CASE COMMENT: *PLAINTIFF S195/2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION* [2017] HCA 31 (17 AUGUST 2017)

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I INTRODUCTION

On 17 August 2017, the High Court delivered a brief judgment in the case of *Plaintiff S195/2016 v Minister for Immigration and Border Protection* ('*Plaintiff S195/2016*').[1] The Court found against the plaintiff, an Iranian national who sought asylum in Australia. Since 2013, he has been subject to the offshore immigration detention regime and detained on Manus Island at the Manus Regional Processing Centre ('RPC') in Papua New Guinea ('PNG'). The Court unanimously rejected the plaintiff's claim that the Australian government can only exercise its powers outside Australia for purposes that would be legal under the law of the relevant foreign country. The decision confirmed the Australian government's power to establish and maintain its offshore immigration detention facility on Manus Island, despite the earlier finding of the PNG Supreme Court that Australia's arrangement with PNG violated that country's Constitution.

As the High Court published its decision on 17 August 2017, controversy was emerging from the federal parliament that dominated the day's media reporting. Senator Pauline Hanson attracted considerable attention, both within and beyond the Senate chamber, when she appeared wearing a burqa ahead of a debate on a possible ban of the Islamic garment in Australia.[2] This unfortunate episode arguably overshadowed reporting of the High Court's decision in *Plaintiff S195/2016*, and limited debate regarding the significance of that decision for Australia's ongoing program of mandatory offshore detention of people who seek asylum by boat. It is also possible that few journalists regarded the action as likely to succeed, particularly considering the history of failed actions challenging elements of Australia's mandatory offshore immigration detention regime.

This case note seeks to ameliorate that under-reporting of *Plaintiff S195/2016*, by exploring the case in its legal and political contexts, with a focus on Australia's human rights and other international legal obligations. Part II outlines the plaintiff's factual circumstances and describes the procedural history of the action. Part III considers the legal significance and political ramifications of the PNG Supreme Court decision in the *Namah v Pato* ('*Namah*') case.[3] Part IV outlines the High Court's

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1 *Plaintiff S195/2016 v Minister for Immigration and Border Protection* [2017] HCA 31.

2 Myles Morgan, 'Pauline Hanson Enters the Senate Wearing a Burqa', *SBS News* (online), 17 August 2017 <http://www.sbs.com.au/news/article/2017/08/17/pauline-hanson-enters-senate-wearing-burqa>.

3 *Namah v Pato* (2016) SC1497 (Supreme Court of Papua New Guinea).

findings in *Plaintiff S195/2016*. Part V concludes by evaluating the significance of the judgment in the context of Australia's approach to refugees and asylum seekers.

II FACTS AND PROCEDURAL HISTORY

The High Court set out agreed facts in its decision.[4] The unnamed plaintiff, 'S195/2016', is an Iranian national who claims to be a refugee.[5] On 24 July 2013, whilst on board an asylum seeker vessel, he reached Christmas Island within Australia's 'migration zone'. At this time, he was categorised as an 'unauthorised maritime arrival' within the meaning of the *Migration Act 1958* (Cth) ('the Act'). Tony Burke, then Minister for Immigration and Border Protection in the Rudd Labor Government, consequently ordered the plaintiff's removal from Australian territory, exercising the power under section 198AD(5) of the Act. PNG had been designated a 'regional processing country' under section 198AD(1). On 26 August 2013, the plaintiff was taken by Commonwealth officers to PNG, in exercise of their power under section 198AD(2), and detained at the Manus RPC, where he remains to date. The plaintiff applied for refugee protection in PNG but was unsuccessful in his initial application. On 12 December 2016, the PNG Minister for Foreign Affairs and Immigration ordered his removal. However, the PNG government has not yet taken steps to effect the plaintiff's deportation.

The plaintiff maintains that he is a refugee but he has not appealed against his initial unsuccessful application. He was detained on Manus Island when a riot occurred between 16 and 18 February 2014 and witnessed the attack that led to the death of fellow detainee, Reza Barati.[6] The plaintiff gave eyewitness testimony at the later trial of those convicted of killing Mr Barati and was subjected to threats of reprisals for doing so. It has been reported that the plaintiff does not want to be settled in PNG due to consequent fear for his safety.[7] Although he has not been officially detained since around May 2016, he feels effectively detained due to the hostile environment outside the grounds of the detention centre.[8] The PNG government cannot forcibly transfer the plaintiff to Iran because Iran has a policy of refusing to accept involuntary returns.[9]

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4 *Plaintiff S195/2016* [2017] HCA 31 [1]–[4].

