HIGH COURT OF AUSTRALIA

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

Matter No M70/2011

PLAINTIFF M70/2011 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP
& ANOR DEFENDANTS

Matter No M106/2011

PLAINTIFF M106 OF 2011 BY HIS LITIGATION
GUARDIAN, PLAINTIFF M70/2011 PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP
& ANOR DEFENDANTS

Plaintiff M70/2011 v Minister for Immigration and Citizenship
Plaintiff M106 of 2011 v Minister for Immigration and Citizenship
[2011] HCA 32
31 August 2011
M70/2011 & M106/2011

ORDER

Matter No M70/2011

1. *Declare that the declaration made by the "Instrument of Declaration of Malaysia as a Declared Country under subsection 198A(3) of the Migration Act 1958" dated 25 July 2011 was made without power and is invalid.*

2. *The first defendant, whether by his officers or otherwise howsoever, is restrained from taking the plaintiff from Australia to Malaysia.*

3. *The defendants pay the plaintiff's costs of the proceedings to date before Hayne J and the Full Court.*

Matter No M106/2011

1. *Declare that the declaration made by the "Instrument of Declaration of Malaysia as a Declared Country under subsection 198A(3) of the Migration Act 1958" dated 25 July 2011 was made without power and is invalid.*

2. *The first defendant, whether by his officers or otherwise howsoever, is restrained from taking the plaintiff from Australia to Malaysia.*

3. *The first defendant, whether by his officers or otherwise howsoever, is restrained from taking the plaintiff from Australia without there being a consent in writing of the Minister given under s 6A(1) of the* Immigration (Guardianship of Children) Act *1946 (Cth).*

4. *The defendants pay the plaintiff's costs of the proceedings to date before Hayne J and the Full Court.*

Representation

D S Mortimer SC and R M Niall SC with C L Lenehan, K L Walker, E A Bennett and M L L Albert for the plaintiff in both matters (instructed by Allens Arthur Robinson Lawyers)

S J Gageler SC, Solicitor-General of the Commonwealth and G R Kennett SC with S P Donaghue and N M Wood for the defendants (instructed by Australian Government Solicitor)

Intervener

D F Jackson QC with C J Horan intervening on behalf of the Australian Human Rights Commission in M106/2011 (instructed by Australian Human Rights Commission)

CATCHWORDS

Plaintiff M70/2011 v Minister for Immigration and Citizenship
Plaintiff M106 of 2011 v Minister for Immigration and Citizenship

Citizenship and migration – Migration – Refugees – Plaintiffs "unlawful non-citizens" and "offshore entry persons" under *Migration Act* 1958 (Cth) – Plaintiffs detained under s 189(3) – Each plaintiff claimed asylum under Refugees Convention – Section 198(2) required officer to remove from Australia unlawful non-citizen in detention where no successful visa application made – Section 198A(1) empowered officer to take offshore entry person from Australia to country declared under s 198A(3) – Section 198A(3) empowered Minister to declare that specified country provides access for asylum-seekers to effective procedures for assessing protection needs, provides protection for asylum-seekers and refugees, and meets relevant human rights standards in providing protection – Whether s 198A only source of power to remove plaintiffs from Australia when asylum claims not assessed in Australia – Whether s 198(2) supplied power to remove plaintiffs from Australia.

Citizenship and migration – Migration – Refugees – Minister declared Malaysia under s 198A – Whether criteria in s 198A(3)(a)(i)-(iv) jurisdictional facts – Whether declared country must provide access and protections as matter of domestic or international legal obligation – Whether Minister's declaration valid.

Citizenship and migration – Migration – Refugees – Children – Second plaintiff entered Australia as unaccompanied minor and "non-citizen child" under *Immigration (Guardianship of Children) Act* 1946 (Cth) – Section 6 had effect that Minister guardian of second plaintiff – Section 6A provided that non-citizen child could not leave Australia except with consent in writing of Minister – No consent given – Whether taking of second plaintiff to another country lawful.

Words and phrases – "declare", "meets relevant human rights standards", "non-citizen child", "offshore entry person", "provides access", "provides protection", "Refugees Convention", "unaccompanied minor", "unlawful non-citizen".

Immigration (Guardianship of Children) Act 1946 (Cth), ss 4AAA, 6, 6A.
Migration Act 1958 (Cth), ss 189, 198, 198A.

FRENCH CJ.

Introduction

1 These proceedings involve legal issues which arise in a strongly contested area of public policy. The public policy contest relates to the way in which Australia deals with non-citizens who enter its territory by sea without visas and invoke Australia's protection obligations under the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) ("the Refugee Convention").

2 Courts exercising federal jurisdiction, for the last two decades in particular, have had to decide many judicial review applications in respect of administrative decisions affecting asylum seekers. Some of their decisions, including decisions of this Court, have had practical consequences for the implementation of government policy. It is the function of a court when asked to decide a matter which is within its jurisdiction to decide that matter according to law. The jurisdiction to determine the two applications presently before this Court authorises no more[1] and requires no less[2].

3 These applications are brought in the Court's original jurisdiction under ss 75(iii) and 75(v) of the Constitution. The plaintiffs, who are citizens of Afghanistan, arrived at the Australian territory of Christmas Island on 4 August 2011 in a boat designated SIEV 258, which had sailed to Australia from Indonesia. They each claim to have a well-founded fear