Validity of Migration Act provisions for regional processing on Nauru

Tarik Abdulhak reports on *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1.

In *Plaintiff M68/2015 v Minister for Immigration*, a majority of the High Court[1] upheld the validity of s 198AHA of the *Migration Act 1958* (Cth), which authorises the Commonwealth to give effect to arrangements for the offshore processing and detention of unlawful maritime arrivals. The majority held that s 198AHA was a law with respect to aliens and was thus authorised by s 51(xix) of the Australian Constitution.

1. The plaintiff's detention on Nauru and her application to the High Court

The plaintiff is a Bangladeshi asylum seeker who sought unauthorised maritime entry into Australia. In January 2014 she was transferred to the Republic of Nauru, where she was detained. Her transfer was effected under s198AD(2) of the Migration Act, which requires officers of the Department of Immigration to remove unauthorised maritime arrivals to a regional processing country.[2] Nauru was designated a regional processing country on 10 September 2012.[3]

The purpose of the plaintiff's transfer to Nauru was to enable her claim for protection to be assessed by the Nauruan authorities. Under the arrangements discussed in Section 2 below, if the plaintiff is assessed as being entitled to protection under the Refugee Convention,[4] she may be offered settlement in Nauru or in a third country. She would not be entitled to settle in Australia.

In August 2014 the plaintiff was temporarily transferred to Australia for medical treatment. She subsequently commenced proceedings in the High Court's original jurisdiction, seeking, *inter alia*: a writ of prohibition directed to the minister to prevent her return to Nauru; and a declaration that the Commonwealth's actions in procuring her prior detention in Nauru were unlawful because they were not authorised by a valid law of the Commonwealth.

On 30 June 2015, the Commonwealth Parliament enacted amendments to the Migration Act, inserting s 198AHA with retrospective effect to 18 August 2012. The section purports to authorise the Commonwealth to take any 'action' in relation to the processing functions of a regional processing country,[5] including exercising restraint over a person's liberty in such a country.[6] A key question which the court had to determine was whether the Commonwealth's actions in taking part in the implementation of the regional processing arrangements at Nauru were authorised by s 198AHA and / or s 61 of the Commonwealth Constitution.

2. The regional processing arrangements

The regional processing arrangements were operated under a Memorandum of Understanding ('MoU') between the Commonwealth and the Republic of Nauru, and a number of associated agreements. Features of the arrangements which were relevant to the plaintiff's case included the following:

- While Nauru agreed to accept transferees from Australia, the Commonwealth agreed to bear all costs of the arrangement.
- Nauruan visas for transferees can only be issued on application by Australian officials. The officials make the applications on behalf of, and without the consent of, the transferees.
- All transferees reside at, and until recently were detained in, a Regional Processing Centre ('RPC') in Nauru. Australia is responsible for the provision of security infrastructure at the RPC, and for all service contracts to enable the RPC's operation.
- Australia is directly involved in the oversight and management of the RPC.
- Security services at the RPC are provided by private agencies contracted and supervised by Australia. Employees of these agencies have authority to permit detainees to leave the RPC at specified times (see below).

The detention of the transferees was effected under Nauruan law. Starting from February 2015 the transferees were able to obtain permission to leave the RPC for specified periods. In October, shortly before the hearing of this case before the High Court, the Nauruan government indicated its intention to allow unrestricted freedom of movement for the transferees. It therefore appeared that, if the plaintiff were to be returned to Nauru, she would no longer be detained, albeit that she would still be required to reside at the RPC.[7]

3. Judgments of the majority

All seven justices found that the plaintiff had standing to seek a declaration as to the lawfulness of the Commonwealth's conduct. Her application did not involve a hypothetical question. A declaration would not only determine the lawfulness of the plaintiff's past detention but would also address the question of whether the Commonwealth could engage in similar conduct in the future.[8]

Six of the seven justices held that the Commonwealth's participation in the plaintiff's detention on Nauru was authorised by s 198AHA of the Migration Act, which their Honours held to be a valid law of the Commonwealth. The validity of s 198AHA was also addressed through the prism of the principle enunciated in *Chu Kheng Lim v Minister for Immigration*, that the detention of an alien by the Executive, without judicial authority, is only valid to the extent that it is authorised by statute.[9]

