IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

NO M68 OF 2015

BETWEEN: **PLAINTIFF M68/2015**
Plaintiff

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

TRANSFIELD SERVICES (AUSTRALIA) PTY LTD (ACN 093 114 553)
Third Defendant

10 **SUBMISSIONS OF THE FIRST AND SECOND DEFENDANTS**

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PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The issues are identified in the questions stated in the special case filed 24 August 2015 (**SC**).

PART III SECTION 78B OF THE JUDICIARY *ACT 1903* (CTH)

3. Notices have been issued pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV FACTS

4. The facts are set out in the special case.

PART V LEGISLATIVE PROVISIONS

5. In addition to the relevant legislative provisions identified by the plaintiff, the first and second defendants (**the Commonwealth**) rely on the legislative provisions in Annexure A.

PART VI ARGUMENT

SUMMARY

6. The plaintiff's primary case is that, whether or not her past or future detention in Nauru was or would be authorised by the law of Nauru, the Commonwealth Executive was not and would not be authorised by the Commonwealth Constitution and Australian legislation to engage in certain conduct which the plaintiff alleges 'facilitated, organised, caused, imposed, procured or resulted in' that detention. The plaintiff does not claim damages for false imprisonment or any relief establishing a right to liberty if and when returned to Nauru. On the plaintiff's case, whether any detention was or would be authorised by the law of Nauru arises only as a factual question and only if, contrary to her primary case, it is relevant to whether the impugned conduct of the Executive is authorised by Australian law. Despite occasional slips in her submissions (eg PS [7], [8], [100]), the focus of the plaintiff's case is thus not on whether any detention in Nauru was or would be 'unlawful'. The nature of the case has important consequences for the issues in the special case.

7. In summary, the Commonwealth submits as follows:

   7.1. The plaintiff lacks standing to challenge whether the Commonwealth was authorised, in the past, to engage in the acts or conduct in the past which the plaintiff impugns ([26]–[32] below).

   7.2. The impugned conduct was and would be authorised by s 198AHA of the *Migration Act 1958* (Cth) (**Migration Act**) ([33]–[42] below). That provision is supported by the aliens power, the external affairs power and the power with respect to relations with Pacific islands ([43]–[52] below). It does not infringe Ch III of the Constitution ([53]–[77] below).

   7.3. Alternatively, the impugned conduct was and would be supported by s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth), read with regulations made under that Act ([78]–[81] below), or non-statutory executive power ([82]–[87] below).

   7.4. In any event, s 198AD of the Migration Act requires that the plaintiff be taken to Nauru as soon as reasonably practicable ([88]–[98] below).

   7.5. 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 ([100]–[109] below). In any event, the laws do not infringe the *Constitution of Nauru* ([110]–[121] below).

A. PRELIMINARY MATTERS

8. The following four propositions are not in dispute.

9. *First*, consistently with *Chu Kheng Lim v Minister for Immigration* (***Lim***)[1] and *Al-Kateb v Godwin* (***Al-Kateb***),[2] the legislative power of the Commonwealth permits conferral on the Executive of authority to detain (or direct the detention of) a person for non-punitive purposes, including to receive, investigate and determine an application by an alien for an entry permit and (after determination) to admit or remove him or her.

10. *Secondly*, the Executive is responsible for the conduct of international relations, 'including the acquisition of international rights and obligations'.[3] Concluding an agreement like the Memorandum of Understanding with Nauru (**MOU**) is not reserved to the exercise of legislative or judicial power.

11. *Thirdly*, consistently with the principles of sovereign equality, State independence and non-intervention, entry into the MOU did not confer on the Commonwealth an entitlement to direct Nauru as to the content of its domestic laws concerning the subject matter of the MOU or otherwise.[4]

12. *Fourthly*, s 198AD(2) of the Migration Act, the constitutional validity of which was upheld in *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (***Plaintiff S156***),[5] requires an officer of the Commonwealth to take an unauthorised maritime arrival to a regional processing country that the Minister has designated pursuant to s 198AB(1). Section 198AD(2) applied, and continues to apply, to the plaintiff.[6] Her attempt to enter Australia without lawful permission triggered its operation.

13. Applying the above propositions, officers of the Commonwealth lawfully took the plaintiff to Nauru pursuant to s 198AD(2) of the Migration Act, and will return her to Nauru relying on that same power. Nauru's implementation of the MOU entails *inter alia* the grant of a visa to persons who are taken to Nauru, which conditions the residence of those persons and otherwise restrains their movements. The requirements of Nauruan law are no more stringent than those the Commonwealth could, without infringing Ch III of the Constitution, lawfully impose if the plaintiff were allowed to remain in Australia.

14. On the plaintiff's case, the Commonwealth cannot assist another country to process refugee claims if that process involves the detention of claimants who have been excluded by Australia. Nor, it seems, can the Commonwealth even take someone to another country from Australia if it knows he or she will be detained there. However, the plaintiff would apparently have no complaint about being detained in Australia, or about the Commonwealth assisting another country to process refugee claims even if that processing involves detention, provided the claimants had not come from Australia. That is said to result from Ch III of the Constitution. For the reasons set out below, that case should be rejected.

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1 (1992) 176 CLR 1.

2 (2004) 219 CLR 562.

3 *Re Ditfort; ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 369 (Gummow J). See also *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643–4 (Latham CJ).

4 *Charter of the United Nations*, Art 2(1) and (7); *Lotus Case* (1927) PCIJ SER A, No 10 at 18–19; SC [84].

5 (2014) 309 ALR 29 at 35 [25] (The Court).

6 Subdivision B of Div 8 of Pt 2 applied, as the plaintiff entered Australia by sea at an excised offshore place and did not hold a visa that was in effect upon entry: she became an 'unlawful non-citizen' (s 14) and was an 'unauthorised maritime arrival' (s 5AA) (SC [48]). As to the continued application of s 198AD(2), see s 198AH(1) and (1A).

B. ADMINISTRATION OF THE NAURU RPC

15. The Preamble to the MOU identifies matters of international policy it advances (SCB 68–9).[7] It is a guiding principle that the Commonwealth will conduct all activities in respect of the MOU 'in accordance with its Constitution and all relevant domestic laws' (cl 4). There is an identical clause in relation to Nauru (cl 5). Nothing in the MOU involves the Commonwealth binding Nauru to particular laws or administrative arrangements relating to the plaintiff's residence or conditions. The Commonwealth has no legal power to compel that result (SC [84]). Nor can it alter the laws of Nauru which impose restrictions on the plaintiff's movements, though none of the Commonwealth, Transfield or its contractors would have sought to impose such restrictions or asserted any right to do so (SC [76], [94]). The plaintiff's 'but for' analysis, in support of her submission that it is the Commonwealth, not Nauru, that is effectively detaining her (PS [63]), is at odds with this fact.

16. From their entry into Nauru, the laws of Nauru apply to Transferees (SC [11]). The Commonwealth's involvement in the Nauru RPC occurs within the framework of an MOU that recognises and relies on the laws of Nauru as regulating the status of Transferees, the conditions pursuant to which their refugee claims are determined, and the consequences for Transferees of those determinations (SC [75]). Relevantly, the laws of Nauru include (and have included): a prohibition on a person who is not a Nauruan citizen entering or remaining in Nauru without a valid visa authorising that entry or presence;[8] conferral of power on the Principal Immigration Officer to grant a non-citizen a visa in prescribed classes;[9] and conferral of power on the Minister for Justice and Border Control to order the removal of a person who remains in Nauru after the expiration or cancellation of their visa.[10]

17. The regional processing centre visa (**RPC visa**) is a class of visa granted to Transferees on receipt of an application from a Commonwealth officer (2014 Regulations, cl 9(3)). It was not, and is not, a precondition to the grant that a person apply on his or her own behalf, or otherwise consent to its grant.[11] Consistently with the objectives of the MOU, the purposes for which an RPC visa may be granted concern determination and review of Transferees' refugee claims, and the consequences of such determinations in terms of the ultimate place in which a Transferee shall reside (cl 9(4)).

18. In the event of a positive determination by the Secretary of the Department of Justice and Border Control of Nauru (**Secretary**) under s 6 of the *Refugees Convention Act 2012* (Nr) (**Refugees Convention Act**), the Transferee will remain in Nauru but leave the RPC (pursuant to a temporary settlement visa which has no movement restrictions (2014 Regulations, cl 9A)) or will be moved to a safe third country. In the event of a negative determination, the Transferee will remain in Nauru while avenues for review are exhausted. Arrangements are then made for his or her removal pursuant to s 11 of the 2014 Immigration Act. There is nothing to stop a Transferee leaving Nauru voluntarily. As at 13 July 2015, 81 Transferees had so departed, to countries other than Australia (SC [26(r)]).

19. Section 4 of the Refugees Convention Act recognises the principle of non-refoulement (SCB 253). The Act implements a regime to give it effect. Applications for refugee status are made to and determined by the Secretary (ss 5–6) (SCB 253–4). If the Secretary determines a Transferee is not a refugee or declines to make a determination, he or she may apply to the Refugee Status Tribunal for merits review (s 31) (SCB 264). The Tribunal may affirm or vary the Secretary's decision, set it aside and substitute a new decision, or remit the matter to the Secretary for reconsideration (s 34)

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7 The Objectives in cll 1–3 of the MOU reflect those broader international objectives (SCB 70).

8 *Immigration Act 2014* (Nr) (**2014 Immigration Act**), s 10(1) (SCB 375); *Immigration Act 1999* (Nr) (**1999 Immigration Act**), s 9(1) (SCB 138).

9 *Immigration Regulations 2014* (Nr) (**2014 Regulations**), cl 4 (SCB 393); *Immigration Regulations 2000* (Nr), cl 3 (SCB 157).

10 2014 Immigration Act, s 11 (SCB 376); 1999 Immigration Act s 11 (SCB 138–9).

11 *Amiri v Director of Police* [2004] NRSC 1 at [16] (Connell CJ) (SCB 579–80).

(SCB 265–6). An appeal on a point of law lies to the Supreme Court of Nauru (s 43(1)) (SCB 269). As at 13 July 2015, Nauru had conducted 628 refugee status determinations, the outcomes of which are set out in SC [26].

20. Unless and until a Transferee is determined to be a refugee, he or she must comply with the conditions of his or her RPC visa, which are prescribed in cl 9(6) of the 2014 Regulations. Those conditions include (SCB 401–2): residing in premises specified in the visa (cl 9(6)(a)); remaining at those premises or at common areas notified to the holder by a service provider except in the case of an emergency or other extraordinary circumstances, or where the absence is organised or permitted by a service provider (cl 9(6)(c));[12] and cooperating in having a determination made by the Secretary under s 6 of the Refugees Convention Act (cl 9(f)).

