

PLAINTIFF M68/2015 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ORS (M68/2015)

Date Special Case referred to Full Court: 20 August 2015

On 10 September 2012, the first respondent ('the Minister') designated Nauru as a regional processing country under s 198AB(1) of the *Migration Act 1958* (Cth) (*Migration Act*). On 29 July 2013, the Minister issued a direction under s 198AD of the *Migration Act* requiring officers to take unauthorised maritime arrivals to Papua New Guinea or Nauru.

The plaintiff is a citizen of Bangladesh who on 19 October 2013 was on board a vessel that was intercepted at sea by officers of the Commonwealth. She was taken to Christmas Island, and then, on 22 January 2014, to detention in Nauru. She has applied to be recognised as a refugee under the *Convention Relating to the Status of Refugees*. On 23 January 2014 the Principal Immigration Officer of Nauru granted to the plaintiff a regional processing centre visa, which specified that she must reside at the Nauru Regional Processing Centre ('the RPC'). Pursuant to s 18C of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) and rule 3.1.3 of the Rules of the RPC Centre it was unlawful for the plaintiff to leave, or attempt to leave her accommodation facility within the RPC without the permission of an authorised officer.

On 2 August 2014 the plaintiff was brought to Australia for medical treatment. The plaintiff filed an application for an order to show cause seeking, inter alia, a writ of prohibition to prevent the Minister from taking steps to return her to the Republic of Nauru. Nettle J, on 20 August 2015, referred the Special Case agreed by the parties to the Full Court. The issue raised by this case is whether the Commonwealth can take persons, who are present in Australia and have the full protections of the Australian Constitution, to a foreign country so as to subject them to extra-judicial, extraterritorial detention which is funded, caused and effectively controlled by the Commonwealth, but which lacks those constitutional protections.

The plaintiff submits: (a) officers of the Commonwealth engaged in conduct (which includes entering into and exercising rights under a contract in relation to the provision of services at regional processing countries dated 24 March 2014 between the third defendant (Transfield) and the Commonwealth), which authorised, procured, caused and resulted in her detention at the RPC and would (if she were returned to Nauru) engage in further conduct of that nature with the same result; (b) she has standing to challenge that conduct; (c) that conduct was required to be, but was not authorised, by a valid statutory provision enacted by the Commonwealth Parliament or by s 61 of the Constitution; (d) by reason of those matters (alternatively, by reason of those matters and the unlawfulness of the plaintiff's detention under the Constitution of Nauru), s 198AD(2) of the *Migration Act* does not authorise or require that the plaintiff be taken to Nauru; and (e) the Transfield contract is not authorised by s 198AHA of the *Migration Act* or any other law and is invalid.

The Commonwealth submits: (a) the plaintiff lacks standing to challenge whether the Commonwealth was authorised, in the past, to engage in the acts or conduct which she impugns; (b) the impugned conduct was and would be authorised by s 198AHA of the *Migration Act*, which is supported by the aliens power, the external affairs power and the power with respect to relations with Pacific islands; (c) alternatively, the impugned conduct was and would be supported by s 328 of the *Financial Framework*

(*Supplementary Powers*) Act 1997 (Cth), read with regulations made under that Act, or non-statutory executive power; (d) in any event, s 198AD of the *Migration Act* requires that the plaintiff be taken to Nauru as soon as reasonably practicable; (e) none of these matters turn on whether the laws of Nauru, pursuant to which the plaintiff was and would be allegedly detained in Nauru, are invalid because they infringe the *Constitution of Nauru*. Even if they did, the validity of those laws should not be questioned. In any event, the laws do not infringe the *Constitution of Nauru*.

The Attorneys-General of the Western Australia and Queensland have given notice that they will intervene.

The questions reserved by the Special Case signed by the parties include:

- Assuming that:
 - (A) the restrictions imposed on the plaintiff ... were lawful under the law of Nauru; and
 - (B) the specification in the RPC visa ... that the plaintiff must reside at the Nauru RPC, s 18C of the *Asylum Seekers (Regional Processing Centre) Act 2012* (Nr) and rule 3.1.3 of the Centre Rules were lawful and valid under the law of Nauru,

was the Commonwealth or the Minister authorised, in the past, to engage in [the] acts or conduct by:

- (a) s 61 of the *Constitution*?
- (b) s 198AHA of the *Migration Act* (assuming it is valid)?
- (c) s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth), read with reg 16 and items 417.021, 417.027, 417.029 and 417.042 of sched 1AA to the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth)?