THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
BETWEEN:

No S156 of 2013
PLAINTIFF S156/2013
Plaintiff

THE MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Defendant

THE COMMONWEALTH OF AUSTRALIA
Second Defendant

PLAINTIFF'S REPLY SUBMISSIONS

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

Questions 1 and 2: Validity of Sections 198AB and 198AD

The aliens and immigration powers

2. Contrary to the defendants' suggestion (at [26], [28]), the scheme established in ss 198AB and 198AD does not fall within the 'core area' of either the aliens power or the immigration power.
3. The plaintiff accepts that laws which provide only for the departure of aliens from Australia – including by deportation – fall within the scope of the aliens power and, in some cases, the immigration power.
4. Sections 198AB and 198AD in sub-div B do more than merely effectuate the deportation of a particular class of aliens from Australia. They require that persons subject to sub-div B be deported to a country designated by the Minister as a 'regional processing country'. Moreover, the language of the scheme envisages that once deportation to a 'regional processing country' is complete, deportees will remain subject to ongoing control. The phrase 'regional processing country' is used throughout sub-div B and its meaning is informed by s 198AA(b) and the requirements of s 198AB. It is plainly about a third country (or someone) 'processing' delivered persons, including refugees and refugee applicants (such as the plaintiff).
5. The defendants contend that, like sub-div A, sub-div B is merely a scheme for removal (at [8]-[9]) with no on-going control ([24]).
6. The terms of ss 198AB and 198AD and their practical operation suggest otherwise.
7. Sub-div B is headed 'Regional processing', in contrast to sub-div A which is headed 'Removal from Australia of unlawful non-citizens', which establishes that the sub-divs do not merely operate upon different classes of aliens, but are directed towards different purposes. This is made clear by the distinct 'reason' given for the enactment of sub-div B, as set out in s 198AA. The fact that countries designated by the Minister under s 198AB(1) are termed 'regional processing countries' further suggests that once deportation under s 198AD is complete, an element of 'processing' remains to be satisfied, implying that deportees will be subject to ongoing control. The requirement in s 198AB(3) that, when considering whether designating a country is 'in the national interest' the Minister must have regard to assurances made by that country with respect to

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refugee processing and refoulement further suggests that the control of UMAs upon arrival is envisaged by the scheme. Moreover, the practical operation of the scheme in question involves the ongoing detention and control of deportees in a 'regional processing country', long after the completion of the deportation process (SCB39 at [40] and plaintiff's submissions at [27].

8. When determining whether a statute is 'with respect to' a head of power, both its practical and its legal operation must be considered.[1]
9. The question of whether the legislative scheme in ss 198AB and 198AD is supported by the aliens or immigration powers lies beyond the scope of existing precedent. The High Court has not before considered the constitutionality of legislation which envisages ongoing control of aliens removed from Australia, following the completion of the deportation process (See SCB 39 at [40] and plaintiff's submissions at [27]).
10. The Court has considered whether ss 51(xix) and 51(xxvii) encompass a power to elect the place to which an alien will be deported.[2] Such a power does exist. However, contrary to the defendants' submissions (at [17], [20]), it is not correct to say that a 'long line of authority' establishes that this proposition is supported by the aliens power, much less that it lies within the 'core area' of this power.[3] Decisions of this Court suggest that the power to designate a deportation destination arises only as an incidental aspect of the general power to deport aliens under ss 51(xix) and 51(xxvii). For instance, in *Ferrando v Pearce*, Barton J stated that the power to deport '*is exhausted when the alien is placed outside the territorial limits of...Australia*', but that as '*a person cannot well be deported in a ship bound nowhere*', the immigration power extends to allow the election of a destination.[4] Similarly, in *Robtelmes v Brenan*, O'Connor J held that the power to deport includes '*the power of choosing the place of deportation and the means of deportation in order that the exercise of the power shall be effectual*'.[5] (our emphasis)
11. It follows that the scheme in ss 198AB and 198AD, which extends beyond merely authorising a deportation destination, does not fall within the 'core area' of the aliens or immigration powers.
12. In such a case, Gaudron J in *Lim* expressly envisaged that a proportionality test may assist to determine whether a law that does not fall within the core area of the aliens power is 'with respect to' that power.[6] Upon the test suggested by her Honour, a law will fail to have a sufficient connection with s 51(xix) if it is neither connected with the 'entitlement [of aliens] to remain in Australia', nor 'appropriate and adapted to regulating [their] entry or facilitating departure as and when required'.[7] For the reasons outlined in the plaintiff's submissions (at [29]-[32]), the scheme in ss 198AB and 198AD fails this test.[8]

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[1] See eg *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-9 (McHugh J); *Leask* (1996) 187 CLR 579 at 601-2 (Dawson J), 633-4 (Kirby J); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[2] See, *Robtelmes v Brenan* (1906) 4 CLR 395; *Ferrando v Pearce* (1918) 25 CLR 241; *Znaty v Minister for Immigration* (1972) 126 CLR 1.

