IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No M96 OF 2016**

BETWEEN:

PLAINTIFF M96A/2016
First Plaintiff

AND

PLAINTIFF M96B/2016
Second Plaintiff

AND

~~**THE OFFICER IN CHARGE, MELBOURNE IMMIGRATION TRANSITACCOMMODATION**~~

COMMONWEALTH OF AUSTRALIA
First Defendant

AND

~~**COMMONWEALTH OF AUSTRALIA**~~

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Second Defendant

PLAINTIFFS' ANNOTATED AND AMENDED SUBMISSIONS

Filed on behalf of: The Plaintiffs
Prepared by: Joel Townsend; Guy Coffey; Hollie Kerwin
Law firm: Victoria Legal Aid
Tel: (03) 9280 3757; (03) 9280 3736; (03) 9269 0416 Fax (03) 9269 0210
Email: hollie.kerwin@vla.vic.gov.au; guy.coffey@vla.vic.gov.au; joel.townsend@vla.vic.gov.au
350 Queen Street, Melbourne, VIC 3000
Address for service DX 210646 Melbourne

PART I PUBLICATION OF SUBMISSIONS

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

Part II ISSUE

2. The ultimate issue is whether the plaintiffs' detention by or on behalf of the defendants was and is lawful, in circumstances where the plaintiffs were brought to Australia by officers of the Commonwealth for temporary purposes including medical treatment, and have at all times needed to be in Australia for those purposes.

PART III SECTION 78B NOTICES

3. Notices under s 78B of the *Judiciary Act 1903* (Cth) were given by the plaintiffs on 5 August 2016.

Part V RELEVANT FACTS

4. The defendants have demurred to the plaintiffs' further amended statement of claim dated 20 February 2017~~.20 October 2016~~. For the purposes of determining the demurrer, the defendants are taken to have admitted the allegations in the statement of claim.[1] By the demurrer, the defendants deny the legal sufficiency of the facts alleged to entitle the plaintiffs to a legal remedy.[2]

5. The plaintiffs, a mother and daughter, were brought to Australia by officers of the Commonwealth on 1 November 2014. Since that time, they have been detained in Australia by or on behalf of the defendants. They are currently detained at the Melbourne Immigration Transit Accommodation (**MITA**).

6. The plaintiffs first arrived in Australia at Christmas Island in August 2013. Being "unauthorised maritime arrivals" within the meaning of s 5AA of the *Migration Act 1958* (Cth), they were detained under s 189(3) of that Act and were subsequently taken to Nauru (a "regional processing country") pursuant to s 198AD(2) in February 2014.

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1 *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 125, 126 (Barwick CJ), 135 (Gibbs J).

2 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 141-142 (Dixon J); *Crouch v The Commonwealth* (1948) 77 CLR 339 at 349 (Latham CJ); *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 368-369 [119]-[121] (Gummow and Hayne JJ), *cf.* at 414-417 [275]-[279] (Kirby J).

7. On or about 1 November 2014, the plaintiffs were brought to Australia by Commonwealth officers (see s 198B of the *Migration Act*).[3] The first plaintiff was brought to Australia for the purposes of medical treatment, including the investigation and treatment of breast lumps and orthodontic treatment.[4] The second plaintiff was brought to Australia to accompany her daughter, and to receive continued medical treatment in relation to chest pains, irregular heartbeat and anxiety-related conditions.[5] Neither of the plaintiffs was told how long they would remain in Australia, nor that they would be held in detention while they were in Australia.[6]

10 8. The plaintiffs have received and continue to receive medical treatment in Australia.[7] In particular, the second plaintiff's health has deteriorated while she has been detained at the MITA. Since their arrival in Australia on 1 November 2014, each of the plaintiffs has needed to be in Australia for the purposes of receiving medical treatment.[8]

9. The plaintiffs are not entitled to apply for a visa while they are in Australia (*Migration Act*, ss 46(1)(e)(iii) and 46B). While the Minister has a personal and non-compellable discretion to permit a transitory person to apply for a visa, the Minister has not given any consideration whether to permit the plaintiffs to make a valid application for a visa.[9]

20 **PART VI PLAINTIFFS' ARGUMENT**

Legislative context

10. Section 198B(1) of the *Migration Act* provides that "an officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia". The term "transitory person" is defined in s 5 of the

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3 Amended Statement of Claim, para 9; Further Amended Statement of Claim, para 9 **[Supplementary Demurrer Book (SDB), p 17]**.

