PLAINTIFF S156/2013 ..... PLAINTIFF;

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND ANOTHER ..... DEFENDANTS.

[2014] HCA 22

HC of A 2014

May 9, 13; *June* 18 2014

French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ

Constitutional Law (Cth) — Powers of Commonwealth Parliament — Naturalisation and aliens — Detention and removal of unlawful non-citizens — Unauthorised maritime arrivals — Designation of "regional processing country" — Commonwealth Constitution, s 51(xix) — Migration Act 1958 (Cth), ss 198AB, 198AD.

Courts — Federal courts — Jurisdiction — Federal Court of Australia — Federal Circuit Court — Proceedings under Migration Act 1958 (Cth) relating to "unauthorised maritime arrivals" — Remittal of proceedings by High Court — Jurisdiction of courts for remitter — Migration Act 1958 (Cth), ss 476(1), 476A(1)(b), (c), 494AA(1)(e).

Section 198AB of the *Migration Act 1958* (Cth) conferred power on the Minister, by legislative instrument, to designate a country as a regional processing country (sub-s (1)). The only express condition for the exercise of the power under sub-s (1) was that "the Minister thinks that it is in the national interest to designate the country to be a regional processing country" (sub-s (2)). Sub-section (3)(a) provided that, in considering the national interest, the Minister "must have regard to whether or not the country has given Australia any assurances to the effect that (i) the country will not expel or return a person taken to the country under [s 198AD] to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and (ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol". Sub-section (3)(b) provided that, in considering the national interest, the Minister "may have regard to any other matter which, in the opinion of the Minister, relates to the national interest".

Section 198AD(2) of the Act required an officer (defined by s 5(1) of the Act), as soon as reasonably practicable, to take a person referred to as an unauthorised maritime arrival who was detained under s 189 to a regional processing country. Sub-section (5) provided that, if there were

two or more regional processing countries, the Minister must, in writing, direct an officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, to the regional processing country specified by the Minister in the direction. Sub-section (6) required the officer to comply with such a direction.

Section 189 required an officer to detain certain persons whom the officer knew or reasonably suspected to be unlawful non-citizens who were in the migration zone (as defined by s 5(1) of the Act) and conferred power on an officer to detain certain persons who were unlawful non-citizens (as defined by ss 5(1) and 4 of the Act) who the officer knew or reasonably suspected to be unlawful non-citizens.

The Act contained no provision concerning unauthorised maritime arrivals once they were taken to a regional processing country.

Held, (1) that ss 198AB and 198AD were laws with respect to a class of aliens and hence were valid laws under s 51(xix) of the *Commonwealth Constitution*.

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 at 25-26, applied.

(2) That there was no mandatory condition for the exercise of the power of designation under s 198AB(1) apart from the formation of an opinion by the Minister that it was in the national interest to do so.

Held, further, that a decision under s 198AD(5) to direct an officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, to a particular regional processing centre was a decision in respect of which the Federal Circuit Court had jurisdiction under s 476(1) of the *Migration Act* but not one in respect of which the Federal Court of Australia had jurisdiction under s 476A(1)(b) or (c). Section 494AA(1)(e), which provided that certain proceedings relating to unauthorised maritime arrivals could not be "instituted or continued" in any court, should not be construed as limiting the ability of the High Court to remit matters to the Federal Circuit Court.

CASE STATED and QUESTIONS RESERVED under the *Judiciary Act 1903* (Cth), s 18.

On 13 Febuary 2014, French CJ stated a case and reserved questions for the consideration of a Full Court of the High Court in proceedings brought in the original jurisdiction by Plaintiff S156/2013 against the Minister for Immigration and Border Protection and the Commonwealth of Australia, claiming: 1. A declaration that s 198AB and/or s 198AD of the *Migration Act 1958* (Cth) is or are invalid. 2. A writ, order or declaration that a decision of the Minister made on 9 October 2012 to designate Papua New Guinea (PNG) as a regional processing country purportedly pursuant to s 198AB was made without power, is invalid and is set aside (the designation decision). 3. A writ, order or declaration that a decision of the Minister made on 29 July 2013

purportedly pursuant to s 198AD(5) to make a direction to specify which regional processing country the plaintiff should be taken to was made without power, is invalid and is set aside (the taking direction). 4. A writ, order or declaration that a decision of the Minister and/or the Commonwealth made on or about 2 August 2013 to take or deport the plaintiff from Australia pursuant to s 198AD was made without power, is invalid and is set aside. 5. A writ, order or mandatory injunction or a writ of habeas corpus directed to the defendants or either of them to command the return of the plaintiff to Australia forthwith, and various ancillary orders. The facts set out in the stated case are summarised in [1]-[6] of the joint judgment of the Court.

M A Robinson SC (with him *G J Williams* and *J Williams*), for the plaintiff. Sections 198AB and 198AD of the *Migration Act 1958* (Cth) are not supported by any head of power in s 51 of the *Constitution*. The sections operate in tandem. Hence their validity must be considered by reference to the scheme they establish. The heads of power for consideration are paras (xix) (naturalisation and aliens), (xxvii) (immigration and emigration) and (xxix) (external affairs).