5 Within the meaning of article 1 of the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

6 A subsequent parliamentary committee inquiry concluded that 'the Australian Government failed in its duty to protect asylum seekers including Mr Barati from harm': Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (December 2014) 146.

7 Ben Doherty and Helen Davidson, 'Reza Barati: Men Convicted of Asylum Seeker's Murder to Be Free in Less than Four Years', *The Guardian* (online), 19 April 2016 <https://www.theguardian.com/australia-news/2016/apr/19/reza-barati-men-convicted-of-asylum-seekers-to-be-free-in-less-than-four-years>.

8 Amy Maguire, 'Manus Island Centre Set to Close – But Where to for the Detainees?', *The Conversation* (online), 18 August 2016 <https://theconversation.com/manus-island-centre-set-to-close-but-where-to-for-the-detainees-64061>.

9 Ben Doherty, 'Iran Refuses to Take Back Asylum Seekers Who Have Been Forcibly Returned', *The Guardian* (online), 15 March 2016 <https://www.theguardian.com/australia-news/2016/mar/15/iran-refuses-to-take-back-asylum-seekers-who-have-been-forcibly-returned>.

In May 2016, lawyers acting for 859 detainees on Manus Island (including the man who would later become known as 'S195/2016') filed a writ of summons in the High Court, seeking the Court's intervention by judicial review of the detainees' transfer to, and detention in, PNG.[10] This was the first stage in the action which eventually became *Plaintiff S195/2016*, an action on behalf of an individual plaintiff, rather than a representative class. At this early stage of the litigation, the plaintiffs argued their detention was illegal on international, constitutional, administrative and civil law grounds. They asked the High Court to declare that their detention constituted:

- Forcible deportation, in the sense of expulsion from Australia and transfer to Manus Island, contrary to international criminal law;[11]
- Arbitrary and indefinite detention in PNG, on the basis of Australia's 'no advantage' principle for asylum seekers travelling by boat[12] and in circumstances where PNG lacked the legal safeguards or competence to adequately protect or process asylum seekers;[13]
- Torture, inhumane and degrading treatment, which would constitute violations of a *jus cogens* norm of international law;[14]
- Rape and other crimes of sexual violence;[15]
- Denial of fundamental human rights, particularly rights to legal representation and a fair hearing;[16]
- Murder (in reference to the killing of Reza Barati in February 2013), grievous bodily harm, assault and robbery; and
- Unlawful death, false imprisonment, trespass and negligence.

In this first stage of the action, the detainees requested relief via the writ of habeas corpus.[17] The plaintiffs asked to be brought before the High Court for the Court to determine whether their detention was legal. The detainees hoped the Court would then issue a writ of mandamus,[18] ordering the government to bring them to Australia

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10 Plaintiffs S99/2014, Amended Writ of Summons, Submission in *Plaintiffs S99/2014 v Minister for Immigration and Border Protection*, S99/2014, 2 May 2016 (copy on file with author).

11 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7 ('*Rome Statute*').

12 Under this principle, those who seek to reach Australia by boat to claim asylum from persecution should not gain any advantage over those who seek Australia's protection through United Nations High Commissioner for Refugees channels (many of whom are residing in refugee camps). This principle was enacted via the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).

13 Australian Human Rights Commission, Submission to Parliamentary Joint Committee on Human Rights, *Examination of the Migration (Regional Processing) Package of Legislation*, January 2013, 26, citing Letter from António Guterres, United Nations High Commissioner for Refugees, to Christopher Bowen, Minister for Immigration and Citizenship of Australia, 5 September 2012, 3.

14 *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 2(2).

15 Oliver Laughland, 'Manus Island Detainees "Raped and Abused" with Full Knowledge of Staff', *The Guardian* (online), 24 July 2013 <https://www.theguardian.com/world/2013/jul/24/manus-island-rape-detainees>.