4 Amended Statement of Claim, para 10; Further Amended Statement of Claim, para 10 **[SDB, p 17]**.

5 Amended Statement of Claim, para 11; Further Amended Statement of Claim, para 11 **[SDB, p 17]**.

6 Amended Statement of Claim, para 12; Further Amended Statement of Claim, para 12 **[SDB, p 17]**.

7 Amended Statement of Claim, para 17 and 18; Further Amended Statement of Claim, paras 17 and 18 **[SDB, pp 18 to 22]**.

8 Amended Statement of Claim, para 19; Further Amended Statement of Claim, para 19 **[SDB, p 23]**.

9 Amended Statement of Claim, para 20; Further Amended Statement of Claim, para 20 **[SDB, p 23]**.

Migration Act, and relevantly includes a person who was taken to a regional processing country under s 198AD.

11. The prohibition in s 42 against a non-citizen travelling to Australia without a visa that is in effect does not apply to a non-citizen brought to Australia under s 198B: s 42(2A)(ca).

12. Section 198AD deals with taking "unauthorised maritime arrivals" (as defined in s 5AA) to a regional processing country. If s 198AD applies, an officer must as soon as reasonably practicable take the unauthorised maritime arrival to a regional processing country (s 198AD(2)), and for such purposes is given a range of coercive powers (s 198AD(3)). There are a number of circumstances where s 198AD does not apply to an unauthorised maritime arrival – where the Minister has made a written determination that s 198AD does not apply (s 198AE), where there is no regional processing country (s 198AF), or where there is no regional processing country which will accept the unauthorised maritime arrival (s 198AG).

13. Section 198AH provides for the application of s 198AD to "transitory persons" who are "unauthorised maritime arrivals". In particular, s 198AH(1A) relevantly provides that s 198AD will apply to a transitory person if and only if:[10]

> *(a) the person is an unauthorised maritime arrival who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and*
>
> *(b) the person is detained under section 189; and*
>
> ***(c) the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).***
>
> [Emphasis added]

14. Section 198 deals with the removal from Australia of unlawful non-citizens (defined in ss 13 and 14 as a non-citizen in the migration zone who does not hold a visa that is in effect). As acknowledged in a note to s 198(1A), some unlawful non-citizens may be transitory persons. Section 198(1A) addresses the circumstances in which a transitory person (other than an "unauthorised maritime arrival") brought to Australia under s 198B must be removed:[11]

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10 The application of s 198AD to transitory persons is also subject to the exceptions set out in ss 198AE, 198AF and 198AG.

11 The situation of transitory persons who are "unauthorised maritime arrivals" is dealt with in a consistent manner by s 198AD as qualified by s 198AH(1) and (1A). Where it applies, the duty under s 198AD to take an "unauthorised maritime arrival" to a regional processing country displaces and takes precedence over the power and duty to remove under s 198. See,

> *(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person* ***as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).***
>
> [Emphasis added]

Section 198(11) provides that s 198 does not apply to an unauthorised maritime arrival to whom s 198AD applies.

15. The effect of these provisions may be summarised as ensuring that a person who is brought to Australia from a regional processing country under s 198B can and will remain for so long as the person needs to be in Australia for the purpose for which he or she was brought here. If and when the person no longer needs to be in Australia for that purpose (whether or not the purpose has been "achieved"), he or she must be removed to a regional processing country as soon as reasonably practicable. However, there is no duty to remove the person from Australia while he or she still "needs" to be here for the relevant purpose.

