

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No M61/2010

PLAINTIFF M61/2010E

PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ORS

DEFENDANTS

Matter No M69/2010

PLAINTIFF M69 OF 2010

PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ORS

DEFENDANTS

Plaintiff M61/2010E v Commonwealth of Australia
Plaintiff M69 of 2010 v Commonwealth of Australia
[2010] HCA 41
11 November 2010
M61/2010 and M69/2010

ORDER

In each matter:

- 1. Declare that, in recommending to the second defendant that the plaintiff was not a person to whom Australia has protection obligations, the third defendant made an error of law, in that the third defendant did not treat the provisions of the Migration Act 1958 (Cth) and the decisions of Australian courts as binding, and, further, failed to observe the requirements of procedural fairness.*
- 2. Application otherwise dismissed.*
- 3. First and second defendants to pay the plaintiff's costs.*

Representation

D S Mortimer SC with R M Niall and K E Foley for the plaintiff in M61/2010 (instructed by Allens Arthur Robinson Lawyers)

S G E McLeish SC with L G De Ferrari and P D Herzfeld for the plaintiff in M69/2010 (instructed by Holding Redlich)

S J Gageler SC, Solicitor-General of the Commonwealth with S P Donaghue and D F O'Leary for the first and second defendants in both matters (instructed by Australian Government Solicitor)

S P Donaghue for the third and fourth defendants in both matters (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Plaintiff M61/2010E v Commonwealth of Australia **Plaintiff M69 of 2010 v Commonwealth of Australia**

Administrative law – Procedural fairness – Error of law – Refugees – Migration – Offshore processing – Plaintiffs were "offshore entry persons" under *Migration Act 1958* (Cth) ("Migration Act") – Plaintiffs detained under s 189(3) of Migration Act – Each claimed Australia owed him protection obligations under Refugees Convention as amended by Refugees Protocol – Each plaintiff precluded from making valid visa application unless Minister decided in public interest to allow: s 46A of Migration Act – Minister had power to grant visa in absence of valid application: s 195A of Migration Act – Each plaintiff subject to "Refugee Status Assessment" by departmental officer and subsequent "Independent Merits Review" by independent contractor – Each departmental officer and independent reviewer concluded plaintiff not a person to whom Australia had protection obligations – Powers under ss 46A and 195A "may only be exercised by the Minister personally" – Minister not under duty to consider whether to exercise power under s 46A or s 195A – Whether continuing detention lawful because assessment and review were steps taken under and for purposes of Migration Act – Whether Minister had decided to consider exercising power under s 46A or s 195A of Migration Act in every case where an offshore entry person claimed to be owed protection obligations – Whether those who conducted assessment and review bound to afford procedural fairness to plaintiffs and act according to law – Whether each review procedurally fair and undertaken in accordance with law.

Constitutional law (Cth) – Validity of Commonwealth laws – Section 75(v) of Constitution – Whether s 46A of Migration Act invalid because consideration of exercise of power could not be enforced – Whether Minister's power arbitrary.

High Court – Original jurisdiction – Constitutional writs and orders – Minister not bound to consider exercising powers under s 46A or s 195A of Migration Act – Whether mandamus available – Whether certiorari would have practical utility – Whether declaration would produce foreseeable consequences for the parties.

Words and phrases – "Carltona principle", "excised offshore place", "Independent Merits Review", "offshore entry person", "Pacific Strategy", "Refugee Status Assessment", "unlawful non-citizen".

Constitution, s 75(v).

Migration Act 1958 (Cth), ss 46A, 189(3), 193(1)(c), 195A, 196(1), 198(2), 198A.

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Migration Amendment (Excision from Migration Zone) Act 2001 (Cth).

Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth).

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. The plaintiff in each of these matters entered Australian territory by entering the Territory of Christmas Island. The Territory of Christmas Island is what the *Migration Act* 1958 (Cth) ("the Migration Act") calls an "excised offshore place"¹. Neither plaintiff is an Australian citizen. Neither held a valid visa to enter Australia. On arriving at Christmas Island, each was detained under s 189(3) of the Migration Act².

2 Each plaintiff is a citizen of Sri Lanka. Each arrived at Christmas Island by boat. Each claims that he is a non-citizen in Australia to whom, in the words of s 36(2)(a) of the Migration Act, "Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"³. The Migration Act provides⁴ that a person who, like each of the plaintiffs, became what the Act calls "an unlawful non-citizen" by entering Australian territory at an excised offshore place, cannot make a valid application for a visa. Accordingly, although the plaintiffs claim to be non-citizens to whom Australia has protection obligations, they cannot validly apply for that class of visa known as protection visas. They therefore cannot engage those provisions of the Migration Act which would oblige the Minister to consider an application and, if satisfied that the criteria for granting the visa are met, grant the visa⁵.

3 While the plaintiffs were detained, officers of the Department of Immigration and Citizenship made, in each case, what departmental documents refer to as a "Refugee Status Assessment", or "RSA", and concluded that neither plaintiff was a person to whom Australia had protection obligations. Each

1 s 5(1).

2 Section 189(3) provides: "If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person."

3 The "Refugees Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951; the "Refugees Protocol" means the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

4 s 46A(1).

5 s 65.

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plaintiff asked for the decision made by the relevant officer of the Department to be reviewed. What the Department calls an "Independent Merits Review", or "IMR", was undertaken by persons who were not officers of the Department, but had been engaged by a company with which the Department had contracted for the provision of such reviews. In each case, the reviewer concluded that the plaintiff was not a person to whom Australia had protection obligations.

4 The lawfulness of the plaintiffs' detention is not in issue in these proceedings. But the plaintiffs assigned a radically different basis for the conclusion that their detention was lawful from that given by the Commonwealth and the Minister. The plaintiffs submitted that their continuing detention, while inquiries were made about their claims to be refugees, was lawful because those steps were being taken under and for the purposes of the Migration Act. By contrast, the Commonwealth and the Minister submitted that the plaintiffs were detained while inquiries having no statutory foundation, whether in the Migration Act or otherwise, were conducted and that the detention was lawful because those inquiries might, but need not, lead to an exercise of powers under the Migration Act. The resolution of this issue is critical to the outcome of the litigation.

The proceedings

5 Each plaintiff instituted proceedings in the original jurisdiction of this Court, naming the Commonwealth, the Minister, and the person who conducted the review, as defendants. Plaintiff M61 joined as the fourth defendant the departmental officer who made the original assessment; Plaintiff M69 joined the Secretary of the Department as the fourth defendant. Each plaintiff alleged, among other things, that he was not afforded procedural fairness during the original assessment or the subsequent review. Each plaintiff alleged that the persons who undertook the assessment and the relevant review made errors of law by not treating themselves as bound to apply relevant provisions of the Migration Act and what this Court and other Australian courts have held about the way in which the criterion of being a person to whom Australia owes protection obligations must be understood and applied.

6 The plaintiff in the second matter, Plaintiff M69, further alleged that the provision of the Migration Act which precludes him from making a valid application for a protection visa (s 46A(1)), and the rest of the section of which that provision forms a part, are invalid.

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7 Each plaintiff claims relief by way of injunction, certiorari and mandamus. Plaintiff M69 also claims relief by way of declaration. One of the declarations claimed by Plaintiff M69 is a declaration that s 46A of the Migration Act is invalid but these reasons will show that the challenge to the validity of s 46A should fail.

8 In considering whether other relief claimed by the plaintiffs should be granted, attention must focus on what was done in the Independent Merits Review. What was done in the Refugee Status Assessment was overtaken by that review. These reasons will show that, in conducting a review, the reviewer was bound to afford procedural fairness to the person whose claim was being reviewed, and was bound to act according to law by applying relevant provisions of the Migration Act and decided cases. These reasons will further show that, although certiorari and mandamus should not issue, a declaration should be made in each case that the person who conducted the Independent Merits Review made the error of law that has been identified and that the plaintiff was not afforded procedural fairness in the conduct of that review. There being no present threat to remove either plaintiff without a further RSA being undertaken, in which the law would be correctly applied and procedural fairness afforded, it is not now necessary to consider granting an injunction.