16 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

17 For consideration of habeas corpus in the immigration detention context, see David Clark, 'Jurisdiction and Power: Habeas Corpus and the Federal Court' (2006) 32 *Monash University Law Review* 275.

18 Considered in the immigration detention context by the High Court in *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231.

to process their refugee claims. Finally, the detainees sought a writ of prohibition,[19] to prevent their transfer to any other place until the case had been decided and their claims assessed. This action was one in a series of high profile claims prompted by Australia's security-driven approach to asylum seekers travelling by boat,[20] notably including the *Tampa* case.[21] In such cases, human rights lawyers have sought to vindicate the rights of asylum seekers who lack access to Australian courts due to their forcible offshore detention. However, such claims have not achieved transformation in Australian policy or practice. Other advocates have sought the aid of international courts, notably by arguing that Australia's practice in this area inflicts crimes against humanity on asylum seekers and refugees.[22] Again, such claims have, to date, failed to shift Australia's practice.

The initial and very ambitious class action commenced as *Plaintiff S195/2016* was never heard by the High Court. Instead, it was set aside to enable the parties to negotiate a special case. That special case became the action between the individual plaintiff and three defendants – the Minister for Immigration and Border Protection (now Peter Dutton of the Turnbull Coalition Government), the Commonwealth of Australia and Broadspectrum (the private company contracted to manage offshore detention facilities). Over several months in late 2016, the parties negotiated outside court and in directions hearings before Bell J, to reach an agreed and confined statement of facts. This process produced a special case that Bell J submitted to the full court of the High Court for consideration.[23]

The Court was asked to determine if the Australian government had power, whether under the *Australian Constitution* or the Act, to do the things it did to the plaintiff (and, implicitly, to others in similar circumstances). The specific questions formulated for the Court's consideration tested whether Australia could validly make and continue its arrangements for offshore processing and detention of asylum seekers on Manus Island, in light of the PNG Supreme Court decision in the *Namah* case. As will be discussed in the following section, the *Namah* case found that those arrangements violated constitutional rights protections in PNG. The High Court considered the following substantive questions:

> Question 1: Was the designation of [PNG] as a regional processing country on 9 October 2012 beyond the power conferred by s 198AB(1) of the Act by reason of the [decision in *Namah*]?
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> Question 2: Was entry into: (a) 2013 Memorandum of Understanding; (b) the Regional Resettlement Arrangement; (c) the 2014 Administrative Arrangements; and (d) the Broadspectrum Contract, beyond the power of the Commonwealth conferred by s 61 of the *Australian Constitution* and/or s 198AHA of the Act by reason of the [decision in *Namah*]?

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19 Under the power in section 75(v) of the *Australian Constitution*.

20 Amy Maguire, 'Australia's Global Reputation at Stake in High Court Asylum Case', *The Conversation* (online), 9 July 2014 <https://theconversation.com/australias-global-reputation-at-stake-in-high-court-asylum-case-28951>.

21 *Ruddock v Vadarlis* (2001) 110 FCR 491.

22 See, eg, Amy Maguire et al, 'Australia, Asylum Seekers and Crimes against Humanity?' (2015) 40 *Alternative Law Journal* 185.

23 Transcript of Proceedings, *Plaintiff S195/2016 v Minister for Immigration and Border Protection* [2016] HCATrans 315 (21 December 2016).

> Question 3: Was the direction made by the Minister on 29 July 2013 beyond the power conferred by s 198AD(5) of the Act by reason of the [decision in *Namah*]?
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> Question 4: Was the taking of the plaintiff to [PNG] on 21 August 2013 beyond the power conferred by s 198AD of the Act by reason of the [decision in *Namah*]?
>
> Question 5: Is the authority for the Commonwealth to undertake conduct in respect of regional processing arrangements in [PNG] conferred by s 198AHA of the Act dependent on whether those arrangements are lawful under the law of [PNG]?
>
> Question 6: Is the Commonwealth precluded from assisting [PNG] to take action pursuant to the orders outlined at paragraph 35 [of the special case] by reason of the [decision in *Namah*]?