21. The *Asylum Seekers (Regional processing Centre) Act 2012* (Nr) (**RPC Act**) regulates operation of the centres at which a Transferee (referred to in the RPC Act as a 'protected person' (s 3) (SCB 185)) is required to reside in accordance with cl 9(4)(a) of the 2014 Regulations. Consistently with that visa condition, s 18C(1) of the RPC Act prohibits a protected person from leaving, or attempting to leave, the RPC 'without prior approval from an authorised officer, an Operational Manager or other authorised persons' (s 18C(2)) (SCB 207). No Commonwealth officers or staff of Transfield are appointed as authorised officers; the Secretary has appointed 138 staff of Wilson Security as authorised officers (SC [67]).

22. Responsibility for operating the RPC, and for making the rules governing that operation, is vested by the RPC Act in Operational Managers, who are officers of Nauru (SCB 803). Specific obligations of Operational Managers include: ensuring that Transferees have access to information about the centre (including centre rules and the procedure for having their refugee status determined), amenities and services (s 6(1)) (SCB 187); ensuring that restrictions on the movement of a protected person residing at the centre are limited to the minimum necessary to maintain the security and good order of the centre (s 6(3)) (SCB 188); and making rules for the security, good order and management of the centre and the care and welfare of persons residing there (s 7) (SCB 189–90).

23. The Centre Rules (gazetted 16 July 2014 (SCB 809)) provide that the laws of Nauru apply to everyone in the Centre, including asylum seekers, staff and visitors (r 2.1). The responsibilities of Transferees are set out in r 3, and include complying with all reasonable orders and directions from a service provider that are in the interests of the safety, good order and maintenance of the RPC (r 3.1.2) and not leaving, or attempting to leave, the RPC without prior approval from an authorised officer, an Operational Manager or other authorised persons, except in the case of emergency or other extraordinary circumstance (r 3.1.3). There is no basis for any inference that penalty for a breach may include transfer to restricted accommodation (cf PS [28]).

24. Consistently with the role of the Operational Manager for which s 7 of the RPC Act makes provision, and with r 3.1.3 of the Centre Rules, the Operational Managers of the Nauru RPC have implemented 'open centre arrangements' pursuant to which Transferees residing at the RPC may be granted permission to leave the RPC, unescorted, on five days per week between 9am and 9pm, subject to certain conditions, including completion of an orientation program and obtaining medical clearance (SC [88]). There is no cap on the number of approved Transferees who can participate in the arrangements each open centre day, and during such a day they can come and go as they wish, assisted by a shuttle bus service (SC [89]). The vast majority of Transferees participate in these arrangements (SC [89]).

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[12] With effect from 25 February 2015, cl 9(6)(c) was amended by the *Immigration (Amendment) Regulations 2015* (Nr), SL No 4 of 2015, to delete the requirement in cl 9(6)(c)(ii) of accompaniment by a service provider or approved person. The Amendment Regulations are not in the special case book. The Commonwealth will seek appropriate directions for it to be included in a supplementary special case book.

25. The plaintiff relies on aspects of the Commonwealth's activities in relation to Transferees and the Nauru RPC as constituting the alleged procurement, cause and control of the plaintiff's detention (PS [54]–[62]). However, neither the nature nor the extent of the Commonwealth's involvement alters the proper characterisation of the plaintiff's circumstances: they result from the operation of the laws of Nauru as presently in force. Thus the Administrative Arrangements (SC [9], SCB 73), pursuant to cl 8 of the MOU, reflect the laws of Nauru.[13] The Commonwealth's contractual arrangements with service providers recognise and accommodate those laws;[14] and the actions of service providers are subject to the direction of the Operational Manager, who is an officer of Nauru and is responsible, as a matter of law, for the operation of the Nauru RPC (SC [62]) (cf PS [57]–[60]).[15] Participation in the Ministerial Forum, Joint Advisory Committee and Nauru Joint Working Group cannot properly be described as involving 'oversight and control' (cf PS [61]).

C. STANDING

26. Determining whether the conduct in which the Commonwealth proposes to engage in the future would be authorised under Australian law would have a 'foreseeable consequence'[16] for the plaintiff: if the conduct is not authorised, the Commonwealth would not engage in it, which would affect the plaintiff as the object of that conduct. The plaintiff may, in that context, impugn events which occurred in the past but which remain operative into the future, eg the entry into the Transfield Contract, so as to found an injunction restraining proposed future conduct (cf PS [7]) (see questions 6–12). But whether the Commonwealth was authorised under Australian law to engage in conduct in the past so far as that conduct facilitated etc. the detention of the plaintiff in the past has no foreseeable consequence for the plaintiff.

27. It may be accepted that where a person was detained in the past in Australia and seeks a declaration that that detention was unlawful under Australian law, that declaration may produce a foreseeable consequence in the form of a claim for damages for false imprisonment.[17] But the plaintiff's case concerns whether conduct of the Commonwealth which it is alleged facilitated etc. her detention in the past was authorised under Australian law. That could not form the basis of a claim for damages for false imprisonment because the law applicable to that claim would be the law of the place of the tort, ie the law of Nauru.[18]

28. There is no basis to find that, under Nauruan law, the lawfulness of any detention of the plaintiff in Nauru would be informed by whether conduct of the Commonwealth which facilitated etc. that detention (assuming it did so) was authorised under Australian law. Speculation that that might be so was sufficient on a 'strike out' standard, but without material demonstrating that the law of Nauru actually operates in this way it is insufficient to give the plaintiff standing on a final basis (cf PS [8]).

29. The possibility that a conclusion as to whether the Commonwealth's past conduct was authorised under Australian law may influence a favourable exercise of discretion by the Minister (eg under s 198AE of the Migration Act) is insufficient. The same could have been said of the hope of an *ex*

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13 See eg cll 2.2.6, 2.2.9, 4-6 (SCB 77–83).

14 See eg the Transfield Contract, cll 3.1.2, 3.3.1, Sch 1 Pt 3 cl 4.16.1 (SCB 612, 642); Wilson Security Subcontract cl 3.2(d) and Annexure 1, definition of 'Law' (SCB 688, 705).

15 RPC Act s 5–7 (SCB 186–90); Administrative Arrangements cll 4.1.2, 4.1.3, 4.1.6 (SCB 79).

16 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591 at 613 [52] (Gaudron J).

17 See, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 316 ALR 1.

18 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491. See also *Belhaj v Straw* [2015] 2 WLR 1105 (CA) at 1161–4 [134]–[148] (Lord Dyson MR for the Court); *Rahmatullah v Ministry of Defence* [2014] EWHC 3846 at [23]–[26] (Leggatt J); *Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843 at [304]–[309], [366].

gratia payment in *Gardner v Dairy Industry Authority (NSW)*.[19] Again, while that mere possibility was sufficient on a strike out standard, it is insufficient on a final basis.

30. So far as past expenditure is concerned, the reasons of Heydon J in *Williams v Commonwealth* (***Williams No 1***)[20] are directly applicable.

31. Nothing in *Plaintiff M61/2010E v Commonwealth*[21] affects the position. A declaration there had utility because 'the procedures which are said to be infirm were conducted for the purpose of informing the Minister of matters directly bearing upon the exercise of power to avoid breach by Australia of its international obligations'.[22] That cannot be said here. It is not sufficient that there may be a public interest in determining the lawfulness of past conduct, so that those possessed of executive powers will in future exercise those powers in accordance with law (cf PS [9]).[23] In any case, that objective is met by consideration of the proposed future conduct of the Commonwealth.

32. Accordingly, question 1 should be answered 'no' and questions 2 to 5, which concern past conduct, should not be answered.

D. SECTION 198AHA OF THE MIGRATION ACT

(a) Construction of s 198AHA(1)

33. Section 198AHA of the Migration Act applies 'if the Commonwealth enters into an arrangement with a person or body in relation to the regional processing functions of a country' (s 198AHA(1)). It does not refer in terms to entry into an arrangement with a 'country' (PS [73]). However, the word 'person' in s 198AHA(1) engages s 2C(1) of the *Acts Interpretation Act 1901* (Cth). Its application was expressly recognised in the Explanatory Memorandum to the Bill that introduced s 198AHA[24] and the second reading speech to that Bill.[25] Reference to that material does not involve displacing the clear meaning of the statutory text considered in its context (cf PS [75]) or substituting the subjective intention of those responsible for drafting s 198AHA for the meaning of the words actually used.[26] Rather, it recognises that a purpose of s 198AHA was to authorise conduct by Commonwealth officers precisely where there were arrangements between the Commonwealth and other countries, such as the MOU, which was in place before the enactment of s 198AHA. The existing arrangements between Australia and Nauru were squarely in view when it was enacted.[27] It would defeat the evident

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19 (1977) 18 ALR 55 at 61 (Barwick CJ), 69 (Mason J), 71 (Aickin J). *Gardner* was approved in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591 at 613 [52] (Gaudron J).

20 (2012) 248 CLR 156 at 291–3 [327]–[331]. The rest of the Court concluded that this question could be put aside because State Attorneys-General had intervened to support the challenge to these payments and no question arose concerning their standing to do so: at 181 [9] (French CJ), 223-4 [112] (Gummow and Bell JJ), 240 [168] (Hayne J), 341 [475] (Crennan J), 361 [557] (Kiefel J). Nothing in that reasoning casts doubt on the correctness of Heydon J's conclusions, absent that intervention

21 (2011) 243 CLR 319.

22 (2011) 243 CLR 319 at 359 [103].

23 *Anderson v Commonwealth* (1932) 47 CLR 50 at 51–2 (Gavan Duffy CJ, Starke and Evatt JJ); *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 526–7 (Gibbs J).

24 Explanatory Memorandum to the Migration Amendment (Regional Processing Arrangements) Bill 2015 (Cth) at 6 [12].

25 Second Reading Speech to the Migration Amendment (Regional Processing Arrangements) Bill 2015 (Cth), Commonwealth, House of Representatives, *Parliamentary Debates* (Hansard), 24 June 2015, p 7489.

26 Cf *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264–5 [31]–[32] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

27 Explanatory Memorandum to the Migration Amendment (Regional Processing Arrangements) Bill 2015 (Cth) at 4 [6], 8 [22]; Second Reading Speech to the Migration Amendment (Regional Processing Arrangements) Bill 2015 (Cth), Commonwealth, House of Representatives, *Parliamentary Debates* (Hansard), 24 June 2015, p 7488–9.

purpose of s 198AHA if those arrangements did not engage its terms.[28] The plaintiff's construction would have that effect: the section would not empower the Commonwealth to enter into arrangements with natural persons or companies because it would apply only if there were such arrangements already in place, necessarily empowered by some other provision.

