Andrew & Renata Kaldor Centre
for International Refugee Law

Casenote

PLAINTIFF M96A/2016 v COMMONWEALTH OF AUSTRALIA & ANOR [2017] HCA 16

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This case note provides an overview of key facts and findings of the High Court of Australia in *Plaintiff M96A/2016 v Commonwealth of Australia* [2017] HCA 16 The case concerns the

medical treatment. More information about the processing of asylum seekers in Nauru is available through the Kaldor Centre factsheets.

Facts

The plaintiffs are a mother and daughter from Iran. They arrived

Migration Act 1958 They were detained in Australia and subsequently taken to

in Australia, the plaintiffs were placed in detention, initially in Darwin and later in the Melbourne Immigration Transit Accommodation. The basis

The plaintiffs sole claim was that, during the time that they were in Australia for the temporary purpose of receiving medical treatment, there was no legal basis for their detention.

They did not seek to challenge the lawfulness of their initial detention at Christmas Island, their removal to Nauru and subsequent transfer back to Australia
processing policies more broadly. They also did not seek to challenge the validity of the

once they no longer needed to be in the country for a temporary purpose.

Summary of the relevant law

The plaintiffs a scheme comprised of several provisions in the Act:

- s 42(1) creates a general rule that a non-citizen must not travel to Australia without a valid visa. However, this does not apply where a non-citizen is brought to Australia under s 198B;
- s 198B states that an officer has the power to bring non-citizens who qualify as . defined;
- ss -
  - s 189(1) - - citizens are defined as non-citizens who arrive in Australia without a valid visa (ss 13, 14);
  - s 196(1) states that an unlawful non-citizen detained under s 189 must be kept in immigration detention until they are removed from detention, taken to a regional processing country, deported, or granted a visa; and
- ss 198AD and 198(1A) govern the removal of transitory persons from Australia:
  - when a transitory person who is detained in Australia under s 189 no longer needs to be in Australia for the temporary purpose, an officer has a duty to take that person to a regional processing country as soon as reasonably practicable, regardless of whether the temporary purpose to Australia has been achieved (s 198AD, read with s 198AH); and
  - for all other transitory persons not covered by the above provisions, s 198(1A) states that an officer has a duty to remove them as soon as reasonably practicable after they no longer need to be in Australia (again, regardless of whether the temporary purpose for their return to Australia has been achieved).

Plaintiffs

The plaintiffs accepted that the Commonwealth had power under s 198B to bring them to Australia for the temporary purpose of medical treatment. They argued, however, that once this power had been exercised, ss 189 and 196 did not authorise the Executive to keep them in immigration detention.

The plaintiffs argued that their detention was invalid for two reasons:

a) the purpose of their detention to obtain medical treatment was not constitutionally permissible. In making this argument, the plaintiffs asserted that the only lawful purposes for detention were the three purposes identified by a majority of the High Court in *Plaintiff S4/2014 v Minister for Immigration and Border Protection Plaintiff S4'*), namely:

i) the purpose of removal from Australia;
ii) the purpose of receiving, investigating and determining an application for a visa permitting the alien to enter and remain in Australia; and
iii) the purpose of determining whether to permit a valid application for a visa;[1] and

b) the duration of their detention was not capable of objective determination by a court at any material time. In making this argument, the plaintiffs again relied on *Plaintiff S4*, where the majority said: The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced by the courts, and, ultimately, by this Court .[2]

Judgment

All seven judges found that the plaintiffs detention was lawful. Accordingly, the action was

The Court
detention. It held that the purpose was the same purpose that underpinned all instances involving the detention of unlawful non-citizens: to facilitate their ultimate removal from Australia.[6] The joint judgment noted that the difference between the purpose of detention and the temporary purpose for which the plaintiffs were brought to Australia is highlighted by two factors:

- the fact that detention need not aid the temporary purpose (indeed, in the plaintiffs case, where the temporary purpose was obtaining medical treatment, detention could in fact be antithetical to achieving it);[7] and
- the fact that the statutory scheme did not make the duration of detention coterminous with fulfilment of the temporary purpose.[8]

As the view of the purpose of detention fell within the three permissible categories of detention identified in *Plaintiff S4*, it was unnecessary to determine whether these categories were exhaustive.[9] Similarly, the Court elected not to rule on whether the compatibility of executive detention with the separation of judicial power in Chapter III of the Constitution depends on whether or not the detention can be said to be for the purposes of punishment.[10]

The duration of detention

The Court affirmed that in order for executive detention to be compatible with the constitutional separation of judicial power, there must be objectively determinable criteria for detention.1199 675.94 Tm0 g0 G[(i)5(nd)3(ee)3(d)] TJETQ0.000008871 0 595.32 841.92 d

Further reading

The judgment in this case is available from the High Court website at <http://eresources.hcourt.gov.au/downloadPdf/2017/HCA/16>. The submissions and transcripts of hearing are also available at <http://www.hcourt.gov.au/cases/case_m96-2016>.

Kaldor Centre, *Case note: Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors* [2016] HCA 1, (2016), 13 July, <http://www.kaldorcentre.unsw.edu.au/publication/plaintiff-m682015-v-minister-immigration-and-border-protection-ors-2016-hca-1>.

Madeline Gleeson, *Offshore processing: Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea*, (2015), 8 April, <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview>.

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Endnotes

[1] (2014) 253 CLR 219 at 231 [26].

[2] Ibid, at 232 [29].

[3] *Chu Kheng Lim* (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ).

[4] [2017] HCA 16 at [21]

[5] [49]; Hearing, 2083-2087.

[6] [2017] HCA 16 at [27].

[7] Ibid at [24]-[25].

[8] Ibid at [26].

[9] Ibid at [22].

[10] Ibid.

[11] Ibid at [31].

[12] Ibid at [32].

[13] Ibid at [32], [46].

[14] Ibid at [32].

[15] Ibid at [42].

[16] Ibid at [39]-[41].