As is apparent in these questions, the action became a case focused largely on statutory and constitutional interpretation, rather than a case permitting substantial argument on human rights issues or the consideration of Australia's practice in respect to its international legal obligations. In order to understand the framing of the special case, it is necessary to outline the decision of the PNG Supreme Court in the *Namah* case.

III THE *NAMAH* CASE

In 2013, PNG Opposition Leader Belden Norman Namah launched a challenge to the legality of the detention of asylum seekers in PNG, carried out by arrangement with Australia.[24] Namah asked the Supreme Court to determine whether the bringing in of asylum seekers to PNG by Australia, and their subsequent detention on Manus Island, was contrary to their rights to personal liberty as guaranteed by the *Constitution of the Independent State of Papua New Guinea* ('*PNG Constitution*').[25] The *PNG Constitution* is distinct from Australia's in its inclusion of a *Charter of Rights*.[26] Under section 42 of the *PNG Constitution*, no person may be deprived of his or her liberty except in certain confined circumstances. In the *Namah* case, the Supreme Court considered whether it should regard the Manus Island detainees as lawfully detained under one of the exceptions to the right of personal liberty, specifically the power of the government to detain a person seeking unlawful entry to PNG. However, the Court concluded that this exception did not apply, as the detainees' intended destination was Australia, rather than PNG, and their entry was lawful because it was authorised by a PNG visa.[27] Considering that Australia forcibly transferred the detainees to PNG, the Court could not regard the detainees as responsible for their entry to PNG. No constitutional exception was appropriate to permit their detention

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24 'Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues' (8 September 2012).

25 *Namah* (2016) SC1497, 4 [5] (Kandakasi J) (Supreme Court of Papua New Guinea).

26 *Constitution of the Independent State of Papua New Guinea 1975*.

27 Stephen Tully, 'Manus Island Regional Processing Centre Illegal under PNG Law' [2016] (23) *Law Society of NSW Journal* 84, 84.

and that detention was, therefore, unconstitutional.[28] The Supreme Court ordered the PNG and Australian governments to cease the 'unconstitutional and illegal detention' of the detainees and the breach of their human rights.[29]

The *Namah* case is striking in that it effectively holds Australia to international legal standards in a way that Australian courts cannot. The *Namah* case upholds the international legal obligation on states to refrain from imposing arbitrary or indefinite detention and highlights the ways in which mandatory detention of asylum seekers infringes their human rights.[30] Among similar industrialised, democratic countries, Australia stands alone in its lack of statutory or constitutional human rights protection. The 2009 National Human Rights Consultation Committee recommended that the federal government pass a Human Rights Act.[31] However, the government has not taken up this, or several other, Consultation recommendations. Australian courts therefore have minimal statutory authority to rely on international legal principles in their interpretation of the reach of government power.

Following the decision in the *Namah* case, PNG Prime Minister Peter O'Neill acknowledged that his government was bound to comply with the Court's judgment. He said that the Manus Island RPC would have to close and asked Australia to 'make alternative arrangements for the asylum seekers'.[32] O'Neill's Australian counterpart, Prime Minister Malcolm Turnbull, reiterated Australia's determination not to accept the detainees in any circumstances. The Australian Minister for Immigration and Border Protection, Peter Dutton, described the people remaining on Manus Island as PNG's responsibility.[33] However, in August 2016, the governments jointly announced that the Manus RPC would close.[34] Yet more than a year on, the fate of those detained on Manus remains unclear.

In order to facilitate the closure of the Manus RPC, Australia reached an agreement with the Obama administration for the settlement of some or all of the detainees in the United States. However, the Australian government has struggled to maintain this agreement following the inauguration of President Donald Trump.[35] In September 2017, 22 refugees left PNG for resettlement in the United States. However, it is

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28 Madeline Gleeson, 'PNG Court Decision Forces Australia to Act on Manus Island Detainees', *The Conversation* (online), 27 April 2016 <https://theconversation.com/png-court-decision-forces-australia-to-act-on-manus-island-detainees-58439>.

29 *Namah* (2016) SC1497, 28 [74(6)] (Kandakasi J) (Supreme Court of Papua New Guinea).

30 Tully, above n 27, 84.

31 National Human Rights Consultation Committee, 'National Human Rights Consultation Report' (Report, September 2009) 378.