34. The expression 'person or body' was intended to give the broadest scope for the kinds of arrangements which would engage s 198AHA(1). The word 'person' includes natural persons and those artificial persons mentioned in s 2C(1) of the *Acts Interpretation Act*. The word 'body' includes international bodies, such as the United Nations High Commissioner for Refugees or the International Organization for Migration, which do not have legal status as 'persons', but whose potential involvement in regional processing arrangements can readily be envisaged.[29] PS [74] is thus wrong to submit that the application of s 2C(1) to the word 'person' in s 198AHA(1) would leave the word 'body' with no work to do. The plaintiff's construction has the perverse result that, while s 198AHA would be engaged by arrangements with persons and companies within countries, and supra-national entities such as the United Nations, it would not be engaged by arrangements with countries.

35. Given s 2C(1) of the *Acts Interpretation Act*, it was unnecessary for s 198AHA(1) to refer expressly to an arrangement with a country. It would have been inapt to refer only to an arrangement with 'the regional processing country' (cf PS [73]), as it may be desirable to enter an arrangement with one country in relation to the regional processing functions of another. That is apparent from the references to countries other than the regional processing country in the definitions in s 198AHA(5).

36. The construction advanced by the Commonwealth is supported more broadly by those definitions. The definition of 'arrangement' is apt to describe an international arrangement, such as that reflected in the MOU and the Administrative Arrangements. The definition of 'regional processing functions' as including 'implementation of any law or policy ... by a country in connection with the role of the country as a regional processing country' would sit oddly if the arrangement in relation to that function could not be with that country: such an arrangement would, most naturally, be with that country.

37. Finally, for the reasons in [38]–[42] below, while s 198AHA(2) expressly authorises the exercise of restraint over the liberty of a person, and extra-territorial action, it does not render lawful a restraint over the liberty of a person which would be unlawful in the place in which it occurs. Accordingly, there is no occasion for recourse to the presumptions referred to in PS [76]. Even if that were not so, where a provision on its face interferes with fundamental common law rights or operates extra-territorially, it is an error of principle to apply a presumption against construing the provision as having that effect. The provision must be construed, on its terms, consistently with its purpose, to determine the extent of the interference or extra-territorial operation.[30]

(b) The authority provided by s 198AHA(2)

38. It follows that s 198AHA(1) applies to the arrangement entered into between the Commonwealth and Nauru, as evidenced by the MOU and Administrative Arrangements. As explained in [82]–[87] below, the entry into that arrangement was within the non-statutory executive power of the Commonwealth. Alternatively, the Transfield Contract forms the 'arrangement' which engages s 198AHA(1) (and entry into the Contract was authorised by the Financial Framework Provisions (see [78]–[81] below) or the non-statutory executive power of the Commonwealth (see [82]–[87] below)). Either way, s 198AHA(2) is engaged.

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[28] Cf *Acts Interpretation Act 1901* (Cth) s 15AA.

[29] See the arrangements involving Malaysia, the United Nations High Commissioner for Refugees and the International Organization for Migration in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

[30] *Griffin v Pantzer* (2004) 137 FCR 209 at 231 [56] (Allsop J, with Ryan and Heerey JJ agreeing); *CTM v The Queen* (2008) 236 CLR 440 at 498 [205] (Heydon J).

39. Section 198AHA(2) retrospectively authorised the Commonwealth to take the actions impugned by the plaintiff. Although s 198AHA was only inserted into the Migration Act by the *Migration (Regional Processing Arrangements) Act 2015* (Cth), it commenced from 18 August 2012, and thus covers both the past and proposed conduct of the Commonwealth.

40. That being said, the effect of s 198AHA(2) is limited. It is directed only to putting beyond doubt that the Executive has such authority as is necessary to be conferred by the Parliament so that, as a matter of Australia's internal constitutional arrangements, the Executive has authority to engage in the conduct specified in s 198AHA(2). It is not directed at affecting the rights of other persons by rendering lawful otherwise unlawful conduct: so much is made clear by s 198AHA(3). Thus, s 198AHA(2) authorises the Executive to engage in conduct which may be tortious, but does not purport to render that conduct lawful and thus immunise the Executive from a claim for damages. In the taxonomy developed by Hohfeld, s 198AHA(2) confers a power but says nothing about whether exercise of the power is rightful.[31]

41. The subsection has that operation whether or not the conduct occurs in Australia or a foreign country. It is not a mandatory law of the forum rendering lawful conduct that is unlawful in the foreign country in which it takes place, regardless of the law of that place.[32] Thus, reliance upon it would be no answer to a claim in an Australian court that conduct which took place in Nauru was tortious because it was contrary to the law of Nauru as the law of the place of the tort.

42. This understanding of s 198AHA(2) has two important consequences. *First*, it is implicit in s 198AHA(3) that s 198AHA(2) may authorise conduct (in the manner explained above) as a matter of Australian law even if that conduct be unlawful in the place in which it is to occur. In this case, then, the authority provided by s 198AHA(2) is not contingent upon whether or not the impugned conduct was lawful under the law of Nauru. *Secondly*, the premise from which the plaintiff's arguments concerning the validity of s 198AHA proceed — that s 198AHA(2) purports to make lawful detention of persons which would otherwise be unlawful — is wrong.

(c) Validity of s 198AHA: Head of power

43. **Aliens.** In *Plaintiff S156*,[33] the Court held that ss 198AB and 198AD of the Migration Act were laws with respect to aliens within s 51(xix) of the Constitution as they effected the removal of aliens from Australia.[34] Section 198AHA is likewise a law with respect to aliens. It is concerned with the regional processing functions of a country to which unauthorised maritime arrivals are taken in accordance with s 198AD. In authorising the Commonwealth to take steps directed towards effecting the processing of those persons in that country, it has a sufficient connection to aliens to be a law with respect to that subject matter.

44. The plaintiff's identification of the fact that s 198AHA(2) does not operate only on aliens (cf PS [91]) assumes that to be a requirement of a law 'with respect to'[35] aliens. It is not.[36] There need only be a connection between the law and the subject matter (aliens) that is more than 'insubstantial, tenuous

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31 See Fitzgerald, *Salmond on Jurisprudence* (12th ed, 1966) at 229.

32 Cf, eg, *Intelligence Services Act 2001* (Cth) s 14(1): 'A staff member or agent of an agency is not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency.'

33 (2014) 309 ALR 29.

34 (2014) 309 ALR 29 at 34 [25].

35 'No form of words has been suggested which would give a wider power': *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 186 (Latham CJ).

36 See, eg, *Cunliffe v Commonwealth* (1994) 182 CLR 272.

or distant'.[37] The matters s 198AHA(2) authorises, including when read with the definition of 'regional processing functions' in s 198AHA(5), are all closely connected with the processing of refugee claims of aliens in countries to which they have been taken by the Commonwealth. That is so not only as a matter of the legal operation of s 198AHA on its face but also as a matter of its practical operation.[38]

45. Once this conclusion is reached, no further inquiry into the purpose of any aspect of s 198AHA(2), including the purpose of any restraint of liberty which it authorises, is necessary to determine whether the law is with respect to aliens (cf PS [91]).[39] No question of 'proportionality' arises.[40] The plaintiff's further submissions concerning the MOU at PS [92]–[94] are likewise immaterial.

46. **External affairs and Pacific islands.** Additionally, s 198AHA is a law with respect to external affairs within the meaning of s 51(xxix) of the Constitution. That is so for at least two reasons.

47. *First*, s 198AHA is a law with respect to Australia's external relations, being a subject 'directly within' the subject matter of s 51(xxix).[41] The section is triggered by the existence of an arrangement entered by the Commonwealth in relation to the regional processing functions of another country. If that is satisfied, s 198AHA(2) empowers action or payments in relation to those regional processing functions, and incidental actions. That is necessarily a matter which concerns Australia's external relations, at least its relations with the regional processing country.[42] Such a law may validly authorise or regulate conduct within Australia without losing that character.[43] It is not merely the entry into an arrangement between the Commonwealth and another country which means that Australia's external relations are affected (cf PS [85]): the subject matter of the arrangement, and the matters authorised by s 198AHA(2), are necessarily ones which concern external relations.

48. This characterisation of s 198AHA is independent of whether the arrangement which enlivens it is a treaty which would engage the 'treaty implementation' aspect of s 51(xxix) (cf PS [89]).[44] That aspect of the head of power does not limit or constrain other aspects of the head of power.[45] If a law is with respect to Australia's external relations, it may be characterised as a law with respect to external affairs irrespective of whether those external relations are regulated by a treaty, by a looser international arrangement or by no international arrangement at all. This does not 'set at nought' the conditions[46] required for legislation to be supported by the external affairs power solely on the basis that it implements a treaty (cf PS [89]). That aspect of s 51(xxix) goes beyond other aspects, as it

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37 See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1 at 143 [275] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 314–15 (Brennan J); *Commonwealth v Tasmania* (1983) 158 CLR 1 ***(Tasmanian Dam Case)*** at 152–3 (Mason J).

38 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 ***(Grain Pool)*** at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

39 *Plaintiff S156* (2014) 309 ALR 29 at 35 [25]. See also *Lim* (1992) 176 CLR 1 at 65–6 (McHugh J).

40 *Plaintiff S156* (2014) 309 ALR 29 at 35–7 [26]–[36].

41 *R v Sharkey* (1949) 79 CLR 121 at 136–7 (Latham CJ), see also at 157 (McTiernan J). See subsequently *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (***Polyukhovich***) at 528 (Mason CJ), 599 (Deane J), 637 (Dawson J), 653 (Toohey J), 695–6 (Gaudron J), 714 (McHugh J); *XYZ v Commonwealth* (2006) 227 CLR 532 at 538–9 [10] (Gleeson CJ).

42 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (***Koowarta***) at 202 (Gibbs CJ), see also at 220–1 (Stephen J), 237 (Murphy J), 257–8 (Brennan J).

43 *Koowarta* (1982) 153 CLR 168 at 191 (Gibbs CJ), 257–8 (Brennan J). See also *R v Sharkey* (1949) 79 CLR 121.

44 It is not necessary for the Court to decide whether the MOU would be sufficient to engage that aspect of s 51(xxix).

45 *Horta v Commonwealth* (1994) 181 CLR 183 at 194. See also *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 (***De L***) at 650 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ); Stellios, *Zines's High Court and the Constitution* (Federation Press, 6th ed, 2015) at 438, referring to *Koowarta* (1982) 153 CLR 168 at 202 (Gibbs CJ).

46 See *Victoria v Commonwealth* (1996) 187 CLR 416 ***(Industrial Relations Act Case)***.

may support laws which, absent the treaty, would have no connection with external affairs. That extension is subject to the conditions referred to. They do not otherwise limit the head of power.