The effect of s 198AD, read with ss 5AA and 189, is that only persons who qualify as both unlawful non-citizens and unauthorised maritime arrivals (UMAs) may be sent to a regional processing country designated under s 198AB. This class of persons qualifies as aliens for the purposes of s 51(xix). The aliens power enables Parliament to legislate to exclude or deport aliens (1). But there are limits on the power applying to the determination of the class of persons who qualify as aliens and to the question of what laws can be passed with respect to aliens. Sections 198AB and 198AD are beyond the second set of limits. There must be a "sufficient connection" between a law and a head of power (2). The s 51(xix) power is not a typically purposive power, but *Leask v The Commonwealth* (3) does not preclude the application of the proportionality principle in determining whether a law is made under it. Once a sufficient connection with a head of power is established the principle of proportionality is spent. The appropriateness, necessity or desirability of the law is irrelevant. For a law to be valid under the aliens limb of s 51(xix) it must be directly connected with the alien status of the persons on whom it

(1) *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26, 57.

(2) *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 334, 349, 353-354; *Leask v The Commonwealth* (1996) 187 CLR 579 at 591, 603, 614, 616, 623, 633, 635; *Grain Pool (WA) v The Commonwealth* (2000) 202 CLR 479 at 492.

(3) (1996) 187 CLR 579 at 593, 605, 614, 616, 617, 635.

operates (4). A law that regulates the entry to and departure from Australia of aliens, including deportation, is sufficiently connected with the status of aliens. The scheme established by ss 198AB and 198AD goes further than regulating the entry of aliens and providing for their removal. Those sections are valid only to the extent that they are appropriate and adapted to those ends. Section 198AD subjects UMAs to detention after their removal from Australia. Their detention need not be directed to the determination of their status. The combined effect of s 198AB(4) and (6) is that ss 198AB and 198AD may result in persons affected by the scheme being subject to refoulement or being detained indefinitely in legal limbo, with no requirement that determination of their status be reached. The scheme imports control over the relevant persons after the process of removal from Australia. The sections confer on the Executive power which is punitive and not an incident of the executive powers to exclude, admit and deport an alien (5).

The scheme in ss 198AB and 198AD is not supported by the immigration power in s 51(xxvii). The preventative aspect of the power extends to the arbitrary exclusion of an alien who has entered Australia (6) as well as the power to deport excluded aliens (7). In *Znaty v Minister for Immigration* (8) it was held that the power to deport included the power to select the destination to which the person was to be sent. This case is significantly different from that. Section 198AB does more than specify the locations to which persons deported under s 198AD may be sent: it establishes those locations as regional processing countries and facilitates the holding there after removal from Australia is complete. In *Nationwide News Ltd v Wills* (9) it was said that a proportionality test must be applied in determining whether a law has a sufficient connection with immigration and emigration to be supported by the incidental power in s 51(xxvii). Section 198AB does not require designation to be made with regard to whether designated countries legally provide for the processing of persons

(4) *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 57.

(5) *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33. See also *Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249 at 271-272; *Re Woolley; Ex parte Applicants M279/2003* (2004) 225 CLR 1 at 11 [14]; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [138].

(6) *Ex parte De Braic* (1971) 124 CLR 162 at 164, 167.

(7) *Znaty v Minister for Immigration* (1972) 126 CLR 1.

(8) (1972) 126 CLR 1.

(9) (1992) 177 CLR 1 at 27; see also 30-31.

deported under s 198AD and leaves open the practical effect of indefinite detention after removal is complete. That is disproportionate to the object of removing aliens from Australian territory and has no reasonable connection with immigration. Even if the proportionality approach is not accepted, the scheme is not sufficiently connected with the removal of aliens from Australia since it is directed to the continued control of such aliens after the deportation process is complete.

The scheme established by ss 198AB and 198AD is not a law with respect to external affairs under s 51(xxix). The geographic externality aspect of s 51(xxix) is wide but not unlimited (10). The power is predicated upon the pre-existence of an affair external to Australia (11). Neither s 198AB nor s 198AD satisfies this requirement. Section 198AD regulates persons within Australia with a view to removing them outside the Australian border. *De L v Director-General, NSW Department of Community Services* (12) concerned children already transferred to a foreign country. The only external element in ss 198AB and 198AD is created by the legislation itself.

There is also a question of whether the designation decision was valid. The validity of a decision described by statute as legislative can be tested in the High Court under s 75(v) of the *Constitution* or in the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) or under the *Administrative Decisions (Judicial Review) Act 1977* in proceedings to review the validity of an administrative decision that rests for support on a legislative instrument (13).

The *Migration Act* should be read as a response to Australia's international obligations to protect refugees and as involving adherence to them (14). To give effect to those obligations the Minister was impliedly required here, in informing himself of the national interest, before designating a regional processing country, to take into account: consultations with and advice of the United Nations High Commissioner for Refugees about the proposed designation; the international

(10) *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 632; affd *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 485.

(11) *War Crimes Act Case* (1991) 172 CLR 501 at 602, 641, 696, 714; *Industrial Relations Act Case* (1996) 187 CLR 416 at 485.

(12) (1996) 187 CLR 640.

(13) *Magno v Minister for Foreign Affairs and Trade* (1992) 35 FCR 235.