32 Stephanie Anderson, 'Manus Island Detention Centre to Be Shut, Papua New Guinea Prime Minister Peter O'Neill Says', *ABC News* (online), 27 April 2016 <http://www.abc.net.au/news/2016-04-27/png-pm-oneill-to-shut-manus-island-detention-centre/7364414>.

33 Francis Keany and Louise Yaxley, 'Manus Island Detention: PNG Responsible for Asylum Seekers, Peter Dutton Says', *ABC News* (online), 28 April 2016 <http://www.abc.net.au/news/2016-04-28/png-responsible-for-manus-island-asylum-seeker-dutton-says/7369032>.

34 Peter Dutton, 'Manus Regional Processing Centre' (Media Release, 17 August 2016).

35 Amy Maguire and Jason von Meding, 'Trump–Turnbull Call: Trading People like Pawns Undermines the Goals of International Co-operation', *The Conversation* (online), 5 August 2017 <https://theconversation.com/trump-turnbull-call-trading-people-like-pawns-undermines-the-goals-of-international-co-operation-82082>.

unclear how many more of the 500–600 current Manus detainees will be similarly resettled.[36] The situation is especially unclear for those, like the plaintiff in *Plaintiff S195/2016*, whose initial applications for refugee protection in PNG were denied. The Australian Border Deaths Database maintains a record of deaths associated with Australia's borders, including the deaths of asylum seekers and refugees suffering from acute mental health conditions related to their experience of arbitrary and indefinite detention.[37]

Australia's continued insistence that it will never resettle asylum seekers arriving by boat ignores practical realities. Recent history demonstrates that asylum seekers travelling to Australia by boat are very likely to be refugees, and the rate of successful outcomes in refugee status determinations is far greater for boat arrivals than for those who travel by air with visas.[38] Further, Australia's practice is repeatedly condemned as inconsistent with its international obligations under customary and treaty law. In detaining asylum seekers at sea and cooperating with foreign agencies to return them to their country of origin, Australia has been accused of violating the fundamental principle of non-refoulement of refugees.[39] Several potential claimants have lodged complaints against Australia before the International Criminal Court, alleging crimes against humanity, including deportation and forcible transfer of population, in relation to the mandatory detention of asylum seekers arriving by boat.[40] Australia has attracted particular criticism for the mandatory detention of child asylum seekers arriving by boat, which is argued to violate the best interests principle and specific protections for health care, education and family life under the Convention on the Rights of the Child.[41] However, the combined weight of the *Namah* case and continuous international condemnation[42] of Australian practice has been insufficient to drive a change in policy. The following section considers the High Court's decision in *Plaintiff S195/2016*, in which it was asked to read the Commonwealth's powers in light of the decision in *Namah*.

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36 Eric Tlozek, 'Manus Island: First Refugees Leave PNG for US under Swap Deal', *ABC News* (online), 26 September 2017 <http://www.abc.net.au/news/2017-09-26/22-refugees-leave-manus-island-for-us-swap-deal/8988424>.

37 Border Crossing Observatory, *Australian Border Deaths Database* (9 October 2017) <http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/>.

38 Janet Phillips, 'Asylum Seekers and Refugees: What Are the Facts?' (Research Paper, Parliamentary Library, Parliament of Australia, 2015) 9.

39 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33; Amy Maguire, 'Is It an Offence if Australians Pay People Smugglers to Turn Back?', *The Conversation* (online), 11 June 2015 <https://theconversation.com/is-it-an-offence-if-australians-pay-people-smugglers-to-turn-back-43054>.

40 See, eg, Tendayi E Achiume et al, 'The Situation in Nauru and Manus Island: Liability for Crimes against Humanity in the Detention of Refugees and Asylum Seekers' (Communiqué to the Office of the Prosecutor of the International Criminal Court, 2017). For discussion of the prospects of potential ICC prosecutions, see Amy Maguire et al, above n 22.

41 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 3, 8, 22, 24, 28, 37. See also Amnesty International, 'Island of Despair: Australia's "Processing" of Refugees on Nauru' (Report, 17 October 2016); Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention' (Report, November 2014).