9 The most important of the steps that lead to these conclusions can be summarised as follows:

- (a) Because the Minister has decided to consider exercising power under either s 46A or s 195A of the Migration Act in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations, the RSA and IMR processes taken in respect of each plaintiff were steps taken under and for the purposes of the Migration Act.
- (b) Because making the inquiries prolonged the plaintiffs' detention, the rights and interests of the plaintiffs to freedom from detention at the behest of the Australian Executive were directly affected, and those who made the inquiries were bound to act according to law, affording procedural fairness to the plaintiffs whose liberty was thus constrained.
- (c) The inquiries were not made according to law and were not procedurally fair.

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- (d) Because the Minister is not bound to consider exercising either of the relevant powers, mandamus will not issue to compel consideration, and certiorari would have no practical utility. But in the circumstances of each case, a declaration should be made to the effect described earlier.

10 Neither the issues which arise in these matters, nor the particular questions of statutory construction and application which fall for consideration, can be understood without close attention to the critical provisions of the Migration Act, ss 46A and 195A, placing those provisions in their relevant legislative and historical contexts.

Sections 46A and 195A

11 So far as relevant, s 46A provides:

- "(1) An application for a visa is not a valid application if it is made by an offshore entry person who:
- (a) is in Australia; and
 - (b) is an unlawful non-citizen.
- (2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.
- (3) The power under subsection (2) may only be exercised by the Minister personally.
- ...
- (7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances."

12 So far as presently relevant, s 195A provides:

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"Persons to whom section applies"

- (1) This section applies to a person who is in detention under section 189.

Minister may grant visa

- (2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).
- (3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

- (4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

- (5) The power under subsection (2) may only be exercised by the Minister personally."

13 It will be observed that both s 46A and s 195A give a power that it is said "may only be exercised by the Minister personally"⁶. Both provide⁷ that the Minister does not have a duty to consider whether to exercise the power. The power given by s 46A is, in effect, to determine that an offshore entry person may make a valid application for a visa of a class specified. It is commonly referred to as a decision to "lift the bar" (scil. on making a valid application for a visa). The power given by s 195A is, in effect, to grant a visa without there first

⁶ ss 46A(3), 195A(5).

⁷ ss 46A(7), 195A(4).

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having been a valid application for that visa. Both are powers that are exercisable "[i]f the Minister thinks that it is in the public interest to do so".

The issues

14 Each plaintiff's claim for relief, on account of the alleged denial of procedural fairness and error of law, necessarily directed attention to what power was exercised when the relevant departmental officer conducted a Refugee Status Assessment of each plaintiff, and when the independent contractor conducted the review of that assessment. There can be no consideration of what are the limits on the exercise of a power without first identifying the power that is exercised.

15 The Commonwealth and the Minister submitted that both the assessments and the reviews of the assessments were undertaken in exercise of non-statutory executive power under s 61 of the Constitution. It followed, so they submitted, that there was no obligation to afford procedural fairness in the conduct of those assessments and reviews, and that it mattered not whether those who undertook the inquiries had misunderstood or misapplied the law.

16 Plaintiff M61 alleged that the RSA and IMR processes, undertaken after the plaintiff had entered Australian territory, are properly seen as "either part of the Minister's exercise of powers in ss 46A and 195A or as informing their exercise because of the centrality of a refugee status determination to the execution of the Act". Although Plaintiff M69 adopted these submissions as an alternative way of putting his case, the principal argument advanced on behalf of Plaintiff M69 was that s 46A of the Migration Act is invalid because sub-s (7) gives "an effectively unfettered and unreviewable statutory power to decide whether or not to exercise the power in sub-s (2)". Plaintiff M69 further submitted that, if the inquiries made in the course of the RSA and IMR processes were made pursuant to executive power under s 61 of the Constitution, and not under any authority conferred by statute, those making the inquiries were still obliged to act with procedural fairness and address the legally correct questions.

17 No party submitted that, on any branch of the arguments advanced, the privative provisions of s 474 of the Migration Act were engaged.

18 As noted earlier, evaluation of the competing submissions requires consideration of ss 46A and 195A in their proper statutory and historical contexts. The chief feature of statutory context to which regard must be had is

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those provisions of the Migration Act that provide for the detention and removal of unlawful non-citizens and, in particular, offshore entry persons.

Detention and removal

19 As noted at the outset of these reasons, each plaintiff was detained in the Territory of Christmas Island pursuant to the powers given by s 189(3) of the Migration Act. Section 196(1) fixes the duration of that detention. It provides that:

"An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:

- (a) removed from Australia under section 198 or 199; or
- (b) deported under section 200; or
- (c) granted a visa."

In the circumstances of these cases, where s 200 has no application, the relevant operation of s 196(1) is that each plaintiff must be kept in detention until he is either removed from Australia or granted a visa.

20 Division 8 of Pt 2 of the Migration Act (ss 198-199) regulates the removal from Australia of unlawful non-citizens. Immediately relevant to the circumstances of these cases are certain of the provisions of s 198(2). That sub-section, so far as presently relevant, provides that:

"An officer must remove as soon as reasonably practicable an unlawful non-citizen:

- (a) who is covered by ... paragraph 193(1)(b), (c) or (d); and
- (b) who has not subsequently been immigration cleared; and
- (c) who ...
 - (i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone".

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Section 193(1)(c) refers to a person "detained under subsection 189(2), (3) or (4)". Each plaintiff, having been detained under s 189(3), is therefore an unlawful non-citizen "covered by ... paragraph 193(1) ... (c)". Since each plaintiff is an offshore entry person, neither has been, or could have been, immigration cleared⁸. Since each plaintiff is an offshore entry person in Australia, neither can make a valid application for a visa⁹.

21 On an initial reading of s 198(2), it might be thought that the conditions which engaged the obligation to remove each plaintiff from Australia "as soon as reasonably practicable" were satisfied as soon as the plaintiffs entered the Territory of Christmas Island. If that were so, it would also follow that the continued detention of the plaintiffs, for so long as was necessary to undertake the RSA or the IMR, was unlawful. (In neither case were processes for the plaintiff's removal from Australia set in train until after the completion of both the assessment and the review.) Detention is required and authorised by the Migration Act until removal or grant of a visa. But if attention were confined to the words of s 198(2), there being a duty to remove each plaintiff as soon as reasonably practicable, with there being no possibility of making a valid application for a visa, prolongation of detention for so long as was necessary for the Department to conduct inquiries about the refugee status of the plaintiffs might, at first sight, appear to have been unlawful.

22 As noted at the outset of these reasons, however, it is important to explore the foundations for accepting, as the plaintiffs did, that their detention while the RSA and IMR processes were undertaken was lawful. Exploration of those foundations shows what powers were being exercised when the RSA was conducted and a review of that assessment was undertaken.

23 To read s 198(2) as not permitting detention for so long as was necessary to undertake the RSA and IMR processes would impermissibly divorce it from its text and its context.

24 First, there is a textual reason for reading s 198(2) as permitting detention for those purposes.

8 ss 166(1)(a)(ii), 172(1)(b).

9 s 46A(1).

25 Section 198(2)(c) expressly contemplates that an unlawful non-citizen who is covered by s 193(1)(c) could make a valid application for a substantive visa that can be granted when the applicant is in the migration zone. Yet, by operation of s 46A(1), no offshore entry person in Australia can make a valid application for a visa. Section 193(1)(c) deals with persons who are detained under s 189(2), (3) or (4). Sub-sections (2), (3) and (4) of s 189 contemplate detention of persons in various circumstances. Sub-section (2) of s 189 deals with persons in Australia, but outside the migration zone, suspected of seeking to enter the migration zone; sub-s (3) with unlawful non-citizens in an excised offshore place; sub-s (4) with persons in Australia, but outside the migration zone, suspected of seeking to enter an excised offshore place. Whichever of those powers of detention were to be engaged, the person detained, if brought into Australia, would be an offshore entry person precluded by s 46A(1) from making a valid application for a visa. The only power to permit the making of a valid application for a visa by an offshore entry person in Australia is the power in s 46A(2). The fact that s 198(2)(c) contemplates the making of a valid application for a substantive visa by a person who is covered by s 193(1)(c) suggests strongly that s 198(2) should be read as permitting detention while steps are taken to determine whether the person detained should be permitted to make such an application by the Minister exercising power under s 46A(2).