[3] The defendants rely on several authorities, none of which support this proposition. The authorities cited in footnote 21 of the defendants' submission do not deal with the constitutional ambit of the aliens power, but rather with principles of statutory construction, in cases where no challenge to the constitutionality of a deportation scheme had been made. The authorities cited in footnote 22 of that submission support the proposition that the power to deport encompasses the power to select the country to which deportation will be made, but do not place this proposition in the 'core area' of the aliens power.

[4] *Ferrando v Pearce* at 249

[5] *Robtelmes v Brenan* at 422 (emphasis added).

[6] See *Lim* (1992) 176 CLR 1 at 57; Plaintiff's submissions at [24].

[7] See *Lim* at 57.

[8] See also, plaintiff's submissions at [24]-[28]. With respect to the immigration power, see plaintiff's submissions at [46]-[48].

The external affairs power

13. The plaintiff does not challenge the 'broader proposition' outlined by the defendants that s 51(xxix) 'authorises Parliament to make laws with respect to places, persons, matters or things physically external to Australia',[9] but rather asserts that this power is predicated upon the pre-existence of an affair external to Australia.[10] It is not permissible for Parliament to recite itself into power by manufacturing such an externality and then legislating with respect to it.
14. The scheme established under ss 198AB and 198AD does not operate on an affair with this requisite characteristic of pre-existing externality, but rather regulates persons within Australia with a view to removing them outside Australian borders for processing. Accordingly, it is not supported by s 51(xxix). This argument is not inconsistent with existing authorities, and was not advanced by the plaintiff in *P1/2003 v Ruddock* (2007).[11]

The limitation identified in Chu Kheng Lim

15. The plaintiff's submissions do not challenge the constitutionality of the scheme on the basis that it constitutes an impermissible conferral of judicial power. The sole constitutional proposition advanced is that the legislative scheme is not with respect to any of the heads of power in s 51 of the Constitution.
16. Determining whether the scheme is with respect to a head of power requires an examination of the scope of the heads of power which could potentially support it. This examination must be conducted by reference to the entire context of the Constitution, including any limitations that derive from structural implications. As Brennan J stated in *Re State Public Services Federation; Ex parte Attorney-General (WA)*:

> [T]he construction of a head of legislative power is itself ascertained by reference to the entire context of the Constitution and ... its scope may be limited by implication. The construction of s 51(xxxv) or, for that matter, the construction of any other legislative power in s 51, calls for a consideration of the text of the power, its subject matter and the general constitutional context. None of these factors can be considered in isolation, nor is there a sequence to be followed in considering one factor before another.[12]

17. The limitation identified by Brennan, Deane and Dawson JJ in *Lim* is derived from the general structure of the Constitution. Accordingly, it is relevant to the determination of the scope of ss 51(xix), 51 (xxvii), and 51(xxix).

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18. The defendants contend (at [40]) that the laying of certain documents before Parliament means that the Minister's designation decision is not justiciable. However, any decision of the Minister that is bad in law will remain examinable by the High Court as part of its constitutional writ jurisdiction and that cannot be taken away by this statutory device or mechanism.
19. In any event, in the present case, the Minster failed to table the UNHCR advice before the Senate together with his designation and reasons as he was required to do according to section 198AC(2)(d)(e) and he thereby deprived Parliament of critically relevant advice

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[9] See, defendants' submissions at [31] and plaintiff's submissions at [50]-[52].
[10] See plaintiff's submissions at [52].
[11] (2007) 157 FCR 518.
[12] *Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249 at 275.

(SCB 33 at [12]-[14]). The UNHCR letter was tabled only later, after the Senate had already considered the designation decision.

