such a country under then s 198A, although it was not then a signatory to the Refugee Convention.

On 25 July 2011, the Immigration Minister made a declaration under s 198A in respect of Malaysia. However, on 31 August 2011, a legal challenge in the High Court of Australia to that declaration succeeded in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 321; (2011) 244 CLR 18. The majority of the High Court found that, properly construed, the four sub-paragraphs in section 198A were 'jurisdictional facts' - that is, essential conditions that had to be fulfilled in order for the Minister to have power to make the declaration. Further, what was required was not merely an examination of 'what has happened, is happening or may be expected to happen in the relevant country', but rather those conditions must be fulfilled as 'a matter of legal obligation'. As Malaysia did not have any domestic refugee status determination procedure, was not a party to the Refugee Convention or its Protocol, and had made no legally binding arrangement with Australia obliging it to accord the required protections, the Minister could not make the declaration.

Shortly thereafter, on 21 September 2011, the Australian Government introduced into Parliament the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth). This created a new subdivision, titled 'Regional Processing', with the intention of reversing the High Court's decision. It included the following statement of intent:

i) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed;
ii) offshore entry persons, including offshore entry persons in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country;
iii) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and
iv) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.

The subdivision included the two sections which were challenged in *Plaintiff S156*, ss 198AB and 198AD.

Section 198AB governs the process by which the Minister for Immigration can designate a country as a 'regional processing country'. This declaration is a legislative instrument that must be tabled in Parliament. The instrument must either be approved by resolution of both Houses of Parliament, or is laid before both Houses and neither House passes a resolution disapproving the instrument within five sitting days.

Crucially, this section provides that the 'only condition' that the Minister must satisfy to designate a country is that the 'Minister thinks that is in the national interest to designate the country to be a regional processing country'. The section also provides that, in considering the national interest, the Minister 'must have regard' to the existence of any assurances (which need not be legally binding) by the regional processing country that it will not expel or return a person to a country where that person's 'life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion' (essentially mirroring the *non-refoulement* obligation under art 33 of the Refugee Convention), and assurances that it would make or permit an assessment of whether a person falls within the refugee definition under the Refugee Convention. (It should be noted that these sections do not encompass other *non-refoulement* obligations owed by Australia under the Convention against Torture and the International Covenant of Civil and Political Rights). The section then provides that the Minister 'may have regard to any other matter which, in the opinion of the Minister, relates to the national interest'. Like other Ministerial powers in the Migration Act, this power is to be exercised personally by the Minister. The rules of natural justice are also expressly excluded.

Section 198AD identifies the people who may be transferred to a designated regional processing country, namely 'unauthorised maritime arrivals' subject to detention under section 189, and relevantly empowers officers (including defence officers) to transfer people to and, if necessary, from the regional processing country. It also provides for the Minister to personally make a direction as to where such people should be taken if there is (as is presently the case) more than one designated regional processing country. Again, the rules of natural justice are excluded.

Facts

The plaintiff in this case had applied for refugee status within Australia, but was transferred to Manus Island in PNG. PNG had been designated a 'regional processing country' on 9 October 2012.

The plaintiff's submission reveals interesting facts about the Minister's decision-making process. Although the Minister requested the advice of the UN High Commissioner for Refugees (UNHCR), the Minister did not wait for this advice, which arrived after his designation (para 69 of the plaintiff's submissions). UNHCR's advice, when it arrived, was that PNG did not have the 'legal safeguards nor the competence nor the capacity to shoulder alone the responsibility of protecting and processing asylum-seekers transferred by Australia', and that 'there is, at present, no effective national legal or regulatory framework to address refugee issues' (paras 75-76 of the plaintiff's submissions). UNHCR also warned of the lack of infrastructure and support in PNG, the lack of access to legal representation and

the courts, and the negative impact of the 'no advantage' test that operated at that time (para 78 of the plaintiff's submissions). The Minister's failure to wait for UNHCR's advice meant that this advice was not laid before Parliament, as contemplated by section 198AC.

The Minister also expressly stated in his statement of reasons that 'he chose not to have regard to the international obligations or domestic law of the PNG' (para 73 of the plaintiff's submissions). The issues paper prepared by officials to brief the Minister had considered the issue of Australia's potential violation of international legal obligations to be 'contestable' and noted that, 'while the proposed designation might well constitute a breach or breaches of international law … that it did not matter because the Minister could determine that it was within the national interest and the Minister [could] seek a further submission if he is troubled by the issue' (para 82 of the plaintiff's submissions). The Minister did not seek a further submission on the issue (para 83 of the plaintiff's submissions).

The constitutional arguments

The principal constitutional challenge was that the relevant sections were not supported by any Commonwealth legislative power, including the three typically used to support immigration legislation: namely, the naturalization and aliens power (s 51(xix)), the immigration and emigration power (s 51(xxvii)), and the external affairs power (s 51(xxix)).

Aliens power

The plaintiff began by acknowledging that legislation regulating the removal of persons from Australia was clearly within the aliens power under the Constitution. However, the regional processing regime extended far beyond removal, in that it potentially subjected them to indefinite detention and possible *refoulement*, since the legislation did not mandate that the regional processing country have a framework for refugee processing.

The plaintiff sought to resurrect the High Court authority, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64; 176 CLR 1 in two ways. First, the plaintiff sought to press Gaudron J's suggestion in that case that, to be supported by the aliens power, the law must be 'directly connected' to the alien status of a person, which would include laws regulating entry to or departure from Australia. However, other laws imposing special obligations or disabilities on aliens could only be supported to the extent that these were 'appropriate and adapted' to regulating entry or facilitating departure if and when departure were required. The term 'appropriate and adapted' evokes a kind of 'proportionality' test, common in other jurisdictions but much contested in Australian constitutional law. Such tests assess the degree of relationship between the legislation and its purposes in determining the validity of the legislation.