26 There are also contextual reasons that point to the conclusion that detention while steps are taken to determine whether the detainee should be permitted to make a valid application for a visa is lawful.

27 First and foremost among those contextual reasons is that, read as a whole, the Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol. In some respects, as was explained in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*¹⁰, the provisions of the Migration Act may, at times, have gone beyond what would be required to respond to those obligations. It is not necessary to explore those issues here. Rather, what is presently significant is that the Migration Act proceeds, in important respects, from the assumption that Australia has

10 (2005) 222 CLR 161 at 178-180 [54]-[59]; [2005] HCA 6.

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protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.

28 To understand how that assumption is reflected in the Migration Act, it is necessary to recognise some features of the history of the relevant provisions.

Historical context

29 In 2001, the Parliament enacted six Acts¹¹, one after the other, which affected the entry into, and remaining in, Australia by aliens. Those six Acts were all assented to, and for the most part came into operation, on the same day. The first of those Acts, the *Border Protection (Validation and Enforcement Powers) Act 2001 (Cth)* ("the Border Protection Act"), sought to validate certain actions taken between 27 August 2001 and the commencement of the Act. The actions in question were actions taken by the Commonwealth, by any Commonwealth officer, or by any other person acting on behalf of the Commonwealth, in relation to the MV *Tampa* and certain other vessels, and actions in relation to persons who were on board those vessels during the relevant period. The circumstances that gave rise to those actions are sufficiently described in *Ruddock v Vadarlis*¹². In addition, the Border Protection Act, and several of the other five Acts, amended the Migration Act to change the way in which persons who arrived in, or sought to enter, Australian territory without a valid visa were to be dealt with.

11 *Border Protection (Validation and Enforcement Powers) Act 2001 (Cth)*; *Migration Amendment (Excision from Migration Zone) Act 2001 (Cth)*; *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth)*; *Migration Legislation Amendment Act (No 1) 2001 (Cth)*; *Migration Legislation Amendment Act (No 5) 2001 (Cth)*; *Migration Legislation Amendment Act (No 6) 2001 (Cth)*.

12 (2001) 110 FCR 491.

30 Those changes had a number of features of immediate relevance to the present matters. First, certain Australian territory, including the Territory of Christmas Island, was excised from the migration zone¹³, thus introducing the category of places called excised offshore places. A person who entered Australia at an excised offshore place, after the excision time, and who became an unlawful non-citizen because of that entry, was identified as an "offshore entry person". The Migration Act was amended¹⁴, by inserting s 46A, to provide that an application for a visa is not a valid application if it is made by an offshore entry person who is in Australia and is an unlawful non-citizen.

31 One of the consequential provisions made for dealing with unauthorised arrivals in places excised from the migration zone was to provide, by the insertion of s 198A into the Migration Act¹⁵, that offshore entry persons might be taken from Australia to a country declared under that section. The new s 198A(3) provided that the Minister might declare a country for the purposes of that section by declaring that, in effect, the country in question provides access for persons seeking asylum to effective procedures for assessing their need for protection; provides protection for persons seeking asylum pending determination of their refugee status; provides protection to persons who are given refugee status pending their voluntary repatriation to their country of origin or resettlement in another country; and meets relevant human rights standards in providing that protection. An offshore entry person being dealt with under that provision is taken¹⁶ not to be in immigration detention. The Republic of Nauru and Papua New Guinea were declared countries and persons were removed from Australia to those places in exercise of the power given by s 198A.

32 The Department referred to the procedure contemplated by s 198A, of removing offshore entry persons from Australia to another country, as the "Pacific Strategy". Removal of offshore entry persons to those countries began in 2001 but ceased in 2008.

13 *Migration Amendment (Excision from Migration Zone) Act.*

14 *Migration Amendment (Excision from Migration Zone) Act*, s 3, Sched 1, item 4.

15 *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act*, s 3, Sched 1, item 6.

16 s 198A(4).

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33 While the so-called Pacific Strategy was operating, claims by offshore entry persons taken to a declared country that they were owed protection obligations were assessed according to procedures specified by the Department. The document that recorded those procedures began by stating Australia's international obligations in the following terms:

"Australia's primary obligation under the Refugees Convention is not to *refoule* (return) a refugee, either directly or indirectly, to a country where they have a well-founded fear of persecution for a Convention ground. Australia's protection obligations extend to refugees who have entered Australia's territorial seas. *The Pacific strategy in no way detracts from these obligations.*" (emphasis added)

Because persons dealt with under these procedures were not in Australia, but were in either Nauru or Papua New Guinea, s 46A of the Migration Act did not apply to prevent their making a valid application for a visa. But being outside Australia, and in a declared country, such persons could apply for only certain classes of visa and, in particular, could not apply for a Protection (Class XA) visa.

34 It is not necessary to examine further the operation of the arrangements that were made to effect the Pacific Strategy. What is presently important is that the changes to the Migration Act that were worked by inserting s 46A and, in consequence, inserting s 198A, are to be seen as reflecting a legislative intention to adhere to that understanding of Australia's obligations under the Refugees Convention and the Refugees Protocol that informed other provisions made by the Act. As the document recording procedures for administration of the so-called Pacific Strategy said:

"The new legislation underpinning the Pacific strategy has two mechanisms that reflect Australia's obligations under Article 33 of the Refugees Convention and other Conventions. These mechanisms are:

- *a framework to enable the Minister for Immigration and Multicultural and Indigenous Affairs to decide whether to allow an application for a visa to be made by unauthorised arrivals on excised offshore places* (offshore entry persons) (while in Australia), following consideration of protection obligations under the relevant United Nations Conventions; and

- the ability to take unauthorised arrivals who have entered Australia at excised offshore places (such as Ashmore Reef and Christmas Island) to another country provided that the Minister for Immigration and Multicultural and Indigenous Affairs has declared under s 198A of the *Migration Act* 1958 that the country [meets the requirements described earlier]." (emphasis added)

35 In the light of these considerations of text and context, the obligation created by s 198(2)(a) to remove an unlawful non-citizen who is covered by s 193(1)(c) "as soon as reasonably practicable" should be read as accommodating the making of inquiries, in the words quoted earlier, "to enable the Minister ... to decide whether to allow an application for a visa to be made by unauthorised arrivals on excised offshore places". That is, s 198(2) should be read as accommodating the taking of steps for the purpose of informing the Minister of matters relevant to the possible exercise of power under either s 46A or s 195A. Assuming the relevant steps were taken promptly (and the contrary was not suggested in either of these matters) detention while the inquiries were made would be lawful.

36 To state the accommodation between s 198(2) and the possible exercise of power under s 46A or s 195A in this way does not expressly identify whether, or to what extent, there has been any exercise of power under those sections. Or, to put the same point another way, what exactly is meant by "the taking of steps for the purpose of informing the Minister of matters relevant to the possible exercise of power"? Given that the Commonwealth and the Minister submitted that the inquiries that were made were not undertaken under either s 46A or s 195A, but were made in exercise of non-statutory executive power, it is necessary to examine the matter further. To do that, it is necessary to begin by considering what the Minister has directed be done.

The Minister's announcement

37 On 29 July 2008, the Minister announced that the Government had decided to strengthen and enhance the RSA process. This announcement followed an earlier announcement by the Government "that asylum claims of future unauthorised boat arrivals would be processed on Christmas Island".