49. So far as the regional processing country is a Pacific island, as is the case here and as might often be the case, these same considerations are sufficient to engage the head of power concerning Australia's relations with the islands of the Pacific in s 51(xxx) of the Constitution.

50. *Secondly*, s 198AHA is a law with respect to 'places, persons, matters or things physically external to Australia'.[47] It is a law with respect to the regional processing functions of another country, necessarily a matter external to Australia. This characterisation is not denied by the fact that the law regulates conduct within Australia, since any such conduct is directed to carrying out an object physically external to Australia (cf PS [90]).[48]

51. At the least, all of the impugned conduct of the Commonwealth in this case bears that character. The words 'in relation to' and 'incidental or conducive to' in s 198AHA(2) signify a degree of connection which may be affected by the context.[49] If, on their broadest construction, they extend to *ultra vires* conduct, that construction would not be adopted.[50] But even on their narrowest, valid, construction, they support the conduct at issue here. Alternatively, the 'actions' and 'payments' to which s 198AHA(2) refers are capable of being read down to refer only to actions and payments within a head of power.[51] All of the conduct at issue here would be within the provision so read down. On either view, it is not necessary to determine whether, in some operation not raised on the facts of this case, s 198AHA is unsupported by the external affairs power.

52. These matters are not contradicted by a description of the circumstances as the Commonwealth 'generating' an external affair by taking persons from Australia to another country (PS [87], [90]). The movement of persons to and from Australia is an external affair. It does not lose that character simply because, after the plaintiff attempted to enter Australia, the continuation of her movement came under the Commonwealth's control.[52] Likewise, the fact that a treaty obligation is assumed voluntarily by, and thus 'generated' by, Australia does not mean that it loses its character as an external affair. There is no principle that a head of power excludes matters resulting from the operation of a valid Commonwealth law. The genesis of the external affair here is the attempted unlawful entry of persons into Australia and the resulting statutory obligation to take them to a regional processing country.

(d) Validity of s 198AHA: Judicial power

53. **The true principle.** The plaintiff's attack on the validity of s 198AHA based on Ch III of the Constitution rests on propositions said to have been identified or established in *Lim*.[53] However, the plaintiff seeks to draws more from that case than the propositions for which it stands and, in doing so, seeks to advance a limitation well beyond that which the Constitution contains.

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47 See, eg, *Polyukhovich* (1991) 172 CLR 501 at 528 (Mason CJ), 602 (Deane J), 632 (Dawson J), 696 (Gaudron J), 714 (McHugh J); *Horta v Commonwealth* (1994) 181 CLR 183 at 193–4; *Industrial Relations Act Case* (1996) 187 CLR 416 at 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *XYZ v Commonwealth* (2006) 227 CLR 532 at 538–9 [8]–[10], 544 [20] (Gleeson CJ), 546 [30], 547 [31], 548 [38], 552 [49] (Gummow, Hayne and Crennan JJ).

48 *Mowbray* (2007) 233 CLR 307 at 365 [153] (Gummow and Crennan JJ, with Gleeson CJ agreeing). See also *Polyukhovich* (1991) 172 CLR 501 at 716–17 (McHugh J).

49 *R v Khazaal* (2012) 246 CLR 601 at 613 [31] (French CJ).

50 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Wainohu v New South Wales* (2011) 243 CLR 181 at 226–7 [97] (Gummow, Hayne, Crennan and Bell JJ).

51 See, eg, *R v Hughes* (2000) 202 CLR 535 at 556–7 [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Williams v Commonwealth* (2014) 252 CLR 416.

52 Thus, *De L* (1996) 187 CLR 640 concerned regulations permitting Australia to repatriate children abducted to Australia: at 650 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

53 (1992) 176 CLR 1.

54. In *Lim*, Brennan, Deane and Dawson JJ (with whom Mason CJ relevantly agreed) noted that the provisions of Ch III constitute 'an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested'[54] and that, accordingly, the grants of legislative power 'do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth'.[55] Their Honours quoted *R v Kirby; Ex parte Boilermakers' Society of Australia*[56] for the first proposition. The second — that the judicial power of the Commonwealth may not be conferred other than on a court specified in s 71 of the Constitution — is even older.[57]

55. Brennan, Deane and Dawson JJ said that there are some functions that, by reason of their nature or because of historical associations, are 'essentially and exclusively judicial in character' and identified within that class the function of adjudging and punishing criminal guilt under a law of the Commonwealth.[58] In the course of explaining that the concern of the Constitution in this regard is with 'substance and not mere form', their Honours said:[59]

> It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why that is so is that, putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. [emphasis added]

Their Honours concluded that, at least in times of peace, citizens enjoy 'a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth'.[60]

56. However, as Gaudron J pointed out in *Kruger v Commonwealth*:[61]

> [I]t cannot be said that the power to authorise detention in custody is exclusively judicial except for clear exceptions. ... The exceptions recognised in *Lim* are neither clear nor within precise and confined categories. ... Once exceptions are expressed in terms involving the welfare of the individual or that of the community ... it is not possible to say that, subject to clear exceptions, the power to authorise detention in custody is necessarily and exclusively judicial power. Accordingly, I adhere to the view that I tentatively expressed in *Lim*, namely, that a law authorising detention in custody is not, of itself, offensive to Ch III. [emphasis added]

These comments have been cited with approval many times.[62]

57. As recognised in *Lim*, the true principle is that the judicial power of the Commonwealth may be conferred only pursuant to s 71 of the Constitution and, hence, only on the courts to which that

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54 (1992) 176 CLR 1 at 26.

55 (1992) 176 CLR 1 at 27.

56 (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

57 See, eg, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 355 (Griffith CJ); *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd (Tramways Case [No 1])* (1914) 18 CLR 54 at 75 (Isaacs J); *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54 at 62 (Griffith CJ), 89–90 (Isaacs J); *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 441–442 (Griffith CJ), 450 (Barton J).

58 (1992) 176 CLR 1 at 27.

59 (1992) 176 CLR 1 at 27.

60 (1992) 176 CLR 1 at 28–9.

61 (1997) 190 CLR 1 at 110.

62 See, eg, *Al-Kateb* (2004) 219 CLR 562 at 648 [258] (Hayne J, with Heydon J agreeing); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 24–7 [57]–[62] (McHugh J) (***Woolley***); *Mowbray* (2007) 233 CLR 307 at 330 [18] (Gleeson CJ); *South Australia v Totani* (2010) 242 CLR 1 at 146–147 [382]–[383] (Heydon J); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 135–6 [345] (Heydon J).

section refers. The corollary is that legislation which is otherwise within power and confers a power on the Executive to detain a person is invalid if, and only if, it amounts to a conferral of the judicial power of the Commonwealth on the Executive.

58. A feature that often distinguishes between detention that is an exercise of judicial power and that which is not is whether the detention is punishment for a breach of the law.[63] That distinction formed the basis of the analysis of the 'exceptions' identified by Brennan, Deane and Dawson JJ in *Lim*.[64] It was also the basis for the actual decision in *Lim* that legislation authorising detention by the Executive of aliens for the purposes of preventing their entry into Australia or removing them from Australia was valid: 'it is neither punitive in nature nor part of the judicial power of the Commonwealth'.[65] This distinction has been adopted in later decisions of this Court, in particular by a majority in *Al-Kateb*,[66] and is the doctrine of this Court (cf PS [40]).[67] The more broadly expressed *dicta* in *Lim* do not follow from the true principle said to support them. Gaudron J's analysis in *Kruger* was correct.[68] The broader formulation in *Lim* was not necessary for the decision in that case, is not consistent with *Al-Kateb*, is unsupported by principle and should not be followed.

59. In determining whether a law impermissibly confers the judicial power of the Commonwealth on the Executive, it is the purpose of the law that must be identified. That requires attention primarily to the terms of the relevant law, although it is also informed by context and the mischief at which the law is aimed.[69] In the case of a power conferred on the Executive to detain as an incident of other powers, the detention takes its character from those other powers.[70]

60. It may be accepted that the common law right of every Australian citizen to be at liberty means that, generally speaking, involuntary detention of a citizen would be characterised as penal and punitive.[71] However, that must yield to the existence of any non-punitive statutory purpose.[72] It does not generate a constitutional immunity from non-judicial detention, subject to a limited set of exceptions (cf PS [39]).[73] Further, the reference to 'citizens' is significant (cf PS [41]), as the circumstances in which non-citizens may be detained are more readily characterised as being for a non-punitive purpose than those in which citizens are detained, a non-citizen being vulnerable to non-punitive processes (such as exclusion or deportation) to which a citizen is not subject.[74]

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63 See recently *Duncan v New South Wales* (2015) 318 ALR 375 at 386–9 [41]–[51] (***Duncan***).

64 (1992) 176 CLR 1 at 28.

65 (1992) 176 CLR 1 at 32.

66 (2004) 219 CLR 562 at 584 [45], 586 [49] (McHugh J), 648 [255]—256] (Hayne J, with Heydon J agreeing), 658 [289] (Callinan J). See also *Woolley* (2004) 225 CLR 1 at 13 [19] (Gleeson CJ), 75 [222], 77 [227] (Hayne J).

67 Gummow J's contrary reasons in *Fardon v A-G (Qld)* (2004) 223 CLR 575 at 613 [84] (adopted by Gummow and Crennan JJ in *Mowbray* (1997) 233 CLR 307 at 356 [114]—115]), relied on at PS [40], have not been accepted by a majority of the Court. They are not consistent with the fundamental basis of the analysis in *Lim*.

68 See also *Woolley* (2004) 225 CLR 1 at 24–7 [57]–[62] (McHugh J).

69 See *Al-Kateb* (2004) 219 CLR 562 at 651 [267] (Hayne J); *Woolley* (2004) 225 CLR 1 at 15 [28], [30] (Gleeson CJ), 26 [60], 27 [62] (McHugh J).

70 *Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ).

71 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 385 [206] (Kiefel and Keane JJ) (***Plaintiff M76***).

72 See also *Lim* (1992) 176 CLR 1 at 71 per McHugh J: 'Although detention under a law of the Parliament is ordinarily characterized as punitive in character, it cannot be so characterized if the purpose of the imprisonment is to achieve some legitimate non-punitive object.'

73 *A-G (NT) v Emmerson* (2014) 307 ALR 174 at 188–9 [53] quoted at PS [39] does not support such an immunity: 'just cause' (in the sense of lawful authority) to detain a person can be supplied without judicial determination, as evidenced by *Lim* itself.