The plaintiff argued that the regional processing regime did not meet this test of 'appropriate an adapted', because detention and control on Manus Island was entirely unconnected to the determination of a person's status or rights to enter under Australian law. Nor could it be said to be 'appropriate and adapted' because of its alleged deterrent effect, as the scheme

was so extreme in its operation (for example, the Minister need have no regard to the domestic or international law in the proposed regional processing country).

The plaintiff also sought to rely upon the majority judgment in *Chu Kheng Lim*, which examined the connection between executive detention and the exclusive nature of the judicial power conferred under Chapter III of the Constitution. While finding the detention in that case constitutional, the High Court considered that executive detention was only consistent with Chapter III if it was limited to the period of time reasonably capable of being seen as necessary to complete consideration of permission to enter, remain and deport or remove a person. The plaintiff argued that, in this case, the current regional processing scheme had the effect of executive detention, without time limit, and was not for the purposes of removal or for considering entry to Australia. Nor was the detention necessary to complete consideration for entry into the regional processing country, because no legal or administrative framework for processing in the regional processing country is required by the Migration Act.

All of these arguments failed in the High Court, for the reason that the legislation itself only dealt with removal, and did not provide either for detention or further control. Removal itself was clearly within the aliens power. Therefore, the legislation was constitutionally valid. The Court also showed no renewed enthusiasm for *Chu Kheng Lim*, a case that while not technically overruled appears to have lost much of its precedential value. For example, the Court commented that the plaintiff:

> uses the words 'proportionality' and 'reasonably appropriate and adapted' interchangeably. By themselves, these words do not convey a process of reasoning. They may mean different things about the effect of a law. Without further explication, they are little more than statements of conclusion and as such they may mask more than reveal what is being said and whether a test has been applied.

Immigration and external affairs power

Having decided that the legislation was supported by the aliens power, the High Court did not then comment on the further submissions of the plaintiff in respect of the immigration and external affairs power. It is an odd fact of history that, because earlier High Court decisions had limited the scope of the immigration and emigration power, Australia's migration legislation more recently has been based on the broader aliens power instead.

In relation to the immigration power, the plaintiff had argued that the power to choose a place to deport did not fall within the immigration power itself, as this power was exhausted once a person was removed, but rather was sustained by an implied incidental power. This incidental power under the Constitution validates laws which are necessary to execute laws within power. However, the plaintiff argued, laws justified by the implied incidental power are subject to a proportionality test and for the same reasons argued in relation to the aliens power, these laws were not proportionate to the ends.

The plaintiff's argument under the external affairs power was that the power could not be enlivened merely by Australia's own action in deciding to remove people from Australia.

Rather, there must be a pre-existing external affair to enliven the power. Further, and in the alternative, the breadth of the external affairs power was constrained by the constitutional limit identified by the majority in *Chu Kheng Lim* (the exclusivity of judicial power).

The administrative law challenge

The plaintiff's principal argument in relation to the invalidity of the designation by the Minister was that, notwithstanding the legislative direction that the Minister 'must' only consider one matter, there remained a range of factors that the Minister was required to consider as being relevant. These included:

- consultations with and advice from UNHCR (which was not received before designation, as noted above);
- international obligations or domestic law of PNG (which was expressly not relied upon, as noted above);
- the effectiveness of a national legal or regulatory framework for refugee status determination (which did not exist);
- PNG's capacity to implement its international legal obligations (which, UNHCR's advice indicated, was very limited);
- the potential for arbitrary and indefinite detention in conditions amounting to torture, cruel, inhuman or degrading treatment, without access to legal advice, representation or judicial review;
- the violation or breach of at least four international treaties; and
- the violation or breach of Australia's international and customary law obligations (which the Minister did not consider).

This challenge ran aground on the clear language of the statute, with its express division between matters the Minister 'must have regard to' and a broad discretion as to what other matters might be considered. In doing so, the statute deliberately created an 'unconfined discretion' by enabling the Minister to have regard to any matter, but not obliging him to do so. Significantly, the High Court noted that 'there was some doubt' that the amendments to the offshore processing regime could 'be said to respond to Australia's obligations under the Refugees Convention' (unlike the former s 198A, as interpreted by the High Court) and, indeed, this was 'part of the plaintiff's complaint'.

The plaintiff's other administrative arguments were given even shorter shrift. These included that the process of decision-making was 'legally unreasonable', given the failure to consider UNHCR's advice, the lack of facilities or infrastructure in PNG, the health or safety of the asylum-seekers, the absence of a refugee status determination procedure, and the taking of PNG's assurances at face value. For the same reason, these matters did not need to be considered by the Minister.

Another unsuccessful argument was that the Minister had 'no evidence' to justify his findings that PNG would act, or was capable of acting, consistently with the Refugee Convention, or that his decision would promote a 'fair and orderly refugee and humanitarian program' in PNG (which the Minister stated as one of the five reasons for his decision). The High Court said that there was no requirement that the Minister be satisfied of these facts before exercising the power (that is, they were not 'jurisdictional facts').

Ministerial direction

Finally, the plaintiff challenged the Ministerial direction dated 2 August 2013, which directed officers as to where the asylum seekers should be taken. The Minister's direction divided them into four classes, and directed them to either Nauru or PNG depending upon whether three conditions could be satisfied. The plaintiff argued that, by failing to specify only one country and allowing officers to 'evaluate' to which country the asylum seekers should be sent, the direction was invalid. However, the High Court disagreed, finding that the three conditions were 'simple enquiries, not an evaluative process'.

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