16. Section 189 of the *Migration Act* provides that, if an officer "knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person". Under s 196, an unlawful non-citizen detained under s 189 must be kept in immigration detention until:

> *(a) he or she is removed from Australia under section 198 or 199; or*
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> ***(aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or***
>
> *(b) he or she is deported under s 200; or*
>
> *(c) he or she is granted a visa.*
>
> [Emphasis added]

17. Because a transitory person is unable to make a valid application for a visa (ss 46(1)(e)(iii), 46B), he or she must be kept in immigration detention until the occasion arises for the exercise of the powers to remove the person from Australia or to "deal with" the person under s 198AD(3) – that is, to exercise coercive powers for the purposes of taking the person to a regional processing country. That occasion will not arise while the person still needs to be in Australia for the purposes for which they were brought here under s 198B. During that period, the person has no right to apply for a visa.

Revised Explanatory Memorandum to the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012, p 29.

Legislative history

18. Section 198B was enacted in 2002 by the *Migration Legislation Amendment (Transitional Movement) Act 2002* (Cth). The relevant Explanatory Memorandum noted that there were "a small number of exceptional circumstances" in which it may be necessary to bring to Australia a person who had been removed to Nauru or Papua New Guinea for refugee status assessment, and provided as examples of those situations:[12]

    - *medical treatment for a condition which can not be adequately treated in the place where the person has been taken;*
    - *trials at which the person is to provide evidence in the prosecution of people smugglers; or*
    - *transit through Australia, either to return to their country of origin or to a third country.*

19. The power conferred by new s 198B was not limited to such situations, but rather was at large. When originally enacted, the definition of transitory person excluded a person who had been assessed to be a refugee – however, that limitation was subsequently removed by amendments made in 2013,[13] so as to allow the Commonwealth to bring to Australia for temporary purposes those persons in regional processing countries who had been assessed as refugees but were awaiting a durable resettlement outcome. It appears to have been originally envisaged that the period for which a transitory person was present in Australia would be "as short as possible".[14] In this regard, former s 198C provided that, if a transitory person remained in Australia for a continuous period of 6 months, he or she would be entitled to request the Refugee Review Tribunal (**RRT**) (as it was then called) for an assessment of whether he or she was covered by the definition of refugee in Article 1A of the Refugees Convention.[15]

20. The relevant provisions were further amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), which introduced the current provisions dealing with regional processing contained in

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12 Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002, p 2; see also at p 7 (in relation to new s 198B): "The temporary purposes for which this power may be exercised are, for example, to allow a 'transitory person' to receive medical treatment or to give evidence in legal proceedings."

13 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).

14 See Revised Explanatory Memorandum, Migration Legislation Amendment (Transitional Movement) Bill 2002, p 2.

15 If the outcome of such an assessment were successful, the Minister was required to determine a class of visa for which the person could apply: see former s 198C(8).

Subdivision B of Division 8 of Part 2 of the *Migration Act* (which then comprised ss 198AA to 198AH).[16] Among other things, the definition of "transitory person" in s 5(1) was amended to include a person who was taken to a regional processing country under new s 198AD, and s 196 was amended to provide that immigration detention ends when an officer begins to deal with a non-citizen under s 198AD(3). Accordingly, the power to bring transitory persons to Australia under s 198B was extended to cover unauthorised maritime arrivals (at that time referred to as "offshore entry persons") who had been taken to regional processing countries under the new statutory regime.

10 21. When first enacted, the obligation under s 198AD to take a transitory person back to a regional processing country did not apply if the person had requested a refugee status assessment by the RRT under former s 198C, unless the Secretary gave a certificate under former s 198D that the person had engaged in "uncooperative conduct" as defined. In 2013, the provision for a transitory person to request a refugee status assessment if he or she had been in Australia for a continuous period of 6 months was repealed.[17]

The *Lim* principle

22. It has long been accepted that the Executive has no power to detain a person in custody other than in accordance with a valid law which authorises such
20 detention.[18] Thus, "any officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision".[19]

23. In *Chu Kheng Lim v Minister for Immigration*, the Court upheld the validity of laws providing for the mandatory administrative detention of non-citizens who had entered or remained in Australia without a valid entry permit.[20] Brennan,

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16 These amendments were made in response to the High Court's decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

17 *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth), Schedule 1, items 46 and 48.