(14) *Plaintiff M61/2010E v The Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319 at 339 [27]; *Plaintiff M70/2011 v Minister for Immigration and Citizenship (Malaysian Declaration Case)* (2011) 244 CLR 144 at 174-175 [44], 182 [66]-[67], 189 [90], 201 [135], 223 [210], 236 [256].

obligations or domestic law of PNG; whether there was any effective national legal or regulatory framework for the determination of refugee status under the Refugees Convention; PNG's capacity to implement its international obligations; that the transferees would be arbitrarily and indefinitely detained in PNG in inhumane and degrading conditions, without access to legal advice, representation or judicial review; and that the designation decision would result in breach of at least four international treaties of which Australia was a signatory and was in violation of Australia's obligations under international law and/or customary international law. He did not take account of those mandatory considerations. [He referred to Jones, "The Doctrine of Adoption of Customary International Law: A Future in Conflicting Domestic Law and Crown Tort Liability" (15); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (16); and *Lee v Napier* (17).] The Minister also failed to give those matters proper, genuine or realistic consideration as he was required to do (18). That failure constitutes jurisdictional error. The Minister had no evidence about PNG's relevant capability or intentions, including its assurances that transferees would not be at risk of being sent to another country. The no evidence rule requires findings of fact to be based or logically probative evidence. A finding not so made is an error of law (19). The Minister's decision was also afflicted by legal unreasonableness (20). No sensible Minister acting with due appreciation of his responsibilities would have decided to do what the Minister did. He made the decision in haste and without regard to the health and safety of the transferees or to whether or how their refugee applications would be dealt with by PNG. The decision was also a disproportionate response to the issue before the Minister.

Section 198AD(5) required the Minister to make a direction to his officers to take transferees to the regional processing country specified in the direction where there were two or more regional processing countries. Instead he set out an evaluative process that his officers could determine for themselves. Hence the direction was ultra vires. It was also invalid for uncertainty. Uncertainty will invalidate where an

(15) *Canadian Bar Review*, vol 89 (2010) 402.
(16) (1986) 162 CLR 24 at 39-40.
(17) (2013) 216 FCR 562.
(18) *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291; *Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1 at 7-8; *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 175 [29].
(19) *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41 at 62-68; 31 ALR 66 at 685-690; *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390.
(20) *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

intention can be derived from the text, context and purpose of a statute that a power be confined in a way which requires a high level of certainty or precision (21).

J T Gleeson SC, Solicitor-General for the Commonwealth, and *S P Donaghue* QC (with them *N M Wood*), for the defendants.

J T Gleeson SC. The plaintiff's constitutional case suffers from three main difficulties. First, it is based on a mischaracterisation of the legal and practical operation of ss 198AB and 198AD. They do not provide for the control or detention of the class of aliens in question after removal to a designated country, let alone for their indefinite detention or detention administered by the Commonwealth executive, or for a legal limbo, or for refoulement. The scheme does not apply Australian law to what happens to any UMA in a chosen regional processing country. The characteristics of such a country are not relevant to the validity of the statutory scheme for the designation of a regional processing country. Also irrelevant is the absence of provisions excluding particular consequences in a designated country. The sections provide only for the effective removal of a class of aliens to a designated country, subject to Parliamentary review, on the basis of stipulated criteria that may include what is known about their likely future in that country. The sections result in a transfer of responsibility but what happens to UMAs after removal depends on the domestic law of the country to which they are transferred and is not part of the characterisation of ss 198AB and 198AD. Secondly, the plaintiff's constitutional case depends on a misuse of proportionality. There is no warrant to invoke it with non-purposive heads of power, particularly where no question of incidental power arises (22). The judgment of Gaudron J in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (23) differed from the judgments of the other Justices. Proportionality is invoked illegitimately to criticise the justice or wisdom of the provisions. Thirdly, the plaintiff's case is based on an unduly narrow view of the heads of power. The aliens power authorises a law which requires the removal to another country of a class of aliens who have entered Australia without lawful authority and have been denied a right to join the community (24). Removal

(21) *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 194, 196; *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59 at 71.

(22) *Leask v The Commonwealth* (1996) 187 CLR 579 at 591-606.

(23) (1992) 176 CLR 1 at 57.

(24) *Robtelmes v Brenan* (1906) 4 CLR 395 at 400-406, 415, 420-422; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 94, 117, 132-133; *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 551, 555-562; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 10,

connotes effective removal. Effective removal can include the selection of a country of destination against the alien's will. It may result in the exposure of the alien to consequences of the law of the country of removal. The immigration power authorises a law of a similar character (25). So too does the external affairs power in its geographically external aspect (26). The sections do not manufacture externality. The plaintiff's case wrongly asserts that if the statute does not preclude something happening in a country of removal and it does happen it is the practical effect of the law for which constitutional authority must be found.

S P Donaghue QC. The "mandatory relevant considerations" asserted by the plaintiff are inconsistent with the express provisions of the statutory scheme. The Minister's power to designate, by legislative instrument, a country to be a regional processing country is conditioned only by the Minister's assessment of the national interest: see s 198AB(2). His assessment of the national interest is conditioned only by the requirement that he must consider whether the country has given certain assurances (which need not be legally binding) (27). The assessment of the national interest involves an evaluative judgment for which he bears political responsibility. As well as the Minister's general accountability to Parliament, the scheme establishes by ss 198AA(c) and 198AB(1B) a mechanism that ensures that a designation takes effect only after each House of Parliament approves it or fails to disapprove it after having a reasonable opportunity to do so (28). In assessing the national interest, the Minister complied with ss 198AB(3) and 198AC(2). He was not required to consider Australia's international obligations or to have regard to either the domestic law or international obligations of PNG (29). There is no basis to conclude that the designation, by legislative instrument, was invalid on grounds of "legal unreasonableness". That concept speaks to the existence of a power rather than the expediency of its exercise, and

(cont)
25-26, 32-33, 44-45, 56-58, 64; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 573, 582-584, 600, 604, 632-633, 644, 648.

(25) *Znaty v Minister for Immigration* (1972) 126 CLR 1 at 10.

(26) *War Crimes Act Case* (1991) 172 CLR 501 at 632; *Industrial Relations Act Case* (1996) 187 CLR 416 at 485.