42 Most recently, see United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017).

IV THE HIGH COURT'S DECISION

At the hearing of the special case, Chief Justice of the High Court, Susan Kiefel, asked the plaintiff's barrister how the *Namah* case could bear on the Court's interpretation of the Australian government's powers under the Act. Kiefel CJ noted that those powers are defined by the Act and must be interpreted according to the *Australian Constitution*.[43] The plaintiff argued that the *Australian Constitution* should be read to imply a limitation on governmental power, specifically: 'That the power is to be used for a legal purpose, meaning a purpose legal where it is exercised, where it has effect'.[44] Considering the finding of the PNG Supreme Court that it was illegal for Australia and PNG to bring in and detain asylum seekers on Manus Island, the plaintiff therefore argued that Australia was exercising its powers for an illegal purpose. According to Mr Molomby SC for the plaintiff:

> it is somewhat internally contradictory to regard the Australian Constitution as establishing a rule of law for our nation, yet capable of giving power to committing acts in other countries which are contrary to the law of that nation.[45]

In its decision, the High Court described this line of the plaintiff's case as a 'novel and sweeping proposition'.[46]

The second aspect of the plaintiff's argument was that the Commonwealth lacked statutory power, under the Act, to do the things necessary for regional processing of asylum seekers in PNG, because such statutory power depends on whether those things are legal under PNG law. As stated in the plaintiff's reply to the government's submission:

> The agreements being beyond power in Papua New Guinea, they were also beyond power in Australia. There is no power to make an agreement with a party that does not itself have power to make the agreement. There can be no power to perform an impossibility.[47]

As stated by the High Court, the plaintiff's claim here was that the *Namah* case denied 'the character of an "arrangement" within the meaning of' section 198AHA of the Act, to the effect that the Memorandum of Understanding and Regional Resettlement Arrangement agreed between Australia and PNG were not made in exercise of the Commonwealth's statutory authority.

The Court decided unanimously, and with very brief reasons, to reject the plaintiff's application, concluding that neither of the above propositions were tenable.[48] The

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43 Transcript of Proceedings, *Plaintiff S195/2016 v Minister for Immigration and Border Protection* [2017] HCATrans 99 (9 May 2017) 176–9 (Kiefel CJ).

44 Ibid 331–2 (T Molomby SC).

45 Ibid 456–9 (T Molomby SC).

46 *Plaintiff S195/2016* [2017] HCA 31 [19] (The Court).

47 Plaintiff S195/2016, 'The Plaintiff's Reply', Submission in *Plaintiff S195/2016 v Minister for Immigration and Border Protection*, S195/2016, 28 April 2017, [7].

48 *Plaintiff S195/2016* [2017] HCA 31 [20] (The Court).

Court held that the plaintiff had not cited any authority in prior case law or the text or structure of the *Australian Constitution* for the arguments made:

> The course of authority in this Court leaves no room for doubt that neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to international law. Equally there should be no doubt that neither the legislative nor the executive power of the Commonwealth is constitutionally limited by any need to conform to the domestic law of another country.[49]

Further, the Court found, the definition of 'arrangement' in section 198AHA(5) of the Act clearly encompassed the agreements Australia had entered into with PNG, notwithstanding the Supreme Court decision that those agreements were beyond the constitutional power of the PNG government.[50]

The High Court concluded that the plaintiff had misunderstood the significance of the decision in *Namah* in the context of the special case. According to the Court, the *Namah* case said nothing about the PNG government's capacity to enter into an arrangement with the Australian government to establish or maintain the detention centre, and 'plainly did not hold' that entry into those arrangements was beyond the power of the PNG government.[51] Instead, the Court said *Namah* was concerned with the treatment of asylum seekers at Manus RPC, and perhaps as well with the forceful bringing in to Manus Island of the detainees.[52]

Finally, in respect of Question 5 in the special case, the High Court rejected the plaintiff's claim that the Australian government's statutory power to make regional processing arrangements in PNG was 'dependent on whether those arrangements are lawful' under PNG law. The Court cited its earlier majority decision in *Plaintiff M68/2015*:

> The lawfulness or unlawfulness of Executive Government action under Australian law or under the law of a foreign country … does not determine whether or not that action falls within the scope of the statutory capacity or authority conferred by the section.[53]

V SIGNIFICANCE OF *PLAINTIFF S195/2016*

Considering the Court's reliance on its decision in *Plaintiff M68/2015* to support its finding in *Plaintiff S195/2016*, it is important to consider the parallels and distinctions between these two recent judgments. The action known as *Plaintiff M68/2015* challenged the parallel regional processing arrangement Australia has made with the small Pacific island state of Nauru. The plaintiff was a pregnant Bangladeshi asylum seeker who was originally detained on Nauru and later transferred to Australia for

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49 Ibid (citations omitted).