74 *Lim* (1992) 176 CLR 1 at 29 (Brennan, Deane and Dawson JJ); *Al-Kateb* (2004) 219 CLR 562 at 637 [219] (Hayne J); *Woolley* (2004) 225 CLR 1 at 12–13 [16]–[18], 14 [24] (Gleeson CJ); *Behrooz v Secretary, Department of Immigration and*

61. As in other areas, the character of the law is determined not only by its legal effect but also by its practical operation.[75] Accordingly, the mere fact that a law, on its face, is unconnected with punishment and criminal guilt is not the end of the analysis. Thus, a law of the kind mentioned by Brennan, Deane and Dawson JJ in *Lim* — purporting to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power is defined in terms divorced from both punishment and criminal guilt — might be characterised by its practical operation as, in truth, for the purpose of permitting punishment for breach of the law by the Executive and thus a conferral of judicial power. Of course, a truly arbitrary power of detention would probably not be supported by any head of legislative power, and the nature of a law's connection with a head of power would probably reveal the purpose (punitive or otherwise) of any detention it authorised. If that were not so, at least to the extent that such a law would permit the Executive to use detention as punishment, it would constitute an invalid conferral of judicial power (which, possibly, could not be severed). It is for these reasons, not because of any constitutional immunity with limited exceptions, that a law of this kind would be invalid.

62. Thus, while an object of the separation of judicial power is to guarantee liberty,[76] that guarantee does not have 'an immediate normative operation in applying the Constitution'.[77] The validity of a law purporting to authorise detention of a person by the Executive is not to be tested by reference to whether it falls within or is analogous to a previously recognised exception to any such guarantee (cf PS [40]). It is to be tested by reference to whether it impermissibly confers the judicial power of the Commonwealth on the Executive.

63. It is therefore not the case that the only circumstances in which legislation may authorise the detention of an alien are for the purposes of deportation or expulsion. In *Lim*, Brennan, Deane and Dawson JJ held that detention for those purposes would be valid because it would not be a conferral of judicial power[78] but they did not hold that these were the only such permissible purposes. They also said that provisions authorising detention for those purposes will be valid only 'if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered'.[79] That comment was directed to the permissible length of the period of detention, as recognised by Crennan, Bell and Gageler JJ in *Plaintiff M76/2013*[80] in the passage cited at PS [42].

64. So too, in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*,[81] speaking of the Migration Act, this Court said:

> It follows that detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. And it further follows that, when describing and justifying detention as being under and for the purposes of the Act, it will always be necessary to identify the purpose for the

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Multicultural and Indigenous Affairs (2004) 219 CLR 486 at 499 [21] (Gleeson CJ); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 385 [206] (Kiefel and Keane JJ).

75 *Grain Pool* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

76 *Wilson v Minister for Aboriginal and Torres Straight Island Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

77 Cf *Re Minister for immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23 [72] (McHugh and Gummow JJ). What is in issue is whether the law infringes the structural separation of powers by conferring judicial power on the Executive, rather than the operation of a guarantee of individual rights: *R v Davison* (1954) 90 CLR 353 at 380–2 (Kitto J); *Kruger v Commonwealth* (1997) 190 CLR 1 at 61, 68 (Dawson J, with McHugh J agreeing); *Mowbray* (2007) 233 CLR 307 at 355 [111] (Gummow and Crennan JJ).

78 (1992) 176 CLR 1 at 32.

79 (1992) 176 CLR 1 at 33.

80 (2013) 251 CLR 322 at 369 [138].

81 (2014) 253 CLR 291 at 231 [26].

> detention. Lawfully, that purpose can only be one of three purposes: the purpose of removal from Australia; the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; or, in a case such as the present, the purpose of determining whether to permit a valid application for a visa.

The reference to the lawful purposes of detention is to be understood as referring to the purposes for which the Migration Act then authorised detention, not as a statement of the only purposes for which detention of aliens could, consistently with Ch III, be authorised..

65. Once the true principle is identified, there are four reasons that s 198AHA does not infringe it.

66. **The authority provided by s 198AHA(2) is limited.** In *Lim* and other cases, what was at issue was a provision whose legal operation, if valid, was to deprive people of their liberty. Such a provision (if valid) provides an answer to a claim for unlawful imprisonment or *habeas corpus.* It is capable of infringing the prohibition against conferral of judicial power on the Executive because, like a sentence of imprisonment following a judicial adjudication of guilt, it deprives the detainee of liberty.

67. However, as explained in [38]–[42] above, s 198AHA(2) does not have that effect (and does not need to have that effect for the impugned conduct of the Commonwealth to be authorised). It clothes the Executive with the necessary authority to take action in the name of the Commonwealth, including exercising restraint over the liberty of a person. But it does not operate upon the rights of that person so as to make lawful detention which would otherwise be unlawful. It follows that the cases on which the plaintiff relies, such as *Lim*, are inapposite.

68. **No detention in custody by the Commonwealth.** To enter the territory of *Lim* and subsequent cases, it is necessary for the legislation in question to authorise 'detention in custody'. So much was recognised in *Thomas v Mowbray* (***Mowbray***),[82] where various judges of this Court drew a distinction between 'detention in custody' and a 'restriction on liberty'. In *Eatts v Dawson*,[83] Morling and Gummow JJ explained that '[e]lements in the lexical meanings of 'custody' include the notion of dominance and control of the liberty of the person, and the state of being guarded and watched to prevent escape'.

69. This directs attention to a factual question in this case concerning any detention of the plaintiff in Nauru. For any Ch III point raised by the plaintiff not to be hypothetical, the plaintiff must demonstrate she was, when in Nauru, and would be, if returned to Nauru, detained in custody by the Commonwealth pursuant to s 198AHA(2). The facts in [15]–[25] above deny that conclusion. Any detention is by reason of the laws of Nauru. It was not procured by the Commonwealth. To the contrary, had Nauru not required the detention, the Commonwealth would not have sought it.

70. **Not the judicial power of the Commonwealth.** Even if, contrary to the above, the factual circumstances were such as to require a conclusion that officers of the Commonwealth have exercised and are proposing to exercise authority conferred by s 198AHA(2) to detain the plaintiff in custody in Nauru, it does not confer upon the Executive any part of the judicial power of the Commonwealth. The purpose of any detention would take its character from the terms of the provision and from the other provisions of the Migration Act concerning regional processing which constitute a scheme involving the entry into and performance of arrangements with a foreign state to assist with its processing of refugee claims on its soil in accordance with its laws.

71. The scheme completes the process of removal required by s 198AD, which the Executive undertakes pursuant to powers and obligations imposed by the Parliament. It applies where the Executive has entered into arrangements directed to the regional processing functions of a country the Executive

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[82] (2007) 233 CLR 307 at 330 [18] (Gleeson CJ), 356 [114]–[116], 357 [121] (Gummow and Crennan JJ, with Callinan and Heydon JJ agreeing).

[83] (1990) 21 FCR 166 at 179.

has designated as a regional processing country. The detention authorised by s 198AHA(2) is incidental to this scheme, and can readily be seen not to have any punitive purpose or form part of the judicial power of the Commonwealth. Each of the acts forming part of the scheme is quintessentially non-judicial, from Australia's relations with other countries to the exclusion of aliens.

72. Further, any detention in Nauru is not for any punitive purpose, as revealed by the laws of Nauru. Rather, that detention is directed to purposes closely analogous to the purposes for which detention is authorised under the Migration Act, namely the assessment of whether a person who is not a citizen of Nauru is to be permitted to remain in Nauru or is required to be removed.

73. The submission that regional processing is punitive because of a purpose of deterring people smuggling should be rejected (PS [93]–[94]). For one thing, the fact that a law has a deterrent effect does not characterise it as punitive.[84] In any event, the submission is inconsistent with the validity of s 198AD, and the detention which it makes lawful, upheld in *Plaintiff S156*.

74. In truth, the plaintiff does not submit that any of the matters above can be characterised as an exercise of the judicial power of the Commonwealth. Rather, the plaintiff's submissions proceed by reference to previously recognised 'exceptions' to an asserted immunity from extra-judicial detention (PS [80]–[83]). For the reasons in [53]–[65] above, that is a fundamentally wrong approach.

75. **Permissible purpose.** Even if that were the correct approach, the plaintiff's attack would still fail. It is well established that legislation authorising executive detention of aliens for the purposes of removal from Australia, and receiving, investigating and determining an application for a visa, does not infringe Ch III.[85] The plaintiff's submission is that detention of a person for the purpose of assisting another country to undertake those same steps infringes Ch III, notwithstanding that Australia took the person to that country, after he or she sought to enter Australia unlawfully, pursuant to a provision which this Court held valid in *Plaintiff S156*. That submission should be rejected. The list of permissible purposes for executive detention is not closed.[86] The purpose here is closely analogous to those previously recognised as permissible.

76. The plaintiff's submission has the result that the Executive can assist in the regional processing functions of a regional processing country only if the country adopts far more generous standards for the treatment of aliens than Australia does. As things presently stand, the consequence of the plaintiff's submissions is one of two extremes: either unauthorised maritime arrivals must be abandoned by the Commonwealth in the regional processing country or the scheme for regional processing must be abandoned. Those consequences, both of which are very far removed from any exercise of the judicial power of the Commonwealth, stand against the soundness of the plaintiff's submission.

77. Contrary to PS [45]–[47], the close analogy between the purposes of the restraint on liberty authorised by s 198AHA and that previously recognised as permissible under the Migration Act is not denied by an asserted practical impairment of judicial supervision of any detention by Australian courts. Any exception to a prohibition against executive detention cannot, consistently with principle, be framed by reference to the difficulty or otherwise of ascertaining and enforcing the limits of the exception. It must be framed by reference to whether the detention at issue is or is not part of the judicial power of the Commonwealth. The same may be said of the other matters identified in

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84 *Woolley* (2004) 225 CLR 1 at 26 [61] (McHugh J); see more recently *Duncan* (2015) 318 ALR 375 at 388 [47] (The Court).

85 See, eg, *Lim* (1992) 176 CLR 1 at 10 (Mason CJ), 32 (Brennan, Deane and Dawson JJ); *Al-Kateb* (2004) 219 CLR 562 at 571–2 [1], 573 [4] (Gleeson CJ), 583 [40] (McHugh J), 604–5 [110], 613 [139] (Gummow J).

86 *Lim* (1992) 176 CLR 1 at 55 (Gaudron J); *Al-Kateb* (2004) 219 CLR 562 at 648 [257]–[258] (Hayne J); *Woolley;* (2004) 225 CLR 1 at 12 [17] (Gleeson CJ), 24 [57], 26 [60] (McHugh J), 85 [264] (Callinan J); *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 at 648 [108] (Gummow and Hayne JJ).

PS [48]–[49]. In any event, the jurisdiction of Australian courts, and in particular this Court, may still be invoked in cases of alleged excess of Commonwealth executive authority, as in this case.