38 Following the announcement of 29 July 2008, the Department developed two procedural manuals describing the operation of the RSA process: one entitled "Refugee Status Assessment Procedures Manual" ("the RSA Manual"),

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and the other "Guidelines for the Independent Merits Review of Refugee Status Assessments" ("the IMR Manual"). Argument of the present matters proceeded on the basis that the editions of those manuals produced in September 2009 and August 2009 respectively were used in connection with the assessment and review of each plaintiff's claims.

39 The manuals were cast in terms that made plain that the processes for which each provided were to be applied to *all* unlawful non-citizens who entered Australia at an excised offshore place and who, as the RSA Manual said, raised "claims or information which *prima facie* may engage Australia's protection obligations".

40 The adoption of these procedures, and their application in these particular cases, can only be understood as implementing the announcements that have been mentioned: one that the Pacific Strategy would no longer be followed; the other that steps of the kind ultimately recorded in the RSA Manual and the IMR Manual would be undertaken as the means of meeting Australia's obligations under the Refugees Convention and Refugees Protocol, instead of following the Pacific Strategy. And if the power to remove offshore entry persons from Australia under s 198A was not to be used, the only statutory powers that could be engaged to avoid breaching Australia's international obligations were the powers under ss 46A and 195A.

The RSA Manual

41 The purpose of the RSA process was described in the RSA Manual as being "so that the Minister ... can be advised whether Australia's protection obligations under the Refugees Convention are engaged". It was said that "[c]onsideration of the exercise of the Minister's power under s 46A to allow a visa application to be made will occur following assessment of protection obligations as outlined in this manual".

42 Much emphasis was given in the Manual to the RSA process being "a non-statutory process". But the source of the power to undertake the process was not identified. Rather, the Manual described what were said to be some consequences of the process being "a non-statutory process". In particular, it was said that "[t]his means that the Migration Act, the Migration Regulations 1994 ... and Australian case law on the interpretations of the definition of a refugee and 'protection obligations' do not apply", though it was said that "officers should be guided by these as a matter of policy".

43 The Manual said that the common law rules of natural justice or procedural fairness were to be applied "to safeguard the fairness of the RSA procedures". The particular procedures laid down in the Manual were described as being "modelled closely on the onshore [p]rotection visa determination procedures". In that respect, it may be noted that, although the process was repeatedly described as "non-statutory", the Manual proceeded on a footing that suggested that some provisions of the Migration Act applied to at least some aspects of the process. So, for example, the directions given in the Manual about seeking further information or comment from a claimant proceeded on the footing that what the Migration Act describes as "non-disclosable information"¹⁷ need not be disclosed, regardless of whether procedural fairness would require that to be done.

44 If, at the end of the RSA process, an offshore entry person was found to be owed protection obligations, the Manual described the consequence as being that a submission would be prepared by the Department for the Minister "advising the Minister that Australia's protection obligations are engaged and seeking his/her agreement to lift the bar under s 46A of the Act". By contrast, if the officer making the assessment determined that the person was not a person to whom Australia has protection obligations, no submission would go to the Minister. Instead, an opportunity would be given to seek the review of the decision under the IMR process. If the outcome of the review was negative, an opportunity would be given to the person to provide any new or additional information which he or she wished the Department to take into consideration. A further assessment would be undertaken by the Department of whether any other international treaty obligation was engaged in the particular case. If no other international obligation was engaged, the process for removal of the person from Australia would begin.

The IMR Manual

45 As would be expected, much that was set out in the IMR Manual followed or reflected what was said in the RSA Manual. It is therefore not necessary to do more than mention some particular matters arising from the IMR Manual.

¹⁷ ss 5, 424A(3)(c).

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46 The system of Independent Merits Review was described, in the IMR Manual, as having been introduced as one of the new arrangements announced by the Minister on 29 July 2008. Previously, reviews of departmental assessments of refugee status had been undertaken by a senior officer of the Department.

47 Much emphasis was given in the IMR Manual (as it was in the RSA Manual) to the RSA process and the IMR process being "non-statutory". Again, however, the Manual did not seek to identify what power was being exercised. Rather, the consequences said to follow from the process being "non-statutory" were identified. In particular, it was said in the IMR Manual that independent reviewers "may still be guided by the legislated interpretations of the Refugees Convention in sections 36 and 91R-91U of the Act and Australian case law on the interpretation of 'protection obligations'", but it was also said to be "important to note that these sources of interpretation are not binding authorities".

48 The IMR process was subject to what the Department described as "a quality assurance check before an offshore entry person would be notified of the outcome of the IMR review". That process, now supervised by the Registrar of the Refugee Review Tribunal (while on secondment to the Department), was said to "primarily [involve] checking IMR recommendations for spelling, grammatical, cut and paste or other obvious errors". But it was a process that may "result in a suggestion being made to an independent reviewer that he or she may wish to consider an additional matter, consider more up to date country information, or clarify parts of a decision-record or recommendation".

49 At the end of the review, the reviewer was to make a recommendation about whether Australia had protection obligations to the claimant. If the reviewer concluded that Australia did have protection obligations to the claimant, a departmental officer would prepare a submission to the Minister for consideration of the exercise of power under either s 46A(2) or s 195A. If the reviewer concluded that Australia did not have protection obligations to the claimant, no submission would be made to the Minister. Steps of the kind described in connection with the RSA process for considering engagement of any other relevant international obligation would be undertaken and, subject to that, processes for removing the claimant would then begin.

Review by contractors

50 What, if any, significance attaches to the fact that, as noted at the outset of these reasons, the IMR process was conducted by persons engaged by an independent contractor, Wizard People Pty Ltd? That company (the contractor) had agreed with the Commonwealth that it would make specified persons available to undertake reviews of unfavourable Refugee Status Assessments of offshore entry persons "seeking to engage Australia's protection obligations under the Refugees Convention". As noted above, the only function of the reviewer was to make a recommendation about whether protection obligations were owed. Any decision to permit the making of an application for a visa or to grant a visa would be made by the Minister. Any decision to remove a claimant would be made by a departmental officer.

51 It may be accepted, for the purposes of the present matters, that neither the contractor, nor any of the specified persons engaged by the contractor to perform the services it had agreed to provide, is an officer of the Commonwealth. More particularly, it may be accepted that the reviewers who are named as defendants in these matters are not officers of the Commonwealth. Accepting that to be so does not determine, however, whether relief of the kind sought by either plaintiff can now be granted. Rather, the observation that those who conducted the independent reviews are assumed not to be officers of the Commonwealth could determine only that a claim for mandamus, prohibition or injunction against those persons would not, standing alone, found the original jurisdiction of this Court under s 75(v) of the Constitution. In these particular matters, the jurisdiction of the Court is found in s 75(iii) (as matters in which the Commonwealth, or a person being sued on behalf of the Commonwealth, is a party), s 75(v) (as matters in which mandamus and injunction are sought against the Minister and either a departmental officer or the Secretary of the Department – all officers of the Commonwealth) and even, perhaps, s 75(i) (as matters arising under any treaty – the Refugees Convention and the Refugees Protocol). Accordingly, it is appropriate to leave, for another day, the question whether a party identified as "an independent contractor" nevertheless may fall within the expression "an officer of the Commonwealth" in s 75(v) in circumstances where some aspect of the exercise of statutory or executive authority of the Commonwealth has been "contracted out".

52 Instead, attention must be directed to what power was being exercised in each of these cases when, *while the claimant was detained*, a departmental officer undertook a Refugee Status Assessment and then an independent contractor

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reviewed that assessment. Was it, as the Commonwealth and the Minister submitted, no more than a non-statutory executive power to inquire? Was it, as Plaintiff M61 submitted, an exercise of power under s 46A or s 195A? Was it, as Plaintiff M69 submitted, an exercise of non-statutory executive power to inquire because s 46A is invalid? The question of validity must be examined first.

Validity of s 46A

53 The argument advanced on behalf of Plaintiff M69, that s 46A is wholly invalid, began from observations made in a number of cases¹⁸ about the special significance of s 75(v). As was said in *Bodruddaza v Minister for Immigration and Multicultural Affairs*¹⁹, "[a]n essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers²⁰". Section 75(v) furthers that end by controlling jurisdictional error and makes it "constitutionally certain that there [is] a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power"²¹.