(27) *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 38-40; *Malaysian Declaration Case* (2011) 244 CLR 144 at 179 [57], 193-194 [106]; Revised Explanatory Memorandum, *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012*, paras [120]-[138].

(28) *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 648 [30], 656 [55].

(29) See ss 198AA(d), 198AB(4); cf *Malaysian Declaration Case* (2012) 244 CLR 144 at 182-183 [66], 195-196 [116]-[118], 233 [244].

therefore involves a question of construction of the authorising legislation (30). It cannot be concluded that the Minister's designation of PNG had no rational relationship with the purpose for which the s 198AB power was conferred or that his assessment of where the national interest lay could not be formed reasonably on the information available to him.

The taking direction under s 198AD(5) was an internal direction to officers. It did not affect the liability of the plaintiff or any other UMA to be taken to a regional processing country. The direction triggered the imposition of a specific obligation on officers under s 198AD(6), additional to and consistent with the general obligation under s 198AD(2). The taking direction did not require officers to undertake an evaluative exercise. It was clear enough to fulfil the practical purpose it was intended to serve. It was made in the immediate context of a regional resettlement arrangement between Australia and PNG and statements by the Minister about the suitability of PNG for the transfer of some groups of UMAs but not of others. Nothing in the Act creates "mandatory relevant considerations" concerning the performance of the duty under s 198AD(5). [He referred to *Ex parte Zietsch; Re Craig* (31) and the Revised Explanatory Memorandum, *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012*, para [149].]

M A Robinson SC, in reply.

Cur adv vult

18 June 2014

THE COURT delivered the following written judgment: —

1 The plaintiff is a citizen of the Islamic Republic of Iran and entered Australia's migration zone by sea at Christmas Island on 23 July 2013. Christmas Island is an "excised offshore place" within the meaning of s 5(1) of the *Migration Act 1958* (Cth). An officer of what is now the Department of Immigration and Border Protection (32) (the Department) detained the plaintiff, pursuant to the power given by s 189(3) of the *Migration Act* with respect to unlawful non-citizens (33). The

(30) *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 34-35 [48]-[51], 57 [117]-[118]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 363 [67], 371 [92].

(31) (1944) 44 SR(NSW) 360 at 365.

(32) Previously the Department of Immigration and Citizenship.

(33) *Migration Act 1958* (Cth), ss 5(1), 14.

plaintiff's method of entry into Australia also qualified him as an "unauthorised maritime arrival" (a UMA) (34) for the purposes of the *Migration Act*.

2 The plaintiff claims that he is a member of a minority religious group and that he fears persecution in Iran. He claims to be a refugee within the meaning of the international convention relating to refugees (the Refugees Convention) (35), to which Australia is a party.

3 The plaintiff did not make an application for a protection visa (36). As a UMA who is an unlawful non-citizen, he could not make a valid application for a visa (37) unless the first defendant, the Minister for Immigration and Border Protection (the Minister), exercised his discretion under s 46A(2) of the *Migration Act*. The Minister did not consider lifting the bar created by s 46A(1) and no steps were taken to enable him to do so. The plaintiff made no request for such consideration.

4 Whilst on Christmas Island, the plaintiff was advised by an officer of the Department that he would be sent to Manus Island in the Independent State of Papua New Guinea (PNG); that it would take a long time for any refugee claim he might make to be processed; and that, even if he was found to be a refugee, he would never be resettled in Australia. The assessment of the plaintiff's claim to be a refugee was not undertaken while the plaintiff was in Australia and would not appear to have been undertaken by Australia subsequent to his removal. The Minister had designated PNG to be a "regional processing country" before the plaintiff's arrival at Christmas Island. In consequence of that designation and a direction given by the Minister, both of which are provided for in subdiv B of Div 8 of Pt 2 of the *Migration Act*, the plaintiff was removed to an assessment centre at the PNG Naval Base on Manus Island (the Centre).

5 Since his arrival on Manus Island, the plaintiff has resided at the Centre, where he is effectively detained. In the stated case for this Court, it is said that an officer of the PNG Immigration Department has the day-to-day management and control of the Centre and that Australia has appointed a co-ordinator to assist that officer, including by managing all Australian officials and service providers at the Centre.

6 The extent to which Australia participates in the continued detention of the plaintiff is not evident from these facts or the Administrative

(34) *Migration Act 1958*, s 5AA.
(35) Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).
(36) *Migration Act 1958*, s 36.
(37) *Migration Act 1958*, s 46A(1).

Arrangements between PNG and Australia to which they relate (38). In any event, the stated case does not raise questions as to who detains the plaintiff or the authority under which he is detained.

7 The questions which are reserved for the determination of this Court concern the constitutional validity of provisions of subdiv B of Div 8 of Pt 2 of the *Migration Act* for the designation by the Minister of a country as a regional processing country and for the Minister's direction as to the regional processing country to which persons such as the plaintiff are to be taken; and the validity of the decisions made by the Minister to designate PNG as a regional processing country and to direct the removal of classes of UMAs, to one of which the plaintiff belongs.

Migration Act provisions

8 Part 2 of the *Migration Act* is entitled "Control of arrival and presence of non-citizens" and Div 8 of that Part "Removal of unlawful non-citizens etc". Subdivision A of Div 8 is headed "Removal" and subdiv B "Regional processing".

9 Section 198(2) in subdiv A provides that an officer (39) must remove from Australia, as soon as reasonably practicable, an unlawful non-citizen who, inter alia, has not made a valid application for a visa (sub-s (2)(c)(i)). As has been mentioned, the plaintiff was unable to make such an application. Section 198AD in subdiv B applies to a UMA who is detained under s 189, as the plaintiff was. Section 198AD(2) provides that an officer must, as soon as reasonably practicable, take a UMA from Australia to a regional processing country.