E. THE FINANCIAL FRAMEWORK PROVISIONS

78. The Commonwealth only relies on s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth), read with reg 16 and items, 417.021, 417.027, 417.029 and/or 417.042 of Schedule 1AA to the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth), in the event that the Court does not accept that the impugned conduct is supported by s 198AHA of the Migration Act.

79. The plaintiff's brief submissions on this subject proceed on the premise that the Commonwealth's actions in relation to the Nauru RPC amount to detention, which one or more of the identified items in Sched 1AA must expressly or impliedly authorise (PS [77]). The underlying premise should be rejected for the reasons set out in [68]–[69] above.

80. The identified items of Sch 1AA authorise the actual activities that the Commonwealth undertook, and continues to undertake, in relation to the Nauru RPC. In particular, the objective of item 417.042, which extends to activities conducted since 5 August 2013, is 'funding for costs associated with regional processing and resettlement arrangements, including costs incurred under the memoranda of understanding between Australia and regional processing countries', which 'includes funding for accommodation, support, health, management services and claims processing for unauthorised maritime arrivals transferred to regional processing countries and for resettlement, returns and reintegration assistance'. The terms of that item, the breadth of which is confirmed by the Explanatory Statement,[87] are not prescriptive of the manner in which those services are to be provided by the regional processing country. Additionally, however, item 417.027 authorises capital works expenditure, to ensure appropriate accommodation for asylum seekers and enhancements to existing amenities and security; item 417.029 authorises funding in relation to Memoranda of Understanding arrangements with foreign nations; and, more broadly, item 417.021 authorises expenditure directed at, relevantly, strengthening the migration capabilities of governments in the Asia-Pacific region 'by providing advice on, developing and providing a range of support and other services in respect of regional cooperation and associated activities'.

81. Contrary to the plaintiff's assertion that these items have not authorised the Commonwealth's spending and contracting in relation to the Nauru RPC 'with the requisite clarity' (the source of this limitation is neither identified nor supported), the terms of the above-referenced items sufficiently authorise the scope of the Commonwealth's expenditure in relation to the Nauru RPC. In particular, they authorise entry into the Transfield Contract (including to the extent that is necessary to engage s 198AHA). In so far as the plaintiff contends that those items are not, in turn, supported by a head of power in s 51, the Commonwealth relies on its submissions in relation to legislative authority for s 198AHA of the Migration Act.

F. NON-STATUTORY EXECUTIVE POWER

82. Although the limits of the executive power of the Commonwealth have not been exhaustively defined, '[t]here are undoubtedly significant fields of executive action which do not require express statutory authority'.[88] The executive power referred to in s 61 of the Constitution 'enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the

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87 Explanatory Statement, Select Legislative Instrument 2013 No 229, Financial Management and Accountability Amendment Regulation 2013 (No 7), p 6.

88 *Williams No 1* (2012) 248 CLR 156 at 191 [34] (French CJ). See also 184–5 [22] (French CJ), 226–7 [121] (Gummow and Bell JJ), 342 [483] (Crennan J), 362 [560] (Kiefel J); *Davis v Commonwealth* (2988) 166 CLR 79 (***Davis***) at 108 (Brennan J).

Constitution and to the spheres of responsibility vested in it by the Constitution', and 'includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law'.[89]

83. Like a treaty, a Memorandum of Understanding is an international instrument whose negotiation and execution is within the sole purview of the executive. It is 'an instrument of less than treaty status ... not binding under international law [but creating] commitments which are politically and morally binding'.[90] In some areas, they are widely used and often provide supplementary details to treaties.[91] Entry into the MOU with Nauru was therefore clearly within the non-statutory executive power of the Commonwealth; so that, as noted above, the entry into the arrangement constituted by the MOU provides a basis for the operation of s 198AHA of the Migration Act.[92]

10 84. Additionally, non-statutory executive power authorises actions directed at putting into effect the commitments made by Australia and Nauru in the MOU. Such actions are within the Executive's power to conduct external relations, which extends to the performance of international commitments beyond treaty obligations.[93] The MOU: refers to the Fourth Ministerial Conference of the Bali Process on People Smuggling, Trafficking and Related Transnational Crime held in Indonesia on 29–30 March 2011 and the agreement of Ministers at that conference to a regional cooperation framework (SCB 67); provides that the Commonwealth will conduct activities by agreement with Nauru, as a sovereign state, for the purposes of assisting Nauru to carry out its activities in its own territory, pursuant to its laws;[94] and is but an aspect of the Commonwealth's conduct of relations with Nauru. All acts of the Commonwealth impugned in the present proceedings are aspects of implementing the
20 MOU and are within the executive power on that basis (see especially cll 6–10, 12–14, 16 and 22 at SCB 70–72). Entry into the Administrative Arrangements is a clear example.

85. In any event, provision of support to the government of another country is in its own right an aspect of the conduct of relations with that country: this is the basis upon which the Commonwealth may, for example, send medical staff or engineers to another country to assist in disaster relief without the need to enact specific legislation.

86. Alternatively, the Commonwealth's actions in entering into and giving effect to the MOU fall within the express terms of s 61 of the Constitution in that they are for the 'execution and maintenance of ... the laws of the Commonwealth'. The purpose of these activities is to give effect to Div 8 of Pt 2 of

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89 *Barton v Commonwealth* (1974) 131 CLR 477 at 498. See also *Williams No 1* (2012) 248 CLR 156 at 184 [22], 185 [24], 189 [30] (French CJ), 227–8 [123] (Gummow and Bell JJ), 342 [484] (Crennan J); *Davis* (1988) 166 CLR 79 at 92–4 (Mason CJ, Deane and Gaudron JJ), 107–8 (Brennan J); *Re Residential Tenancies Tribunal* (1997) 190 CLR 410 at 424 (Brennan CJ), 438 (Dawson, Toohey and Gaudron JJ), 455 (McHugh J), 463–4 (Gummow J); *Pape v Commissioner of Taxation* (2009) 238 CLR 1 at 60–1 [126]–[128] (French CJ), 83 [214]–[215] (Gummow, Crennan and Bell JJ); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 226 [86] (Gummow, Hayne, Heydon and Crennan JJ); *Ruddock v Vardalis* (2001) 110 FCR 491 at 495–6 [9] (Black CJ), 538 [178] (French J).

90 Commonwealth, Department of Foreign Affairs and Trade, *Signed, Sealed and Delivered — Treaties and Treaty Making: Officials' Handbook* (14th ed, 2014) at 5.

91 See, eg, Annex I to the *Agreement Between the Government of Australia and the European Community on Certain Aspects of Air Services* [2009] ATS 17 and the various treaties and memoranda of understanding there listed.

92 By virtue of s 198AHA(4), non-statutory executive power is not limited by implication as a result of anything in s 198AHA.

93 See *Williams No 1* (2012) 248 CLR 156 at 191 [34], 216–17 [83] (French CJ), 233 [139], 234 [143] (Gummow and Bell JJ); 342 [484] (Crennan J).

94 See, eg, Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820) at 39-50; Winterton, *Parliament, the Executive and the Governor-General* (1983) at 115; Maitland, *The Constitutional History of England* (1980) at 423–8; Evatt, *The Royal Prerogative* (1987) at 143; Stellios, *Zines's High Court and the Constitution* (Federation Press, 6th ed, 2015) at 374. See also Evatt, *The Royal Prerogative* (1987) at 146, quoting Duff J in *Re Oriental Orders in Council Validation Act, BC* (1922) 65 DLR 577 at 599 (also reported at (1922) 63 SCR 293 at 329); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643–4, 648 (Latham CJ).

the Migration Act by ensuring that Nauru remains willing and able to perform the functions of a regional processing country under that regime.

87. The expression 'execution and maintenance' in s 61 is not concerned with the exercise of powers and performance of duties expressly conferred by statutes or provisions of the Constitution. Commonwealth statutes commonly confer specific powers on particular officers or statutory authorities, rather than on the Queen (who is the formal repository of the s 61 power), and such conferrals are plainly within the relevant heads of legislative power. No specific warrant in s 61 is required; indeed, a parallel set of powers and duties, vested in the Queen under s 61, would be productive of confusion. Similarly, where a provision of the Constitution requires or authorises action by an official, it does so of its own force and requires no reinforcement by s 61. The reference in s 61 to execution and maintenance of laws of the Commonwealth should therefore be understood to encompass at least 'the doing and the protection and safeguarding of something authorised by some law of the Commonwealth'.[95] Additionally, whatever the precise content of the expression may be, as French CJ observed in *Williams No 1*, the power extends to 'the doing of all things which are necessary or reasonably incidental to the execution and maintenance of a valid law'.[96]

G. SECTION 198AD OF THE MIGRATION ACT

(a) Question 10

88. Question 10 proceeds on the assumption that the restrictions on the plaintiff's liberty in Nauru would be lawful under the law of Nauru. On that assumption, it asks whether s 198AD(2) authorises and requires that the plaintiff be taken as soon as reasonably practicable to Nauru. The question is directed to isolating the effect, if any, on s 198AD(2) of the plaintiff's challenge to the authority of the Commonwealth to engage in the conduct the subject of questions 6 to 9.

89. In its terms s 198AD imposes a duty unqualified by any reference to the circumstances an unauthorised maritime arrival will encounter in the regional processing country. The plaintiff contends at PS [100] that those unqualified terms should be regarded as subject to an implied limitation where the officer knows or ought to know that the Commonwealth will be involved in detention or deprivation of liberty 'without a lawful Constitutional purpose'.

90. The logic of the argument in support of that limitation appears to be as follows: (1) s 198AD authorises detention; (2) 'unmistakably clear language' would be required to authorise that detention if it 'had the purpose of being antecedent to an unlawful detention in which the Commonwealth was instrumental'; (3) such 'unmistakably clear language' is not present; and (4) s 198AD(2) is therefore inapplicable in a case where the officer is on notice that taking the non-citizen to the relevant regional processing country will result in him or her being detained 'unlawfully', with the Commonwealth 'instrumental' in that detention.

91. The argument breaks down at its second and third steps. *First*, the suggestion that the plaintiff would be subject to 'unlawful detention' in Nauru contradicts the assumption in question 10 itself. What is left is a proposition that the executive acts asserted to be beyond the scope of valid statutory authority are a basis upon which the plain language of s 198AD is somehow to be read down: the same would presumably be said of any *ultra vires* conduct. *Secondly*, to the extent that s 198AD authorises 'detention', it does so in the clearest language in sub-s (3). Detention is authorised for the purposes of sub-s (2) which, as noted above, is not capable of being construed as subject to qualifications of the kind suggested. Infringements of personal liberty having been clearly authorised, meeting the

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[95] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 230 (Williams J).

[96] (2012) 248 CLR 156 at 191 [34] (emphasis added).

'principle of legality', the plaintiff seemingly asserts that even more clarity is needed to authorise those infringements in particular circumstances. There is no basis for such an approach.