54 The argument proceeded from these premises to a conclusion that, not only will the courts declare and enforce the limits of power, there must exist in every case limits on power that can be enforced. More particularly, it was submitted that there cannot be a grant of power on terms of the kind found in s 46A(7): that the person to whom the power is granted need not consider its exercise, whether asked to do so or in any other circumstances. Such a power, it was submitted, would be an arbitrary power, and the purpose of s 75(v) is to prevent arbitrary power. Further support for the argument was sought by reference to three other considerations. First, reference was made to the notion of rule of law and the well-known dictum of Dixon J in *Australian Communist*

18 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 668 [45]; [2007] HCA 14; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J; [1948] HCA 7.

19 (2007) 228 CLR 651 at 668 [46].

20 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152-153 [43]; [2000] HCA 5.

21 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 363.

*Party v The Commonwealth*²² that the Constitution is framed in accordance with many traditional conceptions of which some, including the rule of law, are simply assumed. Second, reference was made to what was said in *Kirk v Industrial Court (NSW)*²³: that to deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court "would be to create islands of power immune from supervision and restraint". Third, reference was made to the uncontroversial proposition that "a non-judicial body cannot determine the limits of its own power".

55 As noted earlier, the particular conclusion urged, that s 46A(7) is invalid, proceeded from the broad proposition that there cannot be a valid grant of power without enforceable limits. The merits of that broader proposition need not be examined. The argument in this case necessarily focused upon a much narrower aspect of that broad proposition: whether there can be a valid grant of power on terms that *consideration* of the exercise of that power cannot be enforced.

56 Contrary to the submissions on behalf of Plaintiff M69, neither s 46A as a whole, nor s 46A(7) in particular, is a provision which is of so little content as not to constitute an exercise of legislative power or to be a "law" as a rule of conduct or a declaration as to power, right or duty²⁴. The relevant content of the provision is readily expressed: "the Minister may ... but need not consider whether to ...". And that is not a form of grant of power unknown to the federal statute book, at least in recent years²⁵.

22 (1951) 83 CLR 1 at 193; [1951] HCA 5.

23 (2010) 239 CLR 531 at 581 [99]; [2010] HCA 1.

24 Cf *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [102]; [2003] HCA 2, quoting *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 per Latham CJ; [1943] HCA 47.

25 See, for example, Migration Act, ss 37A, 46B, 48B, 72, 91F, 91L, 91Q, 137N, 195A, 197AA-197AG, 261K, 351, 391, 417, 454, 495B, 501A, 501J, 503A; *Australian Citizenship Act 2007* (Cth), s 48; *Australian Crime Commission Act 2002* (Cth), s 9; *Commonwealth Radioactive Waste Management Act 2005* (Cth), s 3C; *Taxation Administration Act 1953* (Cth), Sched 1, s 357-70; *Trade Marks Act 1995* (Cth), s 84A.

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57 Grant of power on the terms set out in s 46A(7) does not clash with s 75(v), or with its place or purpose in the Constitution. Maintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise. Nor does it entail that every discretion to exercise a power must be read as if satisfaction of identified criteria would require its exercise²⁶. Yet it was one or other of these propositions which underpinned the arguments for invalidity.

58 Nor do considerations of the kind embraced by the expression "the rule of law" yield some contrary conclusion. As developed in argument, the relevant content of the rule of law was said to be that it is for the courts to enforce the limits on power and for the Parliament to confer a power on a Minister subject to limits. The contravention of the rule of law was described as being to prevent the constitutional jurisdiction in s 75(v) being exercised in relation to the power. But that is not so. Section 46A(7) does not prevent any exercise of jurisdiction under s 75(v).

59 The repository of the power given by s 46A does not determine the limits of the power. If the power is exercised, s 75(v) can be engaged to enforce those limits. No "island of power" is created. Rather, what s 46A(7) does is provide that the repository of the relevant power need not consider whether to exercise it. That is, there being no duty to exercise the power, mandamus will not go to compel its exercise. But that does no more than deny that the particular grant of power entails a duty to consider its exercise.

60 The challenge to the validity of s 46A(7) was not made good. No question therefore arises about the validity of the other provisions of s 46A.

61 This being so, the question – what power was exercised when Refugee Status Assessments and Independent Merits Reviews were conducted with respect to each plaintiff? – becomes was it, as the Commonwealth submitted, no more than a non-statutory executive power to inquire? Was it, as Plaintiff M61

26 Cf *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106; [1971] HCA 12; *Leach v The Queen* (2007) 230 CLR 1; [2007] HCA 3.

submitted (and Plaintiff M69 adopted as an alternative argument), an exercise of power under s 46A or s 195A?

Power

62 The following six considerations bear upon the issue. First, the powers under ss 46A and 195A may *only* be exercised by the Minister *personally*²⁷. Second, the assessment and review were made in consequence of a ministerial direction. Third, in the circumstances of these cases, the continued detention of an offshore entry person, while an assessment and review were conducted, was lawful only because the relevant assessment and review were directed to whether powers under either s 46A or s 195A could or should be exercised. Fourth, if, on assessment or subsequent review, it was decided that Australia did have protection obligations to the claimant, a submission concerning the exercise of power under s 46A would be made to the Minister. Fifth, the plaintiffs submitted that a favourable assessment always or, as the plaintiffs put it, "automatically" led to the Minister exercising power under s 46A. Sixth, if, on assessment or subsequent review, it was decided that Australia did not have protection obligations to the claimant, no submission would be made to the Minister.

63 Of these six considerations, it is the first three that are most important. They are the most important because they present not only an apparent tension between considerations, but also the means of resolving that tension. There is an appearance of tension between the first consideration (that the statute requires that the relevant powers to lift the bar under s 46A, or grant a visa under s 195A, can *only* be exercised by the Minister personally) and the third (the lawfulness of continued detention for the purposes of inquiry). There is the appearance of tension between those considerations because together they invite the question: how could continued detention under the Migration Act be lawful if what prolongs the detention (the Department making inquiries) has no statutory footing? Yet a central contention of the Commonwealth and the Minister was that the inquiries which were made, and which necessarily prolonged each plaintiff's detention, were not made under statute.

64 It 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

27 ss 46A(3), 195A(5).

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Executive. Yet a proposition of that kind lay at the heart of the submissions advanced on behalf of the Commonwealth and the Minister. The Commonwealth and the Minister submitted that detention of an offshore entry person was permitted while the officer detaining the person awaited the *possibility* of the exercise of power under either s 46A or s 195A. That is, the obligation to bring to an end the detention of an unlawful non-citizen who is covered by s 193(1)(c), who has not subsequently been immigration cleared, and who has not made (and cannot make) a valid application for a visa, by removing that person from Australia as soon as reasonably practicable, was said to be suspended for so long as there remains a possibility (presumably a reasonable possibility) of an exercise of power under s 46A or s 195A.

65 Several points may be made about this proposition. First, the existence of any relevant possibility is wholly within the control of the Executive. It follows that the period of an individual's detention would be wholly within the control of the Executive. Second, deciding whether there is a relevant possibility of the exercise of power under either s 46A or s 195A would require some prediction of the likelihood of the exercise of a personal non-compellable power. A criterion of that kind is a very uncertain basis for determining whether detention is lawful or unlawful. Such a construction of the relevant provision should not be adopted unless no other construction is reasonably open. Instead, accommodation of the provisions governing detention and its duration, with what is done in relation to the possible exercise of power under ss 46A and 195A, must seek a firmer statutory foundation.