20. The defendants complain (at [36], [70]) that the plaintiff made unsupported factual assertions. However, the plaintiff's factual assertions (particularly those at [97] of the plaintiff's submissions) are supported by the special case (see, for example: (a) Report of the Expert Panel on Asylum Seekers, SCB 1 at 51 line 18, 57 line 27, 184 at line 40; (b) the Administrative Arrangements between Australia and PNG April 2013 at SCB 27 at 375 at [5.3](the definition of the 'No Advantage Principle'); (c) Letter from the UNHCR to the Minister SCB 8 at 269 line 12-20. As to living in tents, see the Arrangements SCB233 at [4]).
21. As to the seven matters that are the subject of mandatory considerations in making any valid Ministerial designation, they arise by consideration of sub-div B, when read in the context of the Act as a whole, and its subject, scope and purpose. The defendants' construction of the impugned provisions focus centrally on the words the 'only condition' in s 198AB(2). However, the content of the national interest must be informed by the surrounding provisions and the Act as a whole.
22. As to the UNHCR letter dated 9 October 2012 (SCB 266), the defendants contend (at [49]) it was not a relevant consideration. Why, then did the Minister personally write to the UNHCR in September 2012 (SCB 213) seeking his views on the possible designation of PNG? He wrote again on 2 October 2012 (SCB 222 at [37]). He did not indicate any particular timeframe for him to receive a response. The Minister accepted that he was required to table any response (SCB 213 line 35). The advice from the Department that the Minister could lawfully ignore the UNHCR response was misleading and wrong (at SCB 222 at [38]). The Minister accordingly made his decision without that crucial response. He failed to table it before the Lower House. Even after he did receive it, he failed to table it before the Upper House. Thus, Parliament was deprived of the UNHCR response.
23. The defendants assert at [52], that the international obligations and domestic law of PNG were not relevant considerations for the Minister. While section 198AA(d) of the Act provides that the designation 'need not be determined' by reference to the international obligations or domestic law of PNG, section 198AB(3)(a)(i) and (ii) are plain - the Minister must have regard to whether or not PNG has given Australia two specific assurances relating to refugees and refugee applicants. Accordingly, the Act requires a close consideration of PNG's core international obligations under the Convention. However, for no stated reason, the Minister in his decision chose to simply accept the assurances by PNG regarding its international obligations and domestic law and he also chose (SCB 264 at [37]) not to have regard to the international obligations and domestic law of PNG. This was a legal nonsense. They were central and relevant considerations here.
24. The defendants assert (at [53]) that Australia's international obligations or domestic law were not a relevant consideration in the designation decision. While section 198AA(d) of the Act provides that the designation of a country 'need not be determined' by reference to the international obligations or domestic law of that country (PNG), the Act is silent on whether or not the Minister must have due regard for Australia's international obligations and domestic law. Where a statute is ambiguous or silent, the Court should favour a construction that accords with Australia's obligations under the relevant international treaties and conventions.[13]
25. In the statement of reasons, the Minister conceded that 'even if the designation of PNG to

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[13] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, Mason CJ and Deane J at 291.

be regional processing country is inconsistent with Australia's international obligations,' the Minister, 'nevertheless' thought 'that it was in the national interest to designate PNG to be a regional processing country.' (SCB 264 at [36]). It was nonsense for the Minister to consider that it was in Australia's national interest to designate PNG on the one hand, but at the same time, close his eyes to the consideration that the designation might well be inconsistent with Australia's international obligations.

26. As to the 'no evidence' ground, the defendants' contend (at [59]) that the Minister's finding that the designation would promote the maintenance of a fair and orderly Refugee and Humanitarian Program and so on is merely a 'value judgment'. Even if that were the case, which it is not, it is now a finding of fact made by reference to a value judgment for which there was no evidence before the Minister.
27. The defendants question the foundations of the test of legal unreasonableness (at [63] to [67]). However, on any view, no reasonable Minister would hold that it was in the national interest to accept the assurances of PNG on the one hand (SCB 259 at [17]), and yet at the same time 'choose' not to consider the international obligations and domestic law of PNG on the other (SCB 264 at [37]).
28. No reasonable Minister would hold that it would be in the national interest to designate PNG as a regional processing centre, 'even if the designation of PNG to be regional processing country is inconsistent with Australia's international obligations' (SCB 264 at [36]).
29. No reasonable Minister would hold that PNG had the capacity to meet its assurances (SCB MOA 208 [4]; 209 [13],[15]; and 210 [18]) that it would promote the fair and orderly refugee and humanitarian program (SCB 266, UNHCR letter) or that the arrangements that were in place, or were to be put in place, were satisfactory or in the national interest (SCB 263 [32(1)]).
30. The defendants style "legal unreasonableness" as a mere 'label' (at [66]) and say it is an emphatic way to express disagreement with the Minister's designation. However, a fair reading of the joint judgment in *Li's case* establishes that legal unreasonableness is no mere label. It is a significant ground of the Court's constitutional writ jurisdiction which permits testing of the validity of legislative instruments and administrative decisions.
31. The Minister's designation here is void for this ground alone.
32. As to the validity of the taking direction (question four of the reserved questions), the defendants contend (at [72] and [79.3]) that the challenge is useless or futile by reason of s 198AD(2), which it is said is a stand-alone power to remove all UMAs from Australia to a regional processing country.
33. That is not the correct construction of the provision.
34. Section 198AD(2) must be read in its context.
35. When it is read with s 198AD(5), if there are two such countries, the Minister must make a taking direction, as he purported to do here (SCB 317).
36. Accordingly, in the present case (where there are two countries), there must first be a lawful direction made before removal of a UMA.

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