10 The reason for subdiv B, and its provisions relating to the removal of persons to a regional processing country designated by the Minister, is stated in s 198AA:

> "This Subdivision is enacted because the Parliament considers that:
>
> (a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and
>
> (b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the

(38) It may be noted that s 198B provides that an officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia. Under s 5(1), "transitory person" includes a person who was taken to a regional processing country.

(39) *Migration Act 1958*, s 5(1).

Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and

(c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and

(d) 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."

Subdivision B was inserted into the *Migration Act* by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), with effect from 18 August 2012. The Revised Explanatory Memorandum to that Act (40) said that it was a legislative response to the decision of this Court in the *Malaysian Declaration Case* (41), which was handed down on 31 August 2011. It was acknowledged by the defendants during the hearing of this matter that a consequence of the removal of persons to a regional processing country following upon the Minister's exercise of the power to designate that country could be that Australia does not meet its international obligations. That possibility and its consequences need not be gone into for the purposes of the stated case.

11 Section 198AB(1) provides that the Minister may, by legislative instrument, designate that a country is a regional processing country. The only express condition for the exercise of this power is that "the Minister thinks that it is in the national interest to designate the country to be a regional processing country" (sub-s (2)). Sub-section (3)(a) provides that, in considering the national interest, the Minister:

"must have regard to whether or not the country has given Australia any assurances to the effect that:

(i) the country will not expel or return a person taken to the country under section 198AD to another country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion; and

(ii) the country will make an assessment, or permit an assessment to be made, of whether or not a person taken to the country under that section is covered by the definition of *refugee* in Article 1A of the Refugees Convention as amended by the Refugees Protocol."

The assurances referred to in sub-s (3)(a) are not required to be legally binding (sub-s (4)). Sub-section (3)(b) provides that, in the same

(40) Australia, Senate, *Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012*, Revised Explanatory Memorandum, p 2.

(41) *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

process, the Minister: "may have regard to any other matter which, in the opinion of the Minister, relates to the national interest."

12 Section 198AD(5) provides that, if there are two or more regional processing countries, the Minister must, in writing, direct an officer to take a UMA, or a class of UMAs, to the regional processing country specified by the Minister in the direction. If the Minister gives such a direction, the officer must comply with it (sub-s (6)).

13 Section 198AE(1) provides that the Minister may, in writing, determine that s 198AD does not apply to a UMA if the Minister thinks it is in the public interest to do so. However, its provisions do not assume importance in this case.

14 Subdivision B contains no reference to what is to happen to UMAs following their removal from Australia to a regional processing country. It contains no provisions dealing with the custody and detention of UMAs or the processing of their claims to refugee status. Certain "Administrative Arrangements" were entered into between PNG and Australia in April 2013. However, the questions reserved for the Court are not addressed to these Administrative Arrangements. They turn upon the validity of provisions of subdiv B and decisions made pursuant to them.

The designation and the direction

15 On 8 September 2012, Australia and PNG entered into a "Memorandum of Understanding Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues" (the MOU). On 9 October 2012, the Minister designated PNG to be a regional processing country. Clause 18 of the MOU contained assurances from PNG. In his statement of reasons as to why he thought it to be in the national interest to designate PNG as a regional processing country, the Minister said that he had regard to those assurances. On 9 and 10 October 2012 respectively, the House of Representatives and the Senate resolved to approve the designation.

16 On 29 July 2013, the Minister gave a written direction that officers take UMAs of four classes – family groups, adult females who are not part of a family group, adult males who are not part of a family group and unaccompanied minors – to PNG or to the Republic of Nauru, which earlier had been designated as a regional processing country. The conditions which were to be fulfilled for removal to either country were the same, namely if:

> "a. facilities and services are available for the class of persons of which the person is a member; and

b. there is vacant accommodation designated for the class of persons of which the person is a member and that vacant accommodation is greater than that available in [Nauru, in the case of PNG, and PNG, in the case of Nauru]; and

c. this does not result in a family group that all arrived together on or after 19 July 2013 from [sic] being split."

The questions reserved

17 The first challenge made by the plaintiff is to the validity of ss 198AB and 198AD. Questions (1) and (2) ask whether each section is invalid on the ground that it is not supported by any head of power in s 51 of the *Constitution*. It is argued that neither the aliens power (s 51(xix)), nor the immigration (s 51(xxvii)) and external affairs (s 51(xxix)) powers, support those sections.

18 Questions (3) and (4) are predicated upon ss 198AB and 198AD being valid. The questions are directed to the Minister's decisions to designate PNG as a regional processing country and to direct that UMAs of a specified class be taken to PNG. They ask whether these decisions are invalid. The plaintiff's principal argument with respect to these questions is that there were relevant considerations which the Minister was obliged to, but did not, take into account in reaching these decisions.

19 Question (5) asks whether the proceedings are otherwise able to be remitted for determination to the Federal Court of Australia or the Federal Circuit Court of Australia. There is no dispute between the parties that the Federal Circuit Court, but not the Federal Court, has jurisdiction with respect to any remaining grounds for judicial review of the Minister's decision or the action of the officer in taking the plaintiff to PNG.