66 In these cases, that foundation is revealed by recognising the significance of the second matter that has been identified: that the inquiries that are made for the purposes of both the RSA and IMR processes are made in consequence of the decision announced in July 2008. There would otherwise appear to be an irreducible tension between the exercise of a statutory power to detain in a way that prolongs detention, because inquiries are being made, and those inquiries having no statutory foundation. This tension does not arise if the decision to establish and implement the RSA and IMR procedures, announced by the Minister, is understood not just as a direction to provide the Minister with advice about whether power under s 46A or s 195A can or should be exercised, but as a decision by the Minister to consider whether to exercise either of those powers in respect of any offshore entry person who makes a claim that Australia owes the claimant protection obligations.

67 Although the parties gave some prominence in argument to each of the other three considerations identified earlier as bearing upon the question of power, each is less important than the first three that have just been discussed. So, although it is right to observe, as the Commonwealth and the Minister emphasised, that no submission is put before the Minister if the outcome of the RSA and IMR processes is unfavourable to the claimant, that fact does not, of itself, deny that the Minister has begun the task of considering whether to exercise power under either s 46A or s 195A. That the Minister has begun that task is shown by consideration of the first three matters that have been mentioned. Likewise, while the plaintiffs sought to demonstrate that a favourable assessment or review has always led to the Minister exercising power under either s 46A or s 195A, that fact (if it be so) may assist in showing that the Minister has begun to consider whether to exercise the relevant power, but standing alone it does not require that conclusion.

68 It is convenient at this point to deal with how resolution of the issue that is now under consideration fits in with what is usually called the "Carltona principle"²⁸. The Carltona principle has been described²⁹ as a principle of agency, distinct from a delegation of power, which allows an agent to act in the principal's name and use all of the principal's power. The Commonwealth and the Minister submitted that, while the Carltona principle would allow activities of a Minister's Department to be attributed to a Minister, the position is different where (as here) the relevant powers are ones which the statute requires be exercised by the Minister personally. The Commonwealth and the Minister further submitted that an analogy could be drawn between the circumstances of these cases and those provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which deal with conduct for the purpose of making a decision and which were held, by the Federal Court of Australia in *Margarula v Minister for Environment*³⁰, to be confined to conduct of the relevant

28 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 37-38 per Mason J; [1986] HCA 40; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 449-453 [176]-[188] per Gummow and Hayne JJ; [2001] HCA 51.

29 Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed (2009) at 343-345 [6.45].

30 (1999) 92 FCR 35.

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decision-maker. Here, so the Commonwealth and the Minister submitted, the departmental inquiries should not be found to be any exercise of the Minister's powers under either s 46A or s 195A.

69 It is not necessary to decide whether the analogy which the Commonwealth and the Minister sought to draw is apt. Nor is it necessary to attempt to identify the limits of the *Carltona* principle. What is presently important is that what the Department did, in conducting assessments and obtaining reviews, was done in consequence of a ministerial decision that those steps be taken. In requiring those steps to be taken, the Minister did not seek to (and did not) delegate any power. But the fact that the steps were taken in consequence of a ministerial decision is important.

70 Exercise of the powers given by ss 46A and 195A is constituted by two distinct steps: first, the decision to *consider* exercising the power to lift the bar or grant a visa and second, the decision whether to lift the bar or grant a visa. The Minister is not obliged to take either step. Sections 46A(7) and 195A(4) expressly provide that the Minister does not have a duty to consider whether to exercise the relevant power. And ss 46A(2) and (3) and 195A(2) and (5) make plain that it is for the Minister personally to decide whether to exercise the relevant power. But here, the effect of the Minister's announcement was that, instead of removing offshore entry persons from Australia to a declared country under the powers given under s 198A, consideration would be given to exercising the powers given by ss 46A and 195A in every case in which an offshore entry person claimed that Australia owed that person protection obligations. The outcome of that consideration in any individual case would depend upon the result of the processes established by the Department in response to the ministerial announcement. But in order that Australia *not* breach the international obligations it had undertaken in the Refugees Convention and Refugees Protocol, consideration would be given, in every case, to the exercise of the only statutory powers available when the Pacific Strategy was no longer to be pursued: the powers given by ss 46A and 195A. Having decided that he should consider the exercise of power under s 46A or s 195A with respect to every offshore entry person who thereafter claimed that Australia owed that person protection obligations, the Minister required his Department to undertake the inquiries necessary to make an assessment and, if needs be, review the conclusion reached.

71 There having been a decision to consider exercise of the relevant powers in the present and other similar cases, the unchallenged assumption made in these

matters, that detention during the conduct of the assessment and review processes was lawful, is seen to be soundly based. The obligation to remove as soon as reasonably practicable, imposed by s 198(2), is read in the light of other provisions of the Migration Act. The express reference in s 198(2)(c) to the possibility of making a valid application for a visa accommodates the consideration of whether to exercise the powers given by ss 46A and 195A. The accommodation is founded upon the taking of the first step towards the exercise of those statutory powers: the decision to consider their exercise. It is not founded upon necessarily uncertain prognostications about whether exercise of the available powers will ever be considered.

Limits on power?

72 What, if any, relevant limits are there on the way in which the assessment and any subsequent review are conducted?

73 For the reasons that have already been given, the inquiries undertaken in making a Refugee Status Assessment, and any subsequent Independent Merits Review, were inquiries made after a decision to consider exercising the relevant powers and for the purposes of informing the Minister of matters that were relevant to the decision whether to exercise one of those powers in favour of a claimant. Those being the circumstances in which the inquiries were conducted, it is not necessary to examine the submissions advanced on behalf of Plaintiff M69 and the Commonwealth and the Minister about whether exercise of non-statutory executive power is or may be limited by a requirement to afford procedural fairness. Rather, the inquiries having the particular statutory foundations that have been identified, the principles that govern what limits there are to the way in which the assessment and any subsequent review are conducted are well established.

74 It was said, in *Annetts v McCann*³¹, that it can now be taken as settled that when a statute confers power to destroy, defeat or prejudice a person's rights,

31 (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; [1990] HCA 57. See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 61 [51] per McHugh, Gummow and Hayne JJ; [2005] HCA 50; *Saeed v Minister for Immigration and Citizenship* (2010) 84 ALJR 507 at 511 [11]; 267 ALR 204 at 208; [2010] HCA 23.

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interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power. In *Kioa v West*, different views were expressed about whether the requirements of procedural fairness arise from the common law³² or instead depend upon drawing an implication from the legislation which confers authority to decide³³. It is unnecessary to consider whether identifying the root of the obligation remains an open question³⁴ or whether the competing views would lead to any different result. It is well established, as held in *Annetts*³⁵, that the principles of procedural fairness may be excluded only by "plain words of necessary intendment".

75

In the present cases, the Commonwealth and the Minister submitted that, if any power was being exercised under s 46A(2) (and they submitted that it was not), there was no implied obligation to afford procedural fairness because the power is not a power to destroy, defeat or prejudice a right; it is a discretionary power to confer a right. This submission was framed in a way that took up only part of what was said in *Annetts*. Reference was made in *Annetts* to power to destroy, defeat or prejudice not just rights but also interests or legitimate expectations. It will not be necessary to explore in this case what place the notion of legitimate expectations has in this field of discourse³⁶. It is enough to say that the references in *Annetts* to "prejudice", "interests" and "legitimate expectations" suggest that the contrast which the Commonwealth and the Minister sought to draw between destruction, defeat or prejudice of a right, on the one hand, and a discretionary power to confer a right, on the other, proceeds from too narrow a conception of the circumstances in which an obligation to afford procedural fairness might arise. The more comprehensive statement of

32 (1985) 159 CLR 550 at 584 per Mason J; [1985] HCA 81.

33 (1985) 159 CLR 550 at 609, 615 per Brennan J.

34 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 142-143 [168]; [2000] HCA 57; *Saeed* (2010) 84 ALJR 507 at 511 [11]-[13]; 267 ALR 204 at 208-209.

35 (1990) 170 CLR 596 at 598. See also *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396; [1958] HCA 6.

36 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6.

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principle by Mason J in *FAI Insurances Ltd v Winneke*³⁷ sufficiently answers the submissions by the Commonwealth and the Minister. His Honour said that the obligation to afford procedural fairness is not limited to cases where the exercise of the power affects rights in the strict sense, but extends to the exercise of a power which affects an interest or a privilege. It is then important, in the present matters, to identify the rights and interests affected.