18 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 13 (Mason CJ), 19 (Brennan, Deane and Dawson JJ), 63 (McHugh J); *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 528 (Deane J); *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 555 (Latham CJ); *Williams v The Queen* (1986) 161 CLR 278 at 292 (Mason and Brennan JJ).

19 *Chu Kheng Lim* (1992) 176 CLR 1 at 19 (Brennan, Deane and Dawson JJ).

20 The provisions are set out in the judgment of Brennan, Deane and Dawson JJ: (1992) 176 CLR 1 at 16-19. Prior to the introduction of these provisions, the imprisonment of particular non-citizens (prohibited immigrants) was effected through offence-creating provisions and the criminal justice system: see *e.g. Chu Shao Hung v The Queen* (1953) 87 CLR 575.

Deane and Dawson JJ stated that ordinarily "the power to order that a citizen be involuntarily confined in custody is ... part of the judicial power of the Commonwealth entrusted exclusively to Ch III courts".[21] This was because, putting to one side exceptional cases, "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".[22]

24. A qualification to that proposition is that the Parliament has power to make laws for the expulsion and deportation of aliens and for their restraint in custody to the extent necessary to make their deportation effective and for the purpose of executive powers to receive, investigate and determine an application for permission to enter and remain in Australia.[23] Such an authority to detain does not offend the separation of judicial power because "it takes its character from the executive powers to exclude, admit and deport of which it is an incident".[24] Nevertheless, laws authorising Executive detention of aliens will be valid only "if the detention which they require and authorise 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".[25]

25. The principle established in *Lim* has been repeatedly affirmed in recent decisions. In *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship*,[26] Crennan Bell and Gageler JJ stated:

> The constitutional holding in *Lim* was therefore that conferring limited legal authority to detain a non-citizen in custody as an incident of the statutory conferral on the executive of powers to consider and grant permission to remain in Australia, and to deport or remove if permission is not granted, is consistent with Ch III if, but only if, the detention in custody is limited to such period of time as is reasonably capable of being seen as necessary for the completion of administrative processes directed to those purposes.

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21 *Chu Kheng Lim* (1992) 176 CLR 1 at 28.

22 *Chu Kheng Lim* (1992) 176 CLR 1 at 27.

23 *Chu Kheng Lim* (1992) 176 CLR 1 at 32-33 (Brennan, Deane and Dawson JJ).

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

25 *Chu Kheng Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ); see also at 10 (Mason CJ), 65-66 (McHugh J).

26 (2013) 251 CLR 322 at [140]; see also *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [31], [40] (French CJ), [98] (Bell J), [184] (Gageler J), [378]-[386], [400]-[401] (Gordon J).

26. Further, in *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, French CJ, Hayne, Crennan, Kiefel and Keane JJ said:[27]

> [D]etention under and for the purposes of the Act is limited by the purposes for which the detention is being effected. ... [W]hen 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 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 ... the purpose of determining whether to permit a valid application for a visa.

27. Further, the detention must be limited to such period of time as is reasonably capable of being seen to be necessary to effectuate those purposes.[28] The duration of any form of detention, and thus its lawfulness, must be capable of being objectively determined at any time and from time to time.[29]

Characterising the purpose of detention

28. The facts of the present case may be contrasted with previous cases in which detention was characterised as being either for the purposes of considering an application for permission to enter, or for the purposes of removal.

29. In *Koon Wing Lau v Calwell*,[30] orders had been made for the deportation of the plaintiffs.[31] The statute in question relevantly permitted deportees to be held in custody pending their deportation, and there was provision for release upon certain security being given.[32] That was challenged on the basis that it permitted unlimited imprisonment, a challenge that failed by reason of the purpose of the detention.

29.1. Latham CJ (with whom McTiernan J and Webb J agreed), said:[33]

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27 (2014) 253 CLR 219 at 231 [26].

28 *Chu Kheng Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ) and 65-66 (McHugh J); *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [138]-[140]; *Plaintiff S4/2014* (2014) 253 CLR 219 at [26], [29].

29 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [29]; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [184]-[185] (Gageler J); *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41 at [99] (Gageler J).