20 This Court may remit any part of a matter that is pending in the Court to any federal court that has jurisdiction with respect to the matter (42). The effect of s 476B of the *Migration Act* is that this Court may not remit a matter that relates to a "migration decision" to the Federal Court unless the Federal Court has jurisdiction under s 476A(1)(b) or (c); this Court may only remit such a matter to the Federal Circuit Court (and it may only do so if that Court has jurisdiction under s 476). The decision to take the plaintiff to PNG is a migration decision (43). It is not a decision in respect of which the Federal Court has jurisdiction under s 476A(1)(b) or (c); but the Federal Circuit Court has jurisdiction under s 476(1). This is so notwithstanding the terms of s 494AA(1)(e), which provides that

(42) *Judiciary Act 1903* (Cth), s 44(1).

(43) See *Migration Act 1958*, ss 5(1), 5E and 474 definitions.

certain proceedings relating to UMAs may not be "instituted or continued" in any court. Section 494AA(3) makes plain that that provision does not affect the jurisdiction of the High Court under s 75 of the *Constitution*. Section 494AA(1)(e) should not therefore be construed as limiting this Court's ability to remit matters to the Federal Circuit Court.

21 The question as to the jurisdiction of the Federal Circuit Court may be answered in the affirmative. Whether an order for remittal should be made is a matter for a single Justice.

Sections 198AB and 198AD and the aliens power

22 The first inquiry is whether the provisions of subdiv B in question are laws "with respect to" the head of power concerning aliens, which is conferred by s 51(xix). The words "with respect to" require a relevance to or connection with the subject assigned by the *Constitution* to the Commonwealth Parliament (44).

23 Before the question of connection is considered, it may be necessary to characterise the law, by construing it and determining its legal operation and effect (45). In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (46), Brennan, Deane and Dawson JJ (Mason CJ agreeing (47)) said that, as a matter of characterisation, laws which provide for the expulsion or deportation of non-citizens who are present in Australia without a visa are laws respecting that class of aliens and fall within the scope of the legislative power given by s 51(xix).

24 If a law operates directly upon a matter forming part of a subject enumerated among the federal legislative powers, its validity could hardly be denied on the ground of irrelevance or lack of connection to the head of power (48). In *Al-Kateb v Godwin* (49), McHugh J observed that a law authorising the detention of aliens deals with the very subject matter of s 51(xix) and is not incidental to the aliens power. The same may be said of laws requiring their removal. In *Lim*, Gaudron J observed the direct connection between a law providing for the departure of aliens and the status of aliens (50).

(44) *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

(45) *Bank of New South Wales v The Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1 at 186-187; *The Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 152; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-369.

(46) (1992) 176 CLR 1 at 25-26.

(47) *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 10.

(48) *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79.

(49) (2004) 219 CLR 562 at 582-583 [39].

(50) *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*

25 Sections 198AB and 198AD operate to effect the removal of aliens from Australia. As Dixon J observed in *Melbourne Corporation v The Commonwealth* (51), generally speaking, once a federal law has an immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that is enough. On this approach, ss 198AB and 198AD are laws with respect to aliens. No further inquiry is necessary.

26 The plaintiff argues for a different approach. He acknowledges that UMAs qualify as aliens and that the power conferred by s 51(xix) extends to legislation to exclude or deport aliens. The plaintiff does not deny that the relevant test for whether a law is with respect to a head of power is whether there is a sufficient connection between the law and the power. However, the plaintiff contends that for a law to be supported by s 51(xix), it is necessary for it to satisfy another test – one of proportionality – and that these provisions cannot do so.

27 Sections 198AB and 198AD are laws which facilitate the removal of aliens from Australia by identifying a place to which they must be removed. The relevance of proportionality to characterisation of laws of this kind or to the question of whether there is a sufficient connection to the power to make laws respecting aliens is not immediately apparent. The relevance of proportionality might depend upon what is said to be the proportionality test to be employed and also upon views about the purpose of such tests.

28 The plaintiff does not contend for a test of proportionality in addition to that of connection. Rather, he says that the former inheres in the latter. It is his contention that "proportionality may inform the question of whether a sufficient connection with a head of power exists in the first place".

29 It is first necessary to understand what the plaintiff means by "a proportionality test". He 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.

30 The plaintiff does not explain the meaning of those words or identify a test of proportionality which he says must be applied. It is necessary to refer to his argument to glean what is spoken of and how it is said to operate on the provisions in question.

(cont)
(1992) 176 CLR 1 at 57; see also *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 385 [206].

(51) (1947) 74 CLR 31 at 79.

31 The plaintiff submits that "the scheme" established by ss 198AB and 198AD goes significantly further than merely regulating the entry of aliens to, or providing for their removal from, Australia. His argument may be summarised as follows: the scheme imposes a requirement of deportation to, and subsequent control at, a regional processing country for a purpose unconnected with the determination of status or entry rights under Australian law; this goes so far beyond what is necessary to control the entry to Australia of persons subjected to the scheme that it cannot be said to be directed to that purpose; ss 198AB and 198AD cannot be justified by the purpose of deterrence because the scheme established by them is so extreme in its operation that they are not reasonably appropriate and adapted to that end either; and the control that the scheme imposes upon persons *after* their removal from Australia cannot be said to be appropriate and adapted to that end.

32 The "scheme" to which the plaintiff refers is the detention of UMAs in PNG, where their status as refugees may or may not be determined and where, it is contended, they may be subject to refoulement. The essential difficulty with this aspect of the plaintiff's argument is that neither ss 198AB and 198AD, nor subdiv B as a whole, makes any provision for these matters. At most, the references to the removal of UMAs to a regional processing country may imply that their refugee status is to be determined in that country and s 198B (52) may imply some ability to bring a UMA to Australia temporarily. The subdivision says nothing else about what is to happen to such persons in regional processing countries, such as PNG.