92. The plaintiff's construction is also inconsistent with *Plaintiff S156*, where the plaintiff was denied leave to amend his statement of claim to argue that s 198AD did not authorise the Executive to imprison persons in foreign countries for an indefinite period. In denying leave, French CJ observed that s 198AD did not make any provision for imprisonment in third countries.[97] The Full Court endorsed that observation in rejecting a similar contention advanced as an attack on validity.[98] *Plaintiff S156* stands for the proposition that the content of the obligation imposed on officers of the Commonwealth by s 198AD(2), to take a person to whom it applies to a regional processing country, is not dependent on whether the conduct of officers of the Commonwealth in those regional processing countries involves detention by the Commonwealth, or whether that conduct is beyond the power conferred on the Commonwealth Executive . The plaintiff has made no application for leave to reopen *Plaintiff S156*. Nor, for the reasons given by French CJ and by the Full Court, could any such application succeed.

93. Accordingly, whether or not the conduct in which the Commonwealth proposes to engage if the plaintiff were returned to Nauru is authorised by Australian law, s 198AD(2) requires that the plaintiff be taken as soon as reasonably practicable to Nauru. Even if that were not so, for the reasons above, the conduct in which the Commonwealth proposes to engage would be authorised. Furthermore, the proper assumption is that any proposed conduct of the Commonwealth declared by this Court to be beyond power would not occur, so that the conditions envisaged in the argument at PS [100] are not in prospect. It follows that question 10 should be answered 'yes'.

(b) Question 11

94. Question 11 addresses the assumption in question 10: it asks whether the restrictions on the plaintiff's liberty in Nauru would be lawful under the law of Nauru. It is only necessary to answer if the operation of s 198AD(2) is dependent on that point. For the following reasons, it is not.

95. For the reasons above, the operation of s 198AD is not dependent on consideration of the circumstances of unauthorised maritime arrivals after they are taken to a regional processing country. *A fortiori* it is not dependent on whether those circumstances accord with the domestic law of the regional processing country. The contrary view is denied by the statement in s 198AA(d) that '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' (emphasis added). Consistently with this, the assurances to which the Minister must have regard when determining whether to designate a country to be a regional processing country pursuant to s 198A(3) do not involve assurances of compliance with the country's own domestic law (cf PS [101]).

96. Thus, whether it is 'reasonably practicable' to take an unauthorised maritime arrival to a regional processing country is not to be assessed by reference to whether the unauthorised maritime arrival will be treated, in that country, in accordance with that country's domestic law (cf PS [101]). Considering whether that is so would place an impossible burden on officers of the Commonwealth obliged to take an unauthorised maritime arrival to a regional processing country. The criterion of reasonable practicability is directed to practical matters concerned with the taking, not the circumstances of the unauthorised maritime arrival after the taking is complete.[99] The suggestion that

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97 Unreported, French CJ, 19 December 2013 at 13.

98 (2014) 309 ALR 29 at 37–8 [37].

99 See also, concerning 'reasonably practicable' in s 189 of the Migration Act, *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 166 [69] (The Court); *NATB v Minister for Immigration and*

taking would not be reasonably practicable because it would be tortious is circular, since the effect of the provision is to authorise that which would otherwise be tortious.

97. Accordingly, question 11 need not and should not be answered. Question 12 can be answered without doing so. If, to the contrary, the operation of s 198AD(2) is dependent on the plaintiff's circumstances if taken to Nauru being consistent with the domestic law of Nauru, question 11 is necessary to answer. For the reasons in [100]–[121] below, it should be answered 'yes'.

(c) Question 12

98. In either event, question 12 should be answered in the same way. It asks whether s 198AD(2) authorises and requires that the plaintiff be taken as soon as reasonably practicable to Nauru. For the reasons above, it should be answered 'yes'.

H. THE CONSTITUTION OF NAURU

99. For the reasons above, no question of the authority of the Commonwealth Executive turns on whether the detention of the plaintiff in Nauru was lawful under the law of Nauru. However, if it is necessary to consider that issue, the submissions of the Commonwealth are as follows.

(a) Validity of Nauruan laws should not be questioned

100. The nature of the task which the plaintiff urges upon this Court should not be understated. It would require the Court to assess the validity under a foreign constitution of (a) foreign legislation and (b) the conduct of foreign officials taken pursuant to that foreign law on foreign soil. That would require a judgment by this Court upon the acts not only of a foreign executive but also a foreign legislature.

101. Courts in the United Kingdom and the United States, as well as here, have recognised a principle that every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.[100] Recognising that the principle is not unqualified,[101] its application must have regard to the considerations of the separation of powers and international comity which underpin it.

102. In *Buttes Gas & Oil Company v Hammer* (***Buttes Gas***),[102] the principle was described, in language repeated in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd*,[103] as 'inherent in the very nature of the judicial process'. In *Banco Nacional de Cuba v Sabbatino* (***Sabbatino***),[104] the Supreme Court of the United States observed that the continuing validity of the 'act of state' doctrine depended upon 'its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs'.

103. The aspect of the doctrine of principal relevance here is one which determines the law to be applied in a controversy to which the acts of a foreign government are relevant, rather than the justiciability of such a controversy. In *WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn International*,[105] Scalia J, delivering the opinion of the Supreme Court of the United States, described the doctrine not

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Multicultural and Indigenous Affairs (2003) 133 FCR 506 at 516–17 [52]–[53] (The Court); *Kumar v Minister for immigration and Citizenship* (2009) 176 FCR 401 at 415–6 [80] (Besanko J).

[100] *Underhill v Hernandez* 168 US 250 (1897) at 252. See also *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479 at 495 (Griffith CJ), 506 (Barton J), 511 (O'Connor J); *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354 at 366–9 (Black CJ and Hill J).

[101] *Moti* (2011) 245 CLR 456 at 475 [51] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[102] [1982] AC 888 at 931–2 (Lord Wilberforce).

[103] (1988) 165 CLR 30 at 41 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

[104] 376 US 398 (1964) at 427–8.

[105] 493 US 400 (1989) at 409.

as establishing an exception for cases and controversies that may embarrass foreign governments, but rather as requiring that 'in the process of deciding [the case], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid'. The relevant rule was understood similarly by Gummow J in *Re Ditfort; Ex parte Deputy Commissioner of Taxation* and described as a 'super choice of law rule'[106] — language echoed by Perram J in *Habib v Commonwealth* (***Habib***).[107] Properly understood, more is involved than choice of law: official acts of a foreign government in its own territory are not only judged according to the law of that territory but (generally) presumed to be valid under that law. This was also the preferred understanding of the Court of Appeal of England and Wales, following a detailed review of the authorities, in *Belhaj v Straw*.[108]

104. The consequences for international comity of a contrary approach would be significant. Comity in the legal sense is the recognition that one nation permits within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[109] The prospect of courts of one country ruling on the constitutional validity of the laws of another — in the present case, Nauru — would be inconsistent with the principle of comity. That would be so notwithstanding that the ruling is not binding on the other country.

105. As observed in *Moti v The Queen* (***Moti***), 'both the dictum [of Fuller CJ in *Underhill*], and the phrase "act of State", must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula'.[110] In the present case, the plaintiff seeks to impugn the constitutional validity of s 18C of the RPC Act along with certain acts of Nauruan officials made pursuant to other provisions which form part of Nauru's regional processing regime. The allegation that certain laws, duly enacted by the Parliament of Nauru, are unconstitutional raises precisely the concerns about issues of sovereignty and international comity which underpin the reasoning in *Buttes Gas* and *Sabbatino*.[111] It strikes at the core of Nauru's sovereign system of government, pursuant to which original jurisdiction is conferred on the Supreme Court of Nauru, 'to the exclusion of any other court', to determine any question arising under or involving the interpretation or effect of' any provision of the Constitution.[112]

106. Although appeals from the Supreme Court of Nauru lie to this Court, that conferral of jurisdiction excludes any appeal which 'involves the interpretation or effect of the Constitution of Nauru'.[113] That is consistent with the reality of a written constitution as embodying a national legal and political system in relation to which it would be inappropriate for the courts of another country to adjudicate (particularly as to the application of a bill of rights, which falls to be applied in a context where the rights of other persons and the public interest are relevant).[114] While it is not submitted that the case is therefore one which cannot be judged by 'judicial or manageable standards'[115] (a point which would

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[106] (1988) 19 FCR 347 at 371–2.

[107] (2010) 183 FCR 62 at 79 [42].

[108] [2015] 2 WLR 1105 at 1130–5 [56]-[68] (Lord Dyson MR for the Court).

[109] *Hilton v Guyot* 159 US 113 (1895) at 163–4, referred to with approval by the High Court in *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 395–6 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[110] (2011) 245 CLR 456 at 475–6 [52] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[111] The continued relevance of this basis of the rule was affirmed by the UK Supreme Court and Court of Appeal earlier this year in *Shergill v Khaira* [2015] AC 359 and *Belhaj v Straw* [2015] 2 WLR 1105.

[112] *Constitution of Nauru*, s 54.

[113] *Nauru (High Court Appeals) Act 1976*, s 5(1)–(2), and Art 2 of the Agreement contained in the Schedule.

[114] Cf *Constitution of Nauru*, s 3.

[115] Cf *Buttes Gas* [1982] AC 888 at 938 (Lord Wilberforce).

go to justiciability and the existence of a 'matter'),[116] the considerations of comity which point to the existence of the principle described above are particularly strong in such a case.

107. The principle has several limitations. It does not apply where the relevant foreign act of state involves a denial of fundamental human rights or a flagrant breach of international law.[117] That limitation has no application here: no principle of international law or human rights (or of public policy) precludes the detention of non-citizens who arrive in a country, pending their removal or the grant of permission to remain. Another recognised limitation[118] reflects the circumstances in *Moti*[119] and is consistent with the decision of this Court in that case: where a defendant in criminal proceedings alleges that he or she was wrongfully brought into the jurisdiction and the proceedings are therefore an abuse of process, the lawfulness of acts by which he or she was taken from a foreign state may be examined.

108. PS [97] does not engage with this principle. Even if a question as to the validity of certain Nauruan legislation and administrative actions is a 'step along the way' to determining the issues in the case, the principle dictates an answer to that question. This principle was not engaged in *Habib* (upon which the plaintiff relies), which did not raise any question as to the validity pursuant to their own laws of foreign acts of state: the only laws said to have been breached were Australian criminal laws with extraterritorial operation. The legal effect of things done by foreign officials was not in issue.[120]

109. Contrary to the plaintiff's approach, the Court should not embark upon any determination of the constitutional validity of s 18C or the laws pursuant to which Nauruan officials have taken the steps which she impugns. To the extent that the legal effect of those legislative and executive acts under the law of Nauru is relevant to the issues in the proceedings, they are to be treated as valid.