French CJ, Kiefel and Nettle JJ found that the Commonwealth had not detained the plaintiff on Nauru, but had nevertheless participated in the plaintiff's detention.[10] It was necessary for such an action to be authorised by Australian law,[11] and s 198AHA provided the requisite authorisation.[12] The plurality held that s 198AHA is, in turn, supported by the aliens power in s 51(xix) of the Constitution because it concerns the functions of the place to which an alien is removed for the purpose of the determination of his or her refugee status.[13] The Commonwealth's exercise of physical restraint over the plaintiff in Nauru is, however, only valid to the extent that it is within the scope and purpose of s 198AHA, namely the processing of the plaintiff's claim to refugee status.[14] Their Honours also held that the Commonwealth's entry into the MoU with Nauru was authorised by s 61 of the Constitution.[15]

Bell J took a different view of the actual extent of the Commonwealth's participation in the plaintiff's detention on Nauru, finding that the Commonwealth had brought about, and exercised effective control over, that detention.[16] Her Honour held that these actions were authorised by s 198AHA because they were closely connected to the processing of protection claims of an individual who was removed from Australia to a regional processing country. This also provided a sufficient connection between s 198AHA and s 51(xix) of the Constitution.[17] Furthermore, s 198AHA did not offend the principle in *Lim* because: a) in accordance with *Lim*, the parliament is authorised to confer power on the Executive to detain aliens without judicial warrant for the purposes of deportation or investigation of an application for entry;[18] and b) s 198AHA did not offend this principle.[19] Bell J agreed with the plurality's conclusions with respect to s 61 and the scope of validity of the exercise of physical restraint over an alien under s 198AHA.[20]

Gageler J found that security officers who detained the plaintiff acted as *de facto* agents of the Executive Government.[21] However, the Commonwealth's procurement of the plaintiff's detention fell within the statutory authority retrospectively conferred by s 198AHA.[22] His Honour held that s 198AHA

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was authorised by both the aliens power in s 51(xix) and the external affairs power in s 51(xxix) of the Constitution.[23] The section was not punitive in character because, *inter alia*, it authorised detention only for as long as it was reasonably necessary to effectuate a specific statutory purpose (regional processing). Section 198AHA therefore did not offend Chapter III of the Constitution.[24]

Similarly to the other members of the majority, Keane J found that s 198AHA seeks to ensure the reasonable practicability of the removal of aliens to another country for offshore processing. His Honour held that the provision is therefore a valid law under s 51(xix) of the Constitution.[25] In his Honour's view, the authority under s 198AHA to cause the detention of an alien exists only if it is a necessary condition of the willingness and ability of the processing country (e.g. Nauru) to receive the alien for processing.[26] His Honour held that because the plaintiff was detained by Nauru and not by the Commonwealth, the principles in *Lim* were not engaged.[27]

4. Justice Gordon's dissenting judgment

Unlike the majority, Gordon J held that the plaintiff was in fact detained by the Commonwealth on Nauru.[28] In coming to this conclusion, her Honour reviewed various indicia of the Commonwealth's extensive involvement in the detention regime.[29]

Gordon J accepted that s 198AHA authorises the Commonwealth to detain the plaintiff on Nauru.[30] However, in her Honour's view, the section is constitutionally invalid. By providing for the Commonwealth to detain aliens in a foreign country after their removal from Australia, s 198AHA goes beyond regulating the entry and removal of aliens, and thus exceeds the aliens power in s 51(xix) of the Constitution.[31] Her Honour held that 'the aliens power does not provide the power to detain *after* removal is completed.'[32] Furthermore, by exceeding the specific categories of detention which are authorised by the judgment in *Lim* (i.e. deportation and excluding the admission of aliens),[33] s 198AHA contravenes Chapter III of the Constitution.[34]

Gordon J further held that, like the aliens power, the external affairs power (s 51(xxix) of the Constitution) is subject to the limitations and prohibitions in the Constitution, including the *Lim* principle.[35] The external affairs power therefore does not extend to making laws authorising the Executive to detain persons contrary to Chapter III, a limitation which s 198AHA exceeded.[36] For similar reasons, s 198AHA is not supported by the power to pass laws with respect to relations with the islands of the Pacific (s 51(xxx)), or the immigration power (s51(xxvii).[37]

Finally, Gordon J held that, while the Commonwealth's entry into the MoU with Nauru was an act within the non-statutory power of the Commonwealth, s 61 of the Constitution could not provide a constitutional basis for the right to detain in s 198AHA.[38] This is because the executive power of the Commonwealth does not provide authority for an officer of the Commonwealth to detain a person.

