HIGH COURT GIVES TICK TO ASYLUM SEEKER PROCESSING AND DETENTION IN NAURU

By Andrew Yuile

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On 3 February 2016, in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1, ('**M68**') the High Court upheld the Commonwealth's securing, funding and participating in the detention of 'Plaintiff M68' in Nauru, pursuant to an agreement between the Commonwealth and Nauru. In at least one media story after the decision, the Court was said to have held that detention in both Nauru and Manus Island had been found lawful, and that the Commonwealth has the power to detain people in other countries (Sydney Morning Herald, 'High Court finds offshore detention lawful', 3 February 2016). In fact, the Court said nothing about Manus and, while it upheld the Commonwealth's activities in Nauru, it did not hold that the Commonwealth has an unlimited power to detain overseas. The result is that although processing on Nauru can lawfully continue, the situation in other centres or under other future arrangements has not been conclusively decided.

Snapshot

- The Commonwealth has been substantially involved in establishing and running the immigration detention centre in Nauru.
- In M68, the High Court upheld the validity of the Commonwealth's actions, meaning that offshore detention and processing in Nauru can continue.
- However, the decision was fact specific and some members of the Court set out limits on the Commonwealth's power to assist with detention that may remain relevant to Manus Island and any future offshore processing schemes.

The facts

Plaintiff M68 was a Bangladeshi woman who arrived in Australia by boat, was detained and was then sent to Nauru. She was returned to Australia on a temporary basis, for health care. While in Australia, the challenge was lodged in the High Court, attempting to prevent her return to Nauru.

It was agreed that the plaintiff had been taken to Nauru by Commonwealth officers; that those officers had applied for a Nauruan visa on her behalf (without her asking for one) and had paid the visa fees; that she was required to live in the detention centre and that she could not leave; that the Commonwealth was funding the setup and running of the centre, and was involved in its management; and that subcontractors to the Commonwealth ran the security, including perimeter fencing and entrance and exit from the centre. It was also agreed that the day-to-day management of the centre was under the control of an operational manager, who was a Nauruan appointed by the Nauruan government; that Nauruan laws required the plaintiff to have a visa and imposed the condition on her visa of remaining in detention; and that the Commonwealth could not compel the Nauruan government to enact any particular laws, including those requiring the detention of the plaintiff.

Also central to the case was the enactment, in mid 2015, of the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth). That Act inserted into the *Migration Act* s 198AHA, which provided (retrospectively) power to the Commonwealth, if it had entered into an 'arrangement' with another country, to 'take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country', and to make payments to the country for those purposes. Importantly, 'action' was defined as including 'exercising restraint over the liberty of a person'.

The challenge

The plaintiff argued that the Commonwealth's actions in Nauru amounted to at least substantial participation in her detention (at [27]) and: (i) the Commonwealth did not have authority to spend money on or to undertake those actions (building on the decision in *Williams v Commonwealth* (2012) 248 CLR 156); and (ii) that any legislation purporting to grant such authority would transgress the limits on executive power described in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('***Lim***'). (*Lim* held that detention by the State is generally penal or punitive in character and can only be done by a court, as an incident of judicial power following a finding of criminal guilt. An exception to that rule is that the executive can detain aliens for particular purposes; for example, pending their removal from Australia (at [40]).)

The Commonwealth in response argued that: (i) its involvement in offshore processing in Nauru fell short of actual detention - the laws of Nauru imposed the detention requirement; (ii) to the extent authority was required for the Commonwealth's activities, it was given by s 198AHA and/or s 61 of the *Constitution*; and (iii) authority did not transgress the limits in *Lim*. As a rejoinder to the Commonwealth's argument about the laws of Nauru, the plaintiff argued that any such laws were invalid under the Constitution of Nauru.

The judgment

By a majority of 6-1, the Court dismissed the plaintiff's challenge.

The joint judgment of French CJ, Kiefel and Nettle JJ held that it was the laws of Nauru that required the plaintiff's detention (at [32]).

The restrictions on the plaintiff, including on her liberty, were a result of the 'independent exercise of sovereign legislative and executive power by Nauru' (at [34]). The Commonwealth could not compel Nauru to enact laws

requiring detention (at [35]). Further, it was not appropriate for the High Court to question the validity of the Nauruan laws (at [48]-[52]).

Those factual findings meant that the Commonwealth was not detaining the plaintiff (at [36]), meaning that the *Lim* limit did not apply: *Lim* 'has nothing to say about the validity of actions of the Commonwealth and its officers in participating in the detention of an alien by another State' (at [41]). The plurality further held that s 198AHA provided statutory authority for the Commonwealth's actions (at [41]) and that s 198AHA was a valid law (at [42]-[46]).