30 (1949) 80 CLR 533.

31 (1949) 80 CLR 533 at 549.

32 (1949) 80 CLR 533 at 550-551.

33 (1949) 80 CLR 533 at 556.

> The power to hold him in custody is only a power to do so pending deportation and until he is placed on board a vessel for deportation... If it were shown that detention was not being used for these purposes the detention would be unauthorised and a writ of habeas corpus would provide an immediate remedy.

29.2. Dixon J said:[34]

> ... I think the words "pending deportation" imply purpose. The two provisions together mean that a deportee may be held in custody for the purpose of fulfilling the obligation to deport him until he is placed on the vessel. It appears to me to follow that unless within a reasonable time he is placed on board a vessel he would be entitled to his discharge on habeas.

30. In *Lim,* the plaintiffs had entered Australia without permission, and the process of determining their applications for refugee status was ongoing.[35] The challenged provisions authorising detention were subject to time limits that operated by reference to the making or determination of an entry application:[36]

30.1. Section 54P(2) required that a designated person be removed from Australia as soon as practicable after he or she has been in Australia for at least two months (or a longer prescribed period) without making an entry application.

30.2. Section 54P(3) required the removal of a designated person from Australia as soon as practicable after the refusal of an entry application and the finalisation of any appeals against, or reviews of, that refusal.

30.3. Further, s 54Q limited the total period during which a person could be detained under Div 4B to 273 days of active processing.[37]

30.4. Lastly, s 54P(1) provided that an officer must remove a designated person from Australia as soon as practicable if the designated person asks the Minister, in writing, to be removed.

31. These time limits and the ability of a designated person to bring his or her detention to an end together precluded a conclusion that the powers of detention conferred on the Executive exceeded what was reasonably capable of being seen

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34 (1949) 80 CLR 533 at 581.

35 (1992) 176 CLR 1 at 15-16.

36 (1992) 176 CLR 1 at 33.5.

37 (1992) 176 CLR 1 at 33.4.

as necessary for the purposes of deportation or for the making and consideration of an entry application.[38]

32. In *Al-Kateb v Godwin*,[39] the applicant, who had entered Australia without permission, had asked to be removed and the Executive had attempted – but failed – to secure the necessary international cooperation to permit his removal. There was a continuing statutory duty to remove the applicant from Australia, as soon as reasonably practicable. In those circumstances, it was said that Al-Kateb's continued detention was for the purpose of his subsequent removal, and to segregate him or her from the community until removal could be effected.[40]

The purpose of the plaintiffs' detention

33. In the present case, the plaintiffs' detention is not for any purpose connected with the executive power to permit non-citizens to enter and remain in Australia. This is because the plaintiffs have no right to make an application for a visa while they are in Australia, and have not at any time been the subject of any consideration whether to permit them to make a valid application for a visa. The Plaintiffs had express statutory permission to travel to Australia without a visa.

34. Nor is the plaintiffs' detention for the purpose of removing them from Australia. As the plaintiffs have needed and continue to need to be in Australia for the purposes for which they were brought under s 198B, no obligation to remove the plaintiffs from Australia has been enlivened. Unlike cases such as *Al-Kateb*, it is not a case in which there is a subsisting obligation to remove as soon as reasonably practicable, but where the circumstances are such that removal cannot be effected. Rather, there is not yet any obligation to remove the plaintiffs from Australia, and they are not being held in detention for the purposes of carrying out any such obligation.

35. If the plaintiffs are not held in detention for the purposes of their admission to Australia or their expulsion or deportation from Australia, the purposes for which they are being detained by the defendants can only be connected with the purposes for which they were brought to Australia under s 198B. In the present case, these purposes are directly related to the physical and mental health of the Plaintiffs. It cannot be said that administrative detention for such purposes satisfies the *Lim* principle. To keep the plaintiffs in detention is not conducive

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38 (1992) 176 CLR 1 at 34 (Brennan, Deane and Dawson JJ).

39 (2004) 219 CLR 562.