33 The plaintiff seeks to supplement his submissions regarding the statutory provisions in question by reference to facts relating to the Administrative Arrangements between Australia and PNG. Whatever relevance those facts may have to the decisions sought to be reviewed, they can have none to the questions relating to the constitutional validity of ss 198AB and 198AD. The character of those provisions and their connection to a head of power are determined by reference to their terms, operation and effect. It is the operation and effect of the provisions themselves which fall for consideration, not Administrative Arrangements which are made independently of them. Administrative Arrangements between PNG and Australia can say nothing about the connection of the provisions in question to s 51(xix). The plaintiff's case for proportionality – that the sections do more than provide for the removal of aliens – therefore proceeds from a wrong premise.

34 At other points in his argument, the plaintiff refers to the use of proportionality as determining the limits of s 51(xix). In this regard,

(52) See fn 38.

the plaintiff calls in aid what was said by Gaudron J in *Lim* (53), where her Honour expressed the view that "a law imposing special obligations or special disabilities on aliens … which are unconnected with their entitlement to remain in Australia and which are not appropriate and adapted to regulating entry or facilitating departure … is not, in my view, a valid law under s 51(xix)". Her Honour was alone in *Lim* in expressing this view.

35 Her Honour's reference to a law not being "appropriate and adapted" to facilitating departure might bring to mind a law which is not suitable to that end or which is unnecessary. So far as this may involve proportionality, it says nothing about the limits of s 51(xix), as the plaintiff contends. The kind of law which her Honour appears to have had in mind was one which made further provision with respect to aliens beyond their removal, and in doing so came within the operation of the incidental power. Sections 198AB and 198AD do neither of those things.

36 There was reference to the use of proportionality to determine the limits of legislative power in *Leask v The Commonwealth* (54), to which the plaintiff also refers. Brennan CJ there spoke of the use of proportionality in the circumstance where a law is challenged on the basis that it infringes a constitutional limitation, express or implied, which restricts a head of power (55). It may be taken from his Honour's reference to *Australian Capital Television Pty Ltd v The Commonwealth* (56) that his Honour had in mind the relevance of proportionality to a legislative restriction operating upon the implied freedom of communication in matters of politics and government. However, his Honour drew a distinction between the use of proportionality in such a context and its use to determine the character of a non-purposive law (57). Nothing said in *Leask* lends support for the use of proportionality for which the plaintiff contends in this aspect of his argument.

37 The plaintiff also seeks to argue that there is an inherent constitutional limitation on s 51(xix) which restricts the Commonwealth's capacity with respect to laws that operate on aliens. The limitation to which the plaintiff refers is to be found in Ch III. The plaintiff made a similar submission when seeking leave to further amend his statement of claim. The plaintiff sought to argue that the

(53) (1992) 176 CLR 1 at 57.
(54) (1996) 187 CLR 579.
(55) *Leask v The Commonwealth* (1996) 187 CLR 579 at 593-595.
(56) (1992) 177 CLR 106.
(57) See also *Leask v The Commonwealth* (1996) 187 CLR 579 at 602-603 per Dawson J; at 614-615 per Toohey J.

impugned sections do not authorise the Executive to, in effect, imprison persons in third countries against their will for an indefinite period. French CJ refused leave to amend on this point because the plaintiff's submission did not engage with the question of the invalidity of the provisions. In any event, as his Honour observed, the contention is untenable, because neither s 198AB nor s 198AD makes any provision for imprisonment in third countries.

38 For the reasons given earlier, ss 198AB and 198AD are laws with respect to a class of aliens and are within s 51(xix). The plaintiff's challenges to their validity fail. It is not necessary to consider any other heads of power. Questions (1) and (2) should each be answered "No".

The designation and direction decisions

The decision to designate PNG

39 The plaintiff submits, relying on *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (58), that there were a number of considerations which were relevant to the Minister's decision to designate PNG as a regional processing country which were not taken into account and, as a result, the decision is invalid. The premise for the plaintiff's argument is that there are to be implied in subdiv B considerations which the Minister was obliged, as a matter of law, to take into account. The plaintiff lists a number of them. They include: Australia's international law obligations; the need to consult with the Office of the United Nations High Commissioner for Refugees (the UNHCR) prior to designation; PNG's international obligations and its domestic law; PNG's capacity to implement its obligations; the framework, if any, for processing refugee claims in PNG; the possibility of indefinite detention; and the conditions in which UMAs would be detained.

40 The fundamental difficulty with the plaintiff's argument is that there is no mandatory condition for the exercise of the power of designation under s 198AB apart from the formation by the Minister of an opinion that it is in the national interest to do so. Section 198AB(2) expressly states that the "only condition" for the exercise of the power under sub-s (1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country. What is in the national interest is largely a political question, as s 198AA(c) recognises. The only matter to which the Minister is obliged to have regard, in considering the national interest, is whether or not the country to be designated has given Australia any assurances as set out in s 198AB(3)(a). There is no issue in this case that such assurances were in fact given.

(58) (1986) 162 CLR 24 at 40.

41 In *Peko-Wallsend*, Mason J said (59) that, if a statute "expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive". With respect to s 198AB(2), it is plain from the singular condition stated for designation that the Minister is not obliged to take any other matter into account.