Rights or interests affected?

76 Contrary to the submissions of the Commonwealth and the Minister, the Minister's decision to consider whether power should be exercised under either s 46A or s 195A directly affected the rights and interests of those who were the subject of assessment or review. It affected their rights and interests directly because the decision to consider the exercise of those powers, with the consequential need to make inquiries, prolonged their detention for so long as the assessment and any necessary review took to complete. That price of prolongation of detention is a price which some claimants may have paid without protest. After all, they sought entry to Australia and this was the only way of achieving that end. And they claimed that return to their country of nationality entailed a real risk of persecution. But even if it were the fact that individuals were content to have detention prolonged, that must not obscure that what was being done, for the purposes of considering the exercise of a statutory power, had the consequence of depriving them of their liberty for longer than would otherwise have been the case.

77 Because the Minister was not bound to exercise power under either s 46A or s 195A, no matter what conclusion was reached in the assessment or review, it cannot be said that a decision to consider exercising the power affected some right of the offshore entry person to a particular outcome. The offshore entry person had no right to have the Minister decide to exercise the power or, if the assessment or review were favourable, to have the Minister exercise one of the relevant powers in his or her favour. Nonetheless, once it is decided that the assessment and review processes were undertaken for the purpose of the Minister considering whether to exercise power under either s 46A or s 195A, it follows from the consequence upon the claimant's liberty that the assessment and review must be procedurally fair and must address the relevant legal question or

37 (1982) 151 CLR 342 at 360; [1982] HCA 26.

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questions. The right of a claimant to liberty from restraint at the behest of the Australian Executive is directly affected. The claimant is detained for the purposes of permitting the Minister to be informed of matters that the Minister has required to be examined as bearing upon whether the power will be exercised.

78 The Minister having decided to consider the exercise of power under either or both of ss 46A and 195A, the steps that are taken to inform that consideration are steps towards the exercise of those statutory powers. That the steps taken to inform the consideration of exercise of power may lead at some point to the result that further consideration of exercise of the power is stopped does not deny that the steps that were taken were taken towards the possible exercise of those powers. Nor does it deny that taking the steps that were taken directly affected the claimant's liberty. There being no exclusion by plain words of necessary intendment, the statutory conferral of the powers given by ss 46A and 195A, including the power to decide to *consider* the exercise of power, is to be understood as "conditioned on the observance of the principles of natural justice"³⁸. Consideration of the exercise of the power must be procedurally fair to the persons in respect of whom that consideration is being given. And likewise, the consideration must proceed by reference to correct legal principles, correctly applied.

79 What relief is to be afforded if the inquiries that are made are not procedurally fair, or if those inquiries do not proceed by reference to correct legal principles, correctly applied, raises separate issues that will be considered later in these reasons. It is first necessary to examine whether what was done in these two cases was procedurally unfair or attended by relevant legal error.

Plaintiff M61 – Procedural fairness and error of law

80 The written and oral submissions advanced on behalf of Plaintiff M61 about procedural fairness and error of law focused upon the review of the Refugee Status Assessment that was conducted by the third-named defendant (the reviewer). The steps taken by the fourth-named defendant in conducting the initial Refugee Status Assessment were rightly treated as overtaken by the subsequent review. The reviewer concluded that Plaintiff M61 did not meet the

38 *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J.

definition of a refugee set out in Art 1A of the Refugees Convention (as amended by the Refugees Protocol) and recommended that he should not be recognised as a refugee.

The reviewer's reasons

81 It is necessary to notice three aspects of the reasons the reviewer stated for forming the opinions he did.

82 First, early in his statement of reasons, the reviewer said that:

"While this merits review is not bound by Australian law and is of a non-statutory nature, it is appropriate to have regard to Australian legislation and relevant case law as an aid to the interpretation of the Refugees Convention."

83 Second, the reviewer set out a list of the material that he had before him. Those documents included a submission by the plaintiff's adviser and a copy of a statement that the plaintiff had made. In the submission, the plaintiff's adviser described the plaintiff's claims as having two bases. First, the adviser submitted that the plaintiff feared that, if he was returned to his country of nationality (Sri Lanka), he would suffer persecution or substantial discrimination amounting to a gross violation of human rights (or both) at the hands of Sri Lankan authorities or "pro-government paramilitary groups". The submission stated that the feared persecution or discrimination was on account of six matters (including ethnicity and imputed political opinion on account of his brother's membership of the Liberation Tigers of Tamil Eelam – "LTTE"). The submission went on to state a second and separate claim. It said that country information indicated that the plaintiff also faced a risk of harm on account of "his profile as a shop owner" and on account of his membership of particular social groups: "Tamil business owners" or "Tamils who are perceived to be wealthy". The plaintiff referred in his statement to the matters which were said to demonstrate the foundation of this second claim.

84 In his reasons, the reviewer considered the first set of claims. He did not examine, and did not refer in his reasons, to the second claim.

85 The third point to notice about the reviewer's reasons is that he did not accept that the plaintiff had left his country, and could not return there, for the reasons he claimed. An important basis for the conclusion that the plaintiff's

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fears were not well founded was information provided to the reviewer by the Department as country information. In the course of the reviewer's interviewing the plaintiff, none of that country information was put to the plaintiff. In particular, none of the propositions recorded in the reviewer's reasons – that groups whom the plaintiff said he feared were now joining and integrating into the mainstream of politics, that magistrates and judges were ordering the release of LTTE suspects, and that the way in which the authorities dealt with persons returning to Sri Lanka did not accord with the plaintiff's description of his treatment on return from Egypt in 2008 – were raised with him or his adviser for their comment or consideration.

Reviewable error?

86 Each aspect of the reviewer's reasons that has been noted reveals error.

87 First, the determination of whether Australia had protection obligations to the plaintiff was to be made according to law. It is an essential characteristic of the judicature established by Ch III that it declares and determines the limits of power conferred by statute upon decision-makers³⁹. The various legislative powers for which the Constitution provides are expressed as being "subject to" the Constitution and thus to the operation of Ch III, in particular to the exercise of jurisdiction conferred by s 75⁴⁰. The reasoning supporting decisions made in particular controversies acquires a permanent, larger and general dimension as an aspect of the rule of law under the Constitution⁴¹.

88 One of the powers whose exercise was being considered was the power to lift the bar under s 46A and permit the plaintiff to make a valid application for a protection visa. Exercise of that power on the footing that Australia owed protection obligations to the plaintiff would be pointless unless that

39 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152-153 [43].

40 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 632; [1997] HCA 11.

41 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 69 [158]; [2009] HCA 23.

determination was made according to the criteria and principles identified in the Migration Act, as construed and applied by the courts of Australia. For the purposes of the Minister considering the exercise of power under s 46A, what the RSA Manual and the IMR Manual both referred to as "Australian legislation and relevant case law" had, therefore, to be treated as binding upon those who made the assessments and those who reviewed those assessments, not just as "aid[s] to the interpretation of the Refugees Convention".

89 Although expressed generally – as whether Australia owed the plaintiff protection obligations – the fundamental question to which the assessment and review processes were directed had to be understood as whether the criterion stated in s 36(2)⁴², as a criterion for grant of a protection visa, was met. Necessarily, that question had to be understood by reference to other relevant provisions of the Migration Act, and the decided cases that bear upon those provisions. If the legislation and case law were treated as no more than aids to interpretation, the assessment or review would not address the question that the Minister had to consider when deciding whether to lift the bar under s 46A. Whether another, different, question about the application of the Refugees Convention (as amended) according to some understanding of the Convention different from that adopted in Australian legislation and case law could be relevant to the issues presented by the possible application of s 195A need not be considered.

42 Section 36(2) provides:

"A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa."

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Crennan J
Kiefel J
Bell J

32.