50 Ibid [21].

51 Ibid [25].

52 Ibid.

53 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 110 [181] (Gageler J) ('*Plaintiff M68/2015*').

medical treatment.[54] A majority in the High Court, for various reasons, found that in forming a Memorandum of Understanding with Nauru and giving effect to it by forming arrangements for a RPC with Nauru and the private company Transfield (later Broadspectrum), the Commonwealth was acting in accordance with the same constitutional and legislative powers that authorised its arrangements with PNG.[55]

Specifically, in *Plaintiff M68/2015*, the High Court found that section 198AHA of the Act authorised the Commonwealth to participate in the detention of asylum seekers. The Court rejected the plaintiff's argument that the Commonwealth's conduct, including detaining her and authorising and controlling her detainment under section 198AHA of the Act, was not authorised by a constitutional head of power. In a joint decision, French CJ, Kiefel and Nettle JJ, as well as Keane J in a separate judgement, found that the detainment as well as authorisation and control of her detainment was carried out by Nauru and that Australia only participated in that detention. Previous decisions, such as *Plaintiff S156/2013*,[56] had established that the Constitution's 'aliens power' only goes so far as to empower the Commonwealth to detain non-citizens for the purposes of expulsion or deportation. The majority judgments in *Plaintiff M68/2015* concluded that the Commonwealth's actions in relation to Nauru were limited to deportation and expulsion, and thus fell within the scope of the Constitutional 'aliens power'. Further, the plaintiff's detention was found not to be subject to what has become known as the *Lim*[57] test, since – according to the majority in the High Court – the plaintiff's actual detention was carried out by the Nauru government. The *Lim* test limits the Commonwealth's powers of detention to what is 'reasonably necessary' for a valid purpose. Had the *Lim* test applied in *Plaintiff M68/2015*, the plaintiff could have argued that her detainment and the authorisation and control of her detainment were not 'reasonably necessary'.

The decisions in *Plaintiff M68/2015* and *Plaintiff S195/2016* confirm what has been apparent for some time, namely that Australian courts are highly unlikely to rule unlawful Australia's mandatory offshore immigration detention regime, wholly or in part. Both decisions reach the dissonant conclusion that Australian government action will be within power if it is done for a valid statutory purpose, even if that purpose or action overrides a long-held principle of common law or infringes international legal norms or the laws of a foreign country.

There is a distinction between *Plaintiff M68/2015* and *Plaintiff S195/2016* in terms of how the Court located control over the offshore detention of people seeking asylum. In *Plaintiff M68/2015*, Gordon J gave a dissenting judgment, concluding that:

> The acts and conduct of [Australia] just set out demonstrate that her detention in the Nauru RPC was 'facilitated, organised, caused, imposed [or] procured' by

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54 'Asylum Seeker Families Face Deportation to Nauru after High Court Ruling', *SBS News* (online), 3 February 2016 <http://www.sbs.com.au/news/article/2016/02/03/high-court-throws-out-legal-challenge-australias-offshore-detention-policies>.

55 Namely, section 61 of the *Australian Constitution* and section 198AHA of the Act. See *Plaintiff M68/2015* (2016) 257 CLR 42, 60–75 [1]–[55] (French CJ, Kiefel and Nettle JJ), 75–88 [56]–[103] (Bell J), 88–112 [104]–[188] (Gageler J), 112–131 [189]–[265] (Keane J).

56 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28.

57 *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1, 64 ('*Lim*').

