HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ

PLAINTIFF S156/2013 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR DEFENDANTS

Plaintiff S156/2013 v Minister for Immigration and Border Protection
[2014] HCA 22
18 June 2014
S156/2013

ORDER

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.*

Representation

M A Robinson SC with G J Williams and J Williams for the plaintiff (instructed by Adrian Joel & Co Solicitors)

J T Gleeson SC, Solicitor-General of the Commonwealth and S P Donaghue QC with N M Wood for the defendants (instructed by Australian Government Solicitor)

CATCHWORDS

Plaintiff S156/2013 v Minister for Immigration and Border Protection

Constitutional law (Cth) – Legislative power of Commonwealth – Constitution, s 51(xix) – Aliens power – Section 198AB of *Migration Act* 1958 (Cth) provides that Minister may designate country as regional processing country – Section 198AD(2) provides that unauthorised maritime arrival ("UMA") must, as soon as reasonably practicable, be taken from Australia to regional processing country – Section 198AD(5) provides that, if there are two or more regional processing countries, Minister must, in writing, direct an officer to take UMA, or class of UMAs, to regional processing country specified in direction – Whether ss 198AB and 198AD laws with respect to aliens – Whether ss 198AB and 198AD valid.

Administrative law – Judicial review of administrative decisions – Where Minister designated country as regional processing country under power conferred by s 198AB of *Migration Act* 1958 (Cth) – Where only condition for exercise of power is that Minister thinks it is in national interest to do so – Whether Minister was obliged to, but did not, take into account other relevant considerations – Whether designation valid.

Administrative law – Judicial review of administrative decisions – Where Minister made direction under s 198AD(5) of *Migration Act* 1958 (Cth) – Whether direction uncertain or vague – Whether direction valid.

Words and phrases – "aliens power", "national interest", "proportionality", "reasonably appropriate and adapted", "relevant considerations", "with respect to".

Constitution, s 51(xix).
Migration Act 1958 (Cth), Pt 2, Div 8, subdiv B, ss 5(1), 5AA, 5E, 14, 36, 46A, 189, 198, 198AA, 198AB, 198AD, 198B, 474, 476, 476A, 476B, 494AA.
Judiciary Act 1903 (Cth), s 44(1).

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL AND KEANE JJ. 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[1] ("the Department") detained the plaintiff, pursuant to the power given by s 189(3) of the *Migration Act* with respect to unlawful non-citizens[2]. The plaintiff's method of entry into Australia also qualified him as an "unauthorised maritime arrival" ("a UMA")[3] 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")[4], to which Australia is a party.

3 The plaintiff did not make an application for a protection visa[5]. As a UMA who is an unlawful non-citizen, he could not make a valid application for a visa[6] 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

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1 Previously the Department of Immigration and Citizenship.

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

3 *Migration Act* 1958, s 5AA.

4 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

5 *Migration Act* 1958, s 36.

6 *Migration Act* 1958, s 46A(1).

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 Arrangements between PNG and Australia to which they relate[7]. 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.

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7 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.

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[8] 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:
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> (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
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> (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 Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and
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> (c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and

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

(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[9] said that it was a legislative response to the decision of this Court in the *Malaysian Declaration Case*[10], 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

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

10 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; [2011] HCA 32.

> 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 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
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> 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
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> 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[11]. 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[12]. 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 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 enquiry 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[13].

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

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

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

13 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77; [1955] HCA 6.

effect[14]. In *Chu Kheng Lim v Minister for Immigration*[15], Brennan, Deane and Dawson JJ (Mason CJ agreeing[16]) 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[17]. In *Al-Kateb v Godwin*[18], 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[19].

25 Sections 198AB and 198AD operate to effect the removal of aliens from Australia. As Dixon J observed in *Melbourne Corporation v The Commonwealth*[20], generally speaking, once a federal law has an immediate operation within a field assigned to the Commonwealth as a subject of legislative

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14 *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 186-187; [1948] HCA 7; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 152; [1983] HCA 21; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-369; [1995] HCA 16.

15 (1992) 176 CLR 1 at 25-26; [1992] HCA 64.

16 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 10.

17 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79; [1947] HCA 26.

18 (2004) 219 CLR 562 at 582-583 [39]; [2004] HCA 37.

19 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 57; see also *Plaintiff M76/2013 v Minister for Immigration and Multicultural Affairs and Citizenship* (2013) 88 ALJR 324 at 358 [206]; 304 ALR 135 at 178; [2013] HCA 53.

20 (1947) 74 CLR 31 at 79.

power, that is enough. On this approach, ss 198AB and 198AD are laws with respect to aliens. No further enquiry 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.

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[21] 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.

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21 See fn 7.

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, the plaintiff calls in aid what was said by Gaudron J in *Lim*[22], 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*[23], 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[24]. It may be taken from his Honour's reference to *Australian Capital Television Pty Ltd v The Commonwealth*[25] 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[26]. Nothing said in *Leask* lends support for the

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22 (1992) 176 CLR 1 at 57.

23 (1996) 187 CLR 579; [1996] HCA 29.

24 *Leask v The Commonwealth* (1996) 187 CLR 579 at 593-595.

25 (1992) 177 CLR 106; [1992] HCA 45.

26 See also *Leask v The Commonwealth* (1996) 187 CLR 579 at 602-603 per Dawson J, 614-615 per Toohey J.

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 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*[27], 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.

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27 (1986) 162 CLR 24 at 40; [1986] HCA 40.

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.

41 In *Peko-Wallsend*, Mason J said[28] 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[29] 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 par (b) does not say is that the Minister is obliged to take any matter, other than those identified in par (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*)[30] 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

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28 (1986) 162 CLR 24 at 39.

29 (1986) 162 CLR 24 at 40.

30 (2010) 243 CLR 319 at 339 [27]; [2010] HCA 41.

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*[31].

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.

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*[32]. 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[33].

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31 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 174-175 [44], 189 [90].

32 (2013) 249 CLR 332; [2013] HCA 18.

33 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 998-999 [39]; 207 ALR 12 at 21; [2004] HCA 32; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 622 [31]; [2010] HCA 16.

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[34].

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 enquiries, 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:

(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.

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34 *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 196; [1945] HCA 23.

(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.