90 Second, failing to address one of the claimed bases for the plaintiff's fear of persecution meant that the Minister was not informed about a matter that bore upon the question that the Minister had asked to be considered: whether Australia owed the plaintiff protection obligations. The failure to deal with the claim was a denial of procedural fairness⁴³.

91 Third, procedural fairness required the reviewer to put before the plaintiff the substance of matters that the reviewer knew of and considered may bear upon whether to accept the plaintiff's claims. The Migration Act makes special provision about how the Refugee Review Tribunal is to conduct its reviews. It provides⁴⁴ that the Tribunal must give an applicant "clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". But that obligation is subject to qualifications. In particular, it does not extend⁴⁵ to information "that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member". Hence country information is treated as a class of information which need not be drawn to the attention of applicants for review by the Refugee Review Tribunal. But those provisions were not engaged in respect of Independent Merits Reviews of the kind now under consideration or, we would add, in respect of the initial Refugee Status Assessments. The reviewer should have put to the plaintiff for his consideration and comment those aspects of country information known to the reviewer which the reviewer considered may bear upon the claims the plaintiff made. He did not.

92 What follows from these conclusions will be considered later in these reasons under the heading "What relief may be granted?". Before dealing with that subject, it is necessary to undertake the same kind of analysis of the case of Plaintiff M69 as has just been made in relation to Plaintiff M61.

43 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24], 1102 [95]; 197 ALR 389 at 394, 408; [2003] HCA 26.

44 s 424A(1).

45 s 424A(3)(a).

Plaintiff M69 – Procedural fairness and error of law

93 Plaintiff M69 made a number of complaints about want of procedural fairness and error of law. Although his submissions were directed to both the recommendation made at the end of the Refugee Status Assessment and the Independent Merits Review, attention can be confined to the latter recommendation. And having regard to what has already been said in relation to similar complaints by Plaintiff M61, the treatment of the complaints made by Plaintiff M69 may be quite brief.

94 Plaintiff M69 alleged that the third defendant (the reviewer) made the same error of law as was made in the case of Plaintiff M61 by treating the Migration Act and decided cases as no more than guides to determining the issues presented. The plaintiff further alleged that he, like Plaintiff M61, had been denied an opportunity to deal with adverse country information. He further alleged that, after the reviewer had completed her review, but before the plaintiff was notified of its result, the plaintiff made a sur place claim. That claim arose out of the broadcasting of some images of persons in immigration detention who were being moved from Christmas Island to a detention centre on the mainland. The plaintiff's sur place claim was not considered by the reviewer.

The reviewer's reasons

95 In her reasons, the reviewer made a deal of reference to country information concerning the state of affairs in the plaintiff's country of origin (Sri Lanka) and, in particular, the Jaffna district and a hospital at which the plaintiff said he had worked. She concluded that this, and other country information, supported the conclusion that the plaintiff was not at risk for the reasons he claimed. The reviewer relied on country information available to her to conclude, contrary to the plaintiff's contention, that the plaintiff's illegal exit from Sri Lanka did not put him at risk.

Reviewable error?

96 It is sufficient for present purposes to conclude that, for the reasons given in connection with Plaintiff M61, the first and second complaints made on behalf of Plaintiff M69 were made good. It is not necessary to consider any of the other ways in which the plaintiff put his case.

French CJ
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Heydon J
Crennan J
Kiefel J
Bell J

34.

97 For the reasons given in relation to Plaintiff M61, the reviewer made an error of law by treating the Migration Act and decided cases as no more than guides to decision making.

98 As for want of procedural fairness, it may well be that some of the facts said to be revealed by country information were sufficiently put to the plaintiff or his adviser for comment. It is plain, however, that the reviewer did not put to the plaintiff country information she had before her concerning the treatment of failed asylum seekers returning to Sri Lanka. Not putting the substance of the country information to the plaintiff for his consideration and comment denied him procedural fairness.

What relief may be granted?

99 Because ss 46A and 195A both state, in terms, that the Minister does not have a duty to consider whether to exercise the power given by the section, mandamus will not issue to compel the Minister to consider or reconsider exercising either power. That the Minister decided to consider exercising the powers and, for that purpose, directed the making of Refugee Status Assessments and Independent Merits Reviews does not entail that, if the process of inquiry miscarried, the Minister can be compelled again to consider exercising the power.

100 As was explained in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*⁴⁶, the unavailability of mandamus entails that there is no utility in granting certiorari to quash the recommendation which the reviewer made in each of these matters. It is thus not necessary to consider whether certiorari to quash the recommendations would lie. More particularly, it is not necessary to examine whether, as was submitted⁴⁷ on behalf of the Commonwealth and the Minister, certiorari will not go to quash a

⁴⁶ (2003) 211 CLR 441 at 461 [48]; [2003] HCA 1.

⁴⁷ Referring to *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471 at 475; 8 ALR 691 at 699; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580-581, 595; [1992] HCA 10; *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159-165, 178-180; [1996] HCA 44; *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 at 888.

decision or recommendation prior to the final exercise of a discretion that directly affects legal rights unless that decision or recommendation *must* be taken into account by the ultimate decision-maker. (In considering the exercise of power under either s 46A or s 195A, the Minister might, but need not, take account of the recommendations made by those who had conducted an assessment or review of an assessment of an offshore entry person's claim that Australia owes that person protection obligations.) Nor is it necessary to examine whether, or how, the proposition advanced on behalf of the Commonwealth and the Minister, expressed as it is in absolute terms, might permit or require modification to accommodate cases such as the present, where the right that is affected by conducting the impugned process of decision making is a right to liberty. The claims to certiorari and mandamus must be refused.

101 Although the plaintiffs' claims for certiorari and mandamus should be rejected, a declaration should be made in each case that the processes undertaken to arrive at the reviewer's recommendation were flawed in the respects that have been identified. In many cases, the conclusion that certiorari and mandamus do not lie would require the further conclusion that no declaration of right should be made. Why should a declaration be made in these matters?

102 The power to grant declaratory relief is a power which "[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise"⁴⁸. As pointed out in *Ainsworth v Criminal Justice Commission*⁴⁹, it is a form of relief that is confined by considerations which mark out the boundaries of judicial power.

103 In the circumstances of this litigation it cannot be said that a declaratory order by the Court will produce no foreseeable consequences for the parties⁵⁰. Declaratory relief is directed here to determining a legal controversy; it is not

48 *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 437; [1972] HCA 61; *Ainsworth* (1992) 175 CLR 564 at 581-582.

49 (1992) 175 CLR 564 at 582. See also *Pape* (2009) 238 CLR 1 at 68 [152].

50 *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188 per Mason J, 189 per Aickin J; 18 ALR 55 at 69, 71.

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Bell J

36.

directed to answering some abstract or hypothetical question⁵¹. Each plaintiff has a "real interest"⁵² in raising the questions to which the declaration would go. In these cases, 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. The statutory powers to the exercise of which the inquiries were directed are placed in the statutory and historical context earlier described. That context demonstrates the importance attached to the performance of the relevant international obligations by both the legislative and executive branches of the Government of the Commonwealth. Moreover, there is a considerable public interest in the observance of the requirements of procedural fairness in the exercise of the relevant powers⁵³.

104

Accordingly, each plaintiff should have a declaration moulded in terms similar to the declaration made by this Court in *Ainsworth*.

51 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-356 [46]-[47]; [1999] HCA 9.

52 *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448, quoted with approval in *Forster* (1972) 127 CLR 421 at 437-438.

53 Cf *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at 134 [25]; [2008] HCA 43.

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Heydon J
Crennan J
Kiefel J
Bell J

37.

Orders

105 In each matter there should be a declaration that, in recommending to the Minister that the plaintiff was not a person to whom Australia has protection obligations, the third-named defendant made an error of law, in that he (or in the matter of Plaintiff M69, she) did not treat the provisions of the *Migration Act* 1958 (Cth) and the decisions of Australian courts as binding, and further, failed to observe the requirements of procedural fairness. The Commonwealth and the Minister should pay the plaintiffs' costs. Otherwise, each application should be dismissed.