42 In *Peko-Wallsend*, Mason J also said (60) that, when a statute confers a discretion which is unconfined, the factors which may be taken into account are similarly unconfined. Section 198AB(3)(b) provides the Minister with a general discretion to have regard to other matters that, in the opinion of the Minister, relate to the national interest. What para (b) does not say is that the Minister is obliged to take any matter, other than those identified in para (a), into account. Thus, the Minister could, and did, consult with the UNHCR about designating PNG, but he was not obliged to do so. A failure to consider the matters said by the plaintiff to be relevant cannot spell invalidity.

43 There is nothing in the text or scope of subdiv B that supports the implication of the further conditions for which the plaintiff contends. The plaintiff relies on what was said in *Plaintiff M61/2010E v The Commonwealth (Offshore Processing Case)* (61) about the *Migration Act* more generally. It was said that, read as a whole, the *Migration Act* contains an "elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol". It was also said that "the text and structure of the [*Migration Act*] proceed on the footing that the [*Migration Act*] provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason". These statements were cited in the *Malaysian Declaration Case* (62).

44 There may be some doubt whether the provisions of subdiv B, which were inserted after these cases, can be said to respond to Australia's obligations under the Refugees Convention. Indeed, that is part of the plaintiff's complaint. This possibility does not assist the plaintiff's argument. Rather, it would follow that the conditions for which the plaintiff contends cannot be implied on the basis of any assumptions respecting the fulfilment by Australia of its international obligations.

(59) (1986) 162 CLR 24 at 39.
(60) (1986) 162 CLR 24 at 40.
(61) (2010) 243 CLR 319 at 339 [27].
(62) *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 174-175 [44], 189 [90].

45 This ground for invalidity fails, as does that which relies upon the designation decision being legally unreasonable, in the sense explained in *Minister for Immigration and Citizenship v Li* (63). The plaintiff's case for unreasonableness relies upon the Minister's failure to give weight to the matters which the plaintiff erroneously contends that the Minister was obliged to take into account. The plaintiff's argument that the Minister gave too much weight to other considerations was not developed.

46 The plaintiff also argues that there was no evidence that PNG would fulfil its assurances and would promote the maintenance of a programme which was fair to UMAs. However, there was no statutory requirement that the Minister be satisfied of these matters in order to exercise the relevant power. They do not qualify as jurisdictional facts (64).

The direction to take persons to PNG

47 Section 198AD(2) obliges an officer to take a UMA to a regional processing country as soon as reasonably practicable. Where there are two or more regional processing countries, the Minister is to direct the officer to take a UMA or a class of UMAs to the regional processing country specified in the direction (sub-s (5)). The officer is obliged by sub-s (6) to comply with that direction.

48 The Minister's direction divided UMAs into four classes. The direction provided, in effect, that members of those classes be taken to either PNG or Nauru, depending upon whether three conditions could be satisfied. The plaintiff's argument rests on the failure of the Minister to specify only one country to which the plaintiff, or a class of UMAs, should be taken. In the plaintiff's submission, s 198AD does not comprehend such uncertainty or vagueness (65).

49 Given that an officer must comply with a direction, there must be sufficient specification in the direction to enable the officer to comply with it. The three conditions which the direction placed on removal involved simple inquiries, not an evaluative process as the plaintiff contends. In the case of the plaintiff, as a single adult male, the effect of the direction was that he be taken to PNG, provided that there were facilities and services available for him there and that there was more accommodation for his class of UMAs there than in Nauru.

Answers

50 The questions reserved should be answered:

(63) (2013) 249 CLR 332.

(64) *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 998-999 [39]; 207 ALR 12 at 21; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 622 [31].

(65) *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 196.

(1) Is s 198AB of the *Migration Act 1958* (Cth) invalid on the ground that it is not supported by any head of power in s 51 of the *Constitution*?

Answer: No.

(2) Is s 198AD of the *Migration Act 1958* (Cth) invalid on the ground that it is not supported by any head of power in s 51 of the *Constitution*?

Answer: No.

(3) Is the Minister's designation that PNG is a regional processing country made on 9 October 2012 under s 198AB of the *Migration Act 1958* (Cth) invalid?

Answer: No.

(4) Is the Minister's direction made on 29 July 2013 under s 198AD(5) of the *Migration Act 1958* (Cth) invalid?

Answer: No.

(5) Are these proceedings otherwise able to be remitted for determination in the Federal Court of Australia or the Federal Circuit Court of Australia?

Answer: The proceedings are otherwise able to be remitted for determination in the Federal Circuit Court of Australia.

(6) Who should pay the costs of and incidental to this stated case?

Answer: The plaintiff.

The questions reserved in the stated case dated 13 February 2014 be answered as follows:

1. *Is s 198AB of the Migration Act 1958 (Cth) invalid on the ground that it is not supported by any head of power in s 51 of the Constitution?*

   Answer: No.

2. *Is s 198AD of the Migration Act 1958 (Cth) invalid on the ground that it is not supported by any head of power in s 51 of the Constitution?*

   Answer: No.

3. *Is the Minister's designation that PNG is a regional processing country made on 9 October 2012 under s 198AB of the Migration Act 1958 (Cth) invalid?*

   Answer: No.

4. *Is the Minister's direction made on 29 July 2013 under s 198AD(5) of the Migration Act 1958 (Cth) invalid?*

Answer: No.

5. *Are these proceedings otherwise able to be remitted for determination in the Federal Court of Australia or the Federal Circuit Court of Australia?*

Answer: The proceedings are otherwise able to be remitted for determination in the Federal Circuit Court of Australia.

6 *Who should pay the costs of and incidental to this stated case?*

Answer: The plaintiff.

Solicitors for the plaintiff, *Adrian Joel & Co*.

Solicitor for the defendants, *Australian Government Solicitor*.

JDM