Endnotes

1. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 ('Judgment in plaintiff M68'), French CJ, Kiefel and Nettle JJ, Bell J, Gageler J, Keane J (Gordon J dissenting).
2. The term 'unauthorised maritime arrival' is defined in s 5AA of the *Migration Act 1958* (Cth).
3. This designation was made by the Minister for Immigration under s 198AB(1) of the Migration Act.
4. Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).
5. This term is defined in s 198AHA(5) to include the implementation of any law or policy by a country in connection with its role as a regional processing country.
6. s 198AHA(5) of the Migration Act.
7. Gordon J points to this fact at [345].
8. Judgment in *Plaintiff M68*: French CJ, Kiefel and Nettle JJ at [23]; Bell J at [64]; Gageler J [112] (although not referring to the issue of future legality); Keane J at [235] (stating also that a person who has been detained has standing to question the lawfulness of that detention even though he / she is not seeking damages); and Gordon J at [349]–[350] (describing the question of whether the plaintiff's detention at Nauru was unlawful under Australian law as a 'live issue' which has foreseeable consequences).
9. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, at 19.
10. Their Honours held it was 'very much to the point' that Nauru detained the plaintiff in the exercise of its sovereign legislative and executive power and that the Commonwealth could not compel Nauru to make laws requiring detention of transferees: at [34]–[37].
11. Judgment in *Plaintiff M68*, French CJ, Kiefel and Nettle JJ at [41].
12. Ibid at [41], [46].
13. Ibid at [42].
14. Ibid at [46].
15. Ibid at [54].
16. Judgment in *Plaintiff M68*, Bell J at [83], [92]–[93].
17. Ibid at [77].
18. *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, Brennan, Deane and Dawson JJ, at 33; Re *Woolley*; Ex parte Applicants M276/2003 (2004) 225 CLR 1, Gleeson CJ at 12–13; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, Crennan, Bell and Gageler JJ at 369.
19. Judgment in *Plaintiff M68*, Bell J at [98]–[99].
20. Ibid at [101], [103].
21. Judgment in *Plaintiff M68*, Gageler J at [172]–[173].
22. Ibid at [180].
23. Ibid at [182]. His Honour also held, at [178], that the entry by the Commonwealth into the Memorandum of Understanding with Nauru was an exercise of the Executive's non-statutory prerogative capacity to conduct relations with other countries.
24. Judgment in *Plaintiff M68*, Gageler J at [184]–[185].
25. Judgment in *Plaintiff M68*, Keane J at [259], [264]–[265].
26. Ibid at [260]–[262].
27. In his Honour's view, while the Commonwealth may have procured or funded restraints upon the plaintiff's liberty, this did not alter the fact that the plaintiff was detained by the exercise of the governmental power of Nauru: Judgment in *Plaintiff M68*, Keane J at [239].
28. Judgment in *Plaintiff M68*, Gordon J at [276], [352]–[355].
29. See, for example, her Honour's analysis at [299], [323], [332], [354] (the service provider contracted by the Commonwealth was required to and did restrict the plaintiff's liberty; the Commonwealth can, at any time, take over the operation of the regional processing centre ('RPC') from the service provider); [330] (the service provider maintains security in accordance with the policies of the Commonwealth Department of Immigration); [287] (the Commonwealth bears all the costs of the arrangement); [288] (Nauru is required to accept transferees from Australia); [292], [300] (the Commonwealth engages contractors to assist in the refugee determination process, and maintains a significant involvement in the ultimate outcome for each transferee); [300]; [304]–[306] (the Commonwealth participates in the management of the RPC through a committee and working group, and occupies an office at the RPC); [315] (the 'Operational Manager' of the RPC is described as a person who is given responsibility either by Nauru or by the Commonwealth of Australia); [297] (the program coordinator, who manages all service provider contracts at the RPC, is an officer of the Department of Immigration); [308] (a visa for a transferee can only be issued on application by a Commonwealth officer); [310] (it is a condition of the visa that the transferee must remain at the RPC); and [313] (in applying for the visas, the Commonwealth did not seek or obtain the transferees' consent).
30. Judgment in *Plaintiff M68*, Gordon J at [360].
31. Ibid at [376]–[377], [394].
32. Ibid at [393].
33. Ibid at [380], [386], [389], [400].
34. Ibid at [388]–[389]. Her Honour recognised that the exceptional categories may not be closed, but expressed the view that an exception should not be created for the kind of detention considered in this case: at [382], [389], [401].
35. Judgment in *Plaintiff M68*, Gordon J at [408].
36. Ibid at [409]–[411].
37. Ibid at [403].
38. Ibid at [369]–[372].