(b) Validity under the law of Nauru

110. If, contrary to the above, the Court considers it necessary and appropriate to consider the validity under the law of Nauru of s 18C of the RPC Act or the laws pursuant to which Nauruan officials have taken the steps the plaintiff impugns, the Court should conclude that those laws are valid.

111. ***AG v Secretary for Justice.*** In *AG v Secretary for Justice*,[121] the Supreme Court of Nauru rejected the contention that persons brought to Nauru by Australia, and detained in the Nauru RPC, were deprived of their liberty contrary to art 5(1) of *Constitution of Nauru*. The Court held that the deprivation of liberty was for the purpose of effecting their lawful removal from Nauru, within art 5(1)(h). Aside from the 'open centre arrangements' discussed below, and subject to one caveat, the circumstances were relevantly identical to those of the plaintiff when she was in Nauru and if she were returned there. The caveat is that, under the scheme then in place, once Nauru had determined whether a person was a refugee, there was no provision in the law of Nauru for the grant of a temporary settlement visa. However, the plaintiff's attempts to distinguish *AG v Secretary for Justice* on this basis should be rejected (PS [98]).

112. The Supreme Court stated its reasons for concluding that art 5(1)(h) applied at [72] and [76].[122] The position of the plaintiff when she was in Nauru, and if she were returned to Nauru, is indistinguishable.

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116 As noted by Perram J in *Habib* (2010) 183 FCR 62 at 79 [42].

117 As in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.

118 See *Belhaj v Straw* [2015] 2 WLR 1105 at 1146 [91(5)] (Lord Dyson MR for the Court).

119 (2011) 245 CLR 456.

120 (2010) 183 FCR 62 at 70–1 [21]–[22], 80–1 [44] (Perram J); cf *WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn International* 493 US 400 (1989) at 405–406.

121 [2013] NRSC 10 (SCB 589).

122 [2013] NRSC 10 at [72], [76] (von Doussa J) (SCB 603). The reference to '[t]he stated purposes of the RPVs' was to [21] (SCB 595) which recorded that a purpose for which the then Regional Processing Visas (equivalent to RPC visas) may be granted included: 'enabling a person in respect of whom the Secretary has made a determination that he or she is

Clause 11 of the MOU remains as it was; persons determined to be refugees by Nauru may now be granted visas by Nauru, but only on a temporary basis and for the same purpose as applied when a Regional Processing Visa was granted to a person determined by Nauru to be a refugee (SCB 793). Under both regimes, the detention of a person at the Nauru RPC is, ultimately, for the purpose of effecting their lawful removal from Nauru. *AG v Secretary for Justice* held such an ultimate purpose to be sufficient to satisfy art 5(1)(h).

113. The Supreme Court of Nauru is the highest court in the Nauruan appellate hierarchy on questions involving the interpretation or effect of the *Constitution of Nauru*, because, as noted above, no appeal lies to this Court on such questions. There is no basis to think *AG v Secretary for Justice* would not be followed in a future case before the Supreme Court.[123] Accordingly, this Court should find, as a matter of fact, that the law of Nauru is as stated there. There is no occasion for this Court to consider, independently, the content of the law of Nauru. It follows that the laws of Nauru impugned by the plaintiff must be concluded by this Court to be valid.

114. **Permissible purpose.** If, contrary to the submissions above, the Court considers that *AG v Secretary for Justice* does not dispose of this question, the Court should nevertheless find that the impugned laws are valid as a matter of the law of Nauru. That is because any deprivation of liberty was for a purpose permitted by art 5(1)(h) of the *Constitution of Nauru.*

115. *First*, it was 'for the purpose of preventing ... unlawful entry into Nauru'. That expression should not be construed as referring only to the prevention of physical entry into Nauru. That is apparent from the fact that, pursuant to art 3, the protections afforded by art 5 apply only if a person is already 'in Nauru'. The reference to prevention of entry to Nauru must be read as encompassing prevention of entry into the Nauruan community.[124] The detention of a person at the Nauru RPC, while Nauru determines whether to grant him or her a temporary settlement visa, is for that purpose.

116. *Secondly*, and alternatively, any deprivation of liberty was 'for the purpose of effecting ... expulsion, extradition or other lawful removal from Nauru'. In accordance with the reasons in *AG v Secretary for Justice*,[125] this does not refer only to the situation where an actual decision has been made to remove a person from Nauru. Putting aside voluntary departure, the Nauruan process for determining whether a person is a refugee has two end points: either the person is determined to be a refugee and is granted a temporary settlement visa or the person is determined not to be a refugee and is removed. The same process determines whether a person is permitted to stay (temporarily) in Nauru or is to be removed. A deprivation of liberty while that process is undertaken can thus be characterised as one for the purpose of effecting the person's removal from Nauru, ie if they are determined not to be a refugee (cf PS [98]).

117. The rejection of these approaches to art 5(1)(h) would have a perverse consequence. The detention of persons at the Nauru RPC would be valid notwithstanding —indeed because — they could never

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recognized as a refugee to remain in Nauru pending the making of arrangements for his or her settlement in another country'.

123 To the contrary, it followed two previous cases of the Court: *Mahdi v Director of Police* [2003] NRSC 3 (SCB 564) and *Amiri v Director of Police* [2004] NRSC 1 (SCB 571), cited in *AG v Secretary for Justice* [2013] NRSC 10 at [77] (von Doussa J) (SCB 603).

124 For references to 'entry into the community' in the Australian context, see *Lim* (1992) 176 CLR 1 at 71, 73–4 (McHugh J); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 498–499 [20] (Gleeson CJ); *Al-Kateb* (2004) 219 CLR 562 at 571–2 [1], 576 [17] (Gleeson CJ), 584–585 [45]–[46], 585 [48], 586 [49], 595 [74] (McHugh J), 600–1 [91]–[97] (Gummow J), 637 [219], 645 [247], 648 [255]–[256], 649 [259], 658 [289] (Callinan J); *Woolley* (2004) 225 CLR 1 at 13 [19], 14 [26], 15 [27] (Gleeson CJ), 31 [71]–[72], 33 [78], 42 [106] (McHugh J), 47 [115], 52–5 [135]–[148] (Gummow J), 75–76 [222]–[223], 77 [227] (Hayne J). See also *Ruddock v Vardarlis* (2001) 110 FCR 491 at 542 [192] (French J).

125 [2013] NRSC 10 at [63]–[68] (SCB 602–3).

obtain visas permitting them to leave the Nauru RPC and join the Nauruan community. By Nauru taking a step to the benefit of those persons, making it possible for them to obtain visas permitting them to be released from detention, the detention would be rendered invalid. This result would be to the detriment of persons deprived of their liberty, and an incoherent restriction on the ability of Nauru to control the entry of persons into Nauru.

118. **No deprivation of liberty in future.** Finally, by reason of the open centre arrangements, if the plaintiff is returned to Nauru, art 5(1) of the *Constitution of Nauru* would not be engaged because the plaintiff would not be deprived of her liberty.

119. The severity of the circumstances necessary to constitute a deprivation (as opposed to a restriction) of liberty is evidenced by *Secretary of State for the Home Department v JJ*.[126] It concerned control orders subjecting persons to a series of restrictions, including: wearing an electronic tagging device; remaining within a specified residence (a one-bedroom flat) except between 10am and 4pm; permitting police searches of the premises at any time; staying within restricted urban areas when permitted to leave the residence; and not meeting anyone by pre-arrangement without Home Office approval. In holding that the control orders deprived the persons of their liberty, Lord Brown said that this would not have been so if the persons had been permitted to leave their residences for 8 hours a day.[127] In *Secretary of State for the Home Department v MB*,[128] the House of Lords held that very similar restrictions which permitted the person the subject of the control order to be from his home for 10 hours a day did not constitute a deprivation of liberty. The conditions in *Guzzardi v Italy*,[129] which the European Court of Human Rights found constituted a deprivation of liberty, can be starkly contrasted with the open centre arrangements (cf PS [99]).

120. It is no answer that the open centre arrangements are subject to eligibility requirements and the approval of the Operational Manager: there is no basis to conclude that the plaintiff will be unable to participate (cf PS [35]). Nor may the arrangements be put aside simply because they may be terminated (cf PS [35]). Should that occur, it may alter whether Transferees are deprived of their liberty within the meaning of art 5(1) of the *Constitution of Nauru*. But while the arrangements are applied, they are part of the 'concrete' circumstances which must be considered.

121. Contrary to PS [34], the open centre arrangements are not inconsistent with the law of Nauru. In light of an amendment to the 2014 Immigration Regulations in 2015,[130] a Transferee is permitted to leave the Nauru RPC unaccompanied after they have obtained a health and security clearance (a condition for participating in the open centre arrangements), as the absence would be in circumstances organised or permitted by a service provider (as part of the open centre arrangements). Sections 7(2)(c) and (d) of the RPC Act provide only that centre rules may be made containing certain provisions. That is expressly without limitation of the power to make centre rules conferred by s 7(1). The Centre Rules actually made do not contain provisions as stated in s 7(2)(c) and (d).

PART VII QUESTIONS STATED

122. The questions stated for the opinion of the Full Court should be answered as follows: (1): No. (2): Inappropriate to answer. (3): Inappropriate to answer. (4): Inappropriate to answer. (5): Inappropriate to answer. (6): (6)(a): Unnecessary to answer; (6)(b): Yes; (6)(c): Unnecessary to answer. (7): Unnecessary to answer. (8): (8)(a): Unnecessary to answer; (8)(b): Yes;

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126 [2008] 1 AC 385, cited in *AG v Secretary for Justice* [2013] NRSC 10 at [50] (SCB 599). See also *Secretary of State for the Home Department v AP* [2011] 2 AC 1.

127 [2008] 1 AC 385 at [108]. See also *Ciancimino v Italy* (1991) 70 DR 103; *Raimondo v Italy* (1994) 18 EHRR 237.

128 [2008] 1 AC 440. See also *Secretary of State for the Home Department v E* [2008] 1 AC 499.

129 (1980) 3 EHRR 333.

130 See fn 12 above.

(8)(c): Unnecessary to answer. (9): No. (10): Yes. (11): Unnecessary to answer. (12): Yes. (13): None.[131] (14): The plaintiff.

PART VIII LENGTH OF ORAL ARGUMENT

123. Approximately 3 hours will be required for the presentation of oral argument.

Dated: 18 September 2015

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[131] If, to the contrary, the Court considers that the plaintiff is entitled to some relief, the precise framing of the terms of the relief should be left to a single Justice, to be determined after the parties have had an opportunity to consider the Court's reasons for judgment and to make submissions including as to the timing of any steps which the Commonwealth may be required to take.