Justice Keane similarly found that the plaintiff was being detained by Nauru, not the Commonwealth (at [199], [239]). For his Honour also, that meant *Lim* did not apply: that limit was only concerned with 'the legal authority of the Commonwealth to hold an alien in detention' (at [238]). Further, it was not appropriate or necessary to go behind the Nauruan laws to examine their constitutional validity (at [248]-[258]). So far as authority for the Commonwealth's participation in the plaintiff's detention was required, it was provided by s 198AHA, which was a valid law (at [199], [242], [259]-[264]).

Justices Bell and Gageler, each writing separately, dismissed the plaintiff's challenge but for slightly different reasons. In particular, each of their Honours held that, on the facts, the Commonwealth's participation was sufficient to amount to detaining the plaintiff (at [83]-[93], [173]). Their Honours' focus was therefore on whether there was valid authorisation for the detention.

Justice Bell held that s 198AHA covered the Commonwealth's actions (at [73]-[74]) and that s 198AHA was supported by a head of power (at [77]). In relation to *Lim*, her Honour held that the limits on the Parliament's power to authorise executive detention applied to detention both onshore and offshore (at [99]). However, the authority provided by s 198AHA was sufficiently confined: it 'did not confer unconstrained authority on the Commonwealth' and authorised only 'action that can reasonably be seen to be related to Nauru's regional processing functions' (at [101]).

That is, the Commonwealth could only assist in detention to the extent the detention was necessary for the processing of an asylum claim and/or for the removal of a person from Nauru. If detention lasted longer than was necessary for those purposes, it would be unlawful (at [101]). (These are similar to the limits that apply to executive detention in Australia: see *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at [24]-[34]).

Justice Gageler discussed in greater detail the framework of executive power within the *Constitution* and its limits, including the *Lim* limit: see [115]-[166]. It remains to be seen how this analysis will affect future decisions dealing with the executive power outside of the migration space. His Honour held that the non-statutory executive power in s 61 of the *Constitution*, even supported by a law of Nauru, would be insufficient to authorise executive detention (at [174]). However, s 198AHA provided statutory support for the executive's actions (at [180]).

In terms of the *Lim* limit, Gageler J held that detention would be classified as 'punitive' and unlawful unless the duration of the detention was: (i) 'reasonably necessary to effectuate a purpose which is identified in the statute conferring the power to detain and which is capable of fulfilment'; and (ii) 'capable of objective determination by a court at any time and from time to time' (at [184]).

His Honour was satisfied that s 198AHA met those conditions (at [185]).

Dissenting judgment

Justice Gordon dissented. Her Honour held, along with Bell and Gageler JJ, that the Commonwealth was in fact detaining the plaintiff (at [352]-[355]). However, her Honour went on to hold that s 198AHA was beyond power insofar as it purported to authorise activities beyond those necessary for the removal of the plaintiff from Australia or for the determination of an application for a visa in Australia (at [391]).

Section 198AHA did not 'effect a purpose identified in the *Migration Act* which was capable of fulfilment' (at [392]). Because the aliens power in s 51(xix) of the *Constitution* 'does not provide the power to detain *after* removal is completed', it could not support s 198AHA (at [393]), emphasis in original.

Other constitutional heads of power also did not support s 198AHA (see [403], [409]-[411], [412]).

Conclusion

The High Court's decision is in some ways quite narrow. The decisions of French CJ, Kiefel and Nettle JJ and Keane J turn on the specific factual findings in the case – that the Commonwealth was not the detaining entity because detention was a requirement of the laws of Nauru. That was so notwithstanding the Commonwealth's significant involvement. Nauru's control over these matters was highlighted on the eve of the hearing of the case, when the Nauruan government announced that the detention centre was to become fully 'open' – detainees would be allowed to come and go essentially as they pleased (at [19]).

The conclusion of the plurality draws attention to the domestic laws and limits of countries conducting offshore detention. Detention must be imposed by those laws; otherwise, the Commonwealth will be open to a *Lim* challenge. That also means that challenges to the lawfulness of detention would need to be brought in the other country (for example, by challenging the constitutionality of the Nauruan laws).

The factual basis of the plurality's judgment also means it does not necessarily extend to other detention centres, such as Manus. The situation of each centre will turn on its own facts. If the Commonwealth can be said, on the facts, to be detaining persons sent overseas, then the scope of the executive's power to detain will arise. And as the judgments of Bell, Gageler and Gordon JJ show, the Court is likely to impose limits on that power. At the least, it seems likely that the limits which apply to executive detention onshore will apply offshore as well.

At the same time, the government now knows that it can make overseas processing arrangements and, to the extent that any offshore detention depends on the laws of the other country and does not involve the Commonwealth to a greater extent than Nauru, the situation is likely to government be upheld. **LSJ**

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*Andrew was involved in *M68* as part of the legal team for the Minister in the early stages of the case. Andrew also acknowledges assistance for this note gained from papers given by Stephen Donaghue QC and Kristen Walker QC on 9 March 2016 at a seminar on the *Future of Refugee Law*.