> the Commonwealth. The Commonwealth asserted the right by its servants (or Transfield as its agent) to apply force to persons detained in the Nauru RPC for the purpose of confining those persons within the bounds of the place identified as the place of detention, the Nauru RPC. To that end, the Commonwealth asserted the right by its servants or agents to assault detainees and physically restrain them.[58]

However, Gordon J was the only justice hearing *Plaintiff M68/2015* to find the Commonwealth government responsible for the detention of asylum seekers on Nauru. To varying degrees, the six majority judges concluded that the Commonwealth only had control over the plaintiff's detention up to the point of her transfer to authorities in Nauru.[59]

To the extent that the decision in *Plaintiff S195/2016* moves beyond the majority finding in *Plaintiff M68/2015*, the more recent judgment tolerates an even broader conception of executive government power in relation to the mandatory offshore detention of asylum seekers arriving by boat. In *Plaintiff S195/2016*, the High Court did not rely on its earlier position that the Commonwealth transfers control over detention to a foreign government at the time of a detainee's transfer to the foreign territory. Rather, the High Court unanimously declared the Commonwealth's power to arrange the detention of asylum seekers in PNG, despite the fact that such an arrangement violates PNG law. It is difficult to imagine what more the judicial branch could do to ensure that reform or abandonment of current policy and practice rests squarely with the executive government.

The decision in *Plaintiff S195/2016* reveals, yet again, a central feature in the courts' incapacity to restrain government practices that have massive and detrimental implications for the liberty, security and lives of one of the most vulnerable groups in global society. Governmental power to deal with refugees and asylum seekers in contravention of Australia's international legal obligations[60] is largely unconstrained, due to the lack of comprehensive human rights protections in Australian domestic law. Though Australia professes a deep commitment to human rights standards in its foreign relations, including in its current bid for a seat on the UN Human Rights Council,[61] it refrains from entrenching these international norms domestically through legislation or constitutional reform. This position may reflect a cultural assumption

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58 *Plaintiff M68/2015* (2016) 257 CLR 42, 71 [354] (citations omitted).

59 Madeline Gleeson, 'Glimmers of Hope for Detained Asylum Seekers in the High Court's Nauru Decision', *The Conversation* (online), 3 February 2016 <https://theconversation.com/glimmers-of-hope-for-detained-asylum-seekers-in-the-high-courts-nauru-decision-54036>.

60 Amnesty International, above n 41; Australian Human Rights Commission, above n 41; Nick Evershed et al, 'The Nauru Files: The Lives of Asylum Seekers in Detention Detailed in a Unique Database', *The Guardian* (online), 10 August 2016 <https://www.theguardian.com/australia-news/ng-interactive/2016/aug/10/the-nauru-files-the-lives-of-asylum-seekers-in-detention-detailed-in-a-unique-database-interactive>; Human Rights Watch, 'World Report 2016: Events of 2015' (Report, 2016) 85–8; Juan E Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/HRC/28/68 (5 July 2015). See also Amy Maguire, 'UN Condemnation and a Sports Boycott: Australia Again Called on to End Offshore Detention', *The Conversation* (online), 25 July 2017 <https://theconversation.com/un-condemnation-and-a-sports-boycott-australia-again-called-on-to-end-offshore-detention-81509>.

61 Department of Foreign Affairs and Trade, Australian Government, *Australia's Candidacy for the United Nations Human Rights Council 2018–2020* (2017) <http://dfat.gov.au/international-relations/international-organisations/pages/australias-candidacy-for-the-unhrc-2018-2020.aspx>.

that the Australian 'fair go' is sufficient protection against the excessive use of government power.[62] However, even Australian citizens enjoying the highest degree of access to justice nevertheless lack the capacity to assert human rights claims against the Commonwealth. Individuals and communities who have reduced access to justice, notably those subject to mandatory offshore immigration detention, feel the lack of human rights protections in domestic law far more keenly. Such people are disadvantaged both by their limited capacity to reach the courts and assert their legal rights, and by the courts' incapacity to draw international human rights norms into domestic jurisprudence.

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62 Gillian Triggs, 'How the "Fair Go" Became the Last Bulwark for Australia's Freedoms', *The Conversation* (online), 14 December 2015 <https://theconversation.com/gillian-triggs-how-the-fair-go-became-the-last-bulwark-for-australias-freedoms-49743>.