40 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [231], [247] (Hayne J); see also at [45]-[46] (McHugh J).

to the purpose of medical treatment, and is highly likely to be inimical to the fulfilment of that purpose (as is demonstrated by the deterioration in the second plaintiff's health, as a result of her detention, while she has been detained at the MITA). Detention in such circumstances is not for any of the three purposes identified by the plurality in *Plaintiff S4/2014*, and there is no warrant to extend the *Lim* principle to create a new category of permissible purposes for which the Executive may detain a non-citizen which would cover the present case.

36. It is critical to the determination of the constitutional validity of the plaintiffs' detention that they were brought to Australia by Commonwealth officers and entered both lawfully and with permission under the Migration Act: see s 42(2A)(ca). This is not a case involving a person "who presents uninvited and unheralded at the border"[41] or who makes landfall without permission to do so.[42] In this regard, it is immaterial that the plaintiffs may retain the statutory status as an "unauthorised maritime arrival" for the purposes of the *Migration Act* based on the manner and circumstances of their entry to Australia on a previous occasion. It remains the case that the plaintiffs entered and are present in Australia because they were brought here by the Commonwealth.

37. In this regard, it is pertinent to note that the purposes for which a transitory person may be brought to Australia under s 198B are not limited to purposes connected with the person's medical treatment. A transitory person may be brought to Australia by Commonwealth officers for any temporary purpose, including a purpose of the Commonwealth itself. An example provided in the Explanatory Memorandum was bringing a person to Australia for the purpose of giving evidence in a criminal trial (such as a prosecution of a people smuggler). The power conferred by s 198B is not expressly conditioned on the consent of the person who is brought to Australia; nor is it clear whether that person has any entitlement to require his or her return to the regional processing country.

38. The executive powers to exclude, expel or deport aliens are of limited, if any, relevance when it is the Commonwealth which has brought about the non-citizen's entry and continued presence in Australia. Thus, to the extent that the *Lim* principle accommodates detention for the purpose of segregation from the Australian community pending the exercise of powers to exclude (*i.e.* to admit or prevent entry) or expel (*i.e.* remove or deport),[43] this has no bearing on the

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41 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 385 [207] (Kiefel and Keane JJ).

42 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 650 [266].

43 See e.g. *Al-Kateb v Godwin* (2004) 219 CLR 562 at [255]-[256].

validity of the detention of a transitory person brought to Australia under s 198B. As Gummow J noted in *Re Woolley; Ex parte Applicants M276/2003*:[44]

> *Lim* is authority at least for the proposition that, putting the defence power to one side, a law cannot be upheld under the aliens power if it provides for the segregation by incarceration of aliens, without their commission of any offence requiring adjudication, and for a purpose which, in the conclusive opinion of the executive branch, is sufficiently connected with the entry, investigation, admission and deportation of aliens. Still less can the purpose of the incarceration, which is identified in such a law and determined in each case by the opinion of the Executive, be unconnected with any of the above matters and rather be concerned solely with the prevention of aliens becoming "de facto citizens" or members of the "Australian community".

39. The detention of transitory persons brought into Australia by the Commonwealth is also difficult to reconcile with the statutory objects set out in s 4 of the *Migration Act*. The object set out in s 4(1) is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. Subsections 4(2) to (5) identify the means by which the Act seeks to advance that object, including by providing for visas permitting non-citizens to enter or remain in Australia, to provide for the removal or deportation of non-citizens whose presence in Australia is not permitted by the Act, and to provide for the taking of unauthorised maritime arrivals from Australia to a regional processing country. While s 198B itself might be seen as falling with the principal object of regulating the coming into and presence in Australia of non-citizens, the detention of persons brought to Australia under s 198B is not connected with any of the specified means by which the Act seeks to achieve that principal object. In such circumstances, it may be doubted whether the plaintiffs' detention can be properly described as being "under and for the purposes of the Act".[45]

The duration of the detention

40. The plaintiffs have been held in detention in Australia for over two years. No statutory time limit is applicable to their detention. The length of the plaintiffs' detention was unknown when they were brought to Australia and remains incapable of being objectively determined. They will remain in detention for such time as they "need" to be in Australia for the purposes for which they were brought here by the Commonwealth. There is no requirement for those purposes

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44 (2004) 225 CLR 1 at [150].

45 See *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [26].

to be recorded or communicated to a transitory person, and they may not necessarily even be articulated in any definite form or uniformly understood at the time of their transfer. The determination whether a person needs to be in Australia for the relevant purpose or purposes may depend, at least in the first instance, on an opinion formed by the Executive Government. As the Court observed in *Plaintiff M61/2010 v Commonwealth of Australia*, "[i]t is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive".[46]

41. The extension of the mandatory detention provisions in ss 189 and 196 of the Migration Act to cover transitory persons brought to Australia under s 198B means that the period for which such persons are detained is no longer bounded by the grant of a visa or the effectuation of removal from Australia, or the associated performance of duties to consider a visa application within a reasonable time or to remove a person as soon as reasonably practicable. Rather, the period of detention is governed only by the question whether and when the person "no longer needs to be in Australia" for the relevant purpose and this threshold is divorced from the achievement of that purpose. Such a period is not readily capable of objective determination by a court at any time and from time to time;[47] nor are the temporal limits connected with the limited permissible purposes of administrative detention such that the power to detain is not unconstrained.

42. On the facts as alleged in the present case, the problem is compounded by the fact that the plaintiffs' continued detention may itself frustrate or impede the purposes of their medical treatment, thereby prolonging the period for which they need to be in Australia for such purposes.

43. Further or alternatively, the duration of the plaintiffs' detention will be governed by the medical treatment and their response to that treatment, which are not entirely within the power or control of the Commonwealth. Even accepting that s 198(1A) and s 198AH contemplate the possible removal of a transitory person in circumstances where the purpose has not been achieved, it remains a pre-

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46 (2010) 243 CLR 319 at 348 [64] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [93] (Hayne J); *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 199 at [84] (Hayne and Kiefel JJ).

47 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [184] (Gageler J); *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [139] (Crennan, Bell and Gageler JJ).

condition of the removal obligation that the person no longer needs to be in Australia for the relevant purpose.

The plaintiffs' detention is beyond power

44. Accordingly, to the extent that ss 189 and 196 of the Migration Act purport to authorise the detention of a transitory person who has been brought to Australia for a temporary purpose under s 198B of the *Migration Act*, and who needs to be in Australia for that purpose, those provisions are beyond power and invalid.[48]

45. The balance of authority would suggest that ss 189 and 196, including in their application to the plaintiffs, can be characterised as laws with respect to the subject matter of "aliens" within s 51(xix) of the Constitution.[49] However, the legislative power under s 51(xix) is "subject to this Constitution", including the limitations derived from Chapter III and the *Lim* principle.

46. The detention of the plaintiffs in such circumstances is not for a permissible purpose under the *Lim* principle, that is, it is not reasonably capable of being seen as necessary for the purposes of deportation or removal or to enable an application for a visa to be made and considered. As a consequence, the power to detain the plaintiffs in such circumstances should be characterised as punitive in nature, and incapable of being conferred on the defendants without contravening the separation of judicial power under Chapter III of the Constitution. In this regard, the separation of powers is fundamental to the rule of law, and the protection of the right to liberty and the freedom from being deprived of liberty other than by due process of law.

PART VII LEGISLATIVE PROVISIONS

47. See attachment.

PART VIII ORDERS

48. The plaintiffs seek an order that the defendants' demurrer be overruled.

49. The proceeding should be listed for further directions before a single Justice.

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48 The provisions may be read down accordingly, either under general principles or pursuant to s 3A of the *Migration Act*.

49 However, *cf. Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [402] (Gordon J).

PART IX TIME ESTIMATE

50. It is estimated that the Plaintiffs will require 1.5 hours for the presentation of oral argument.

Dated: ~~25 November 2016~~ 1 March 2017

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Chris Horan
Telephone: (03) 3 9225 8430
Facsimile: (03) 9225 8668
chris.horan@vicbar.com.au

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Frances Gordon
Telephone: (03) 9225 6809
Facsimile: (03) 9225 7293
francesgordon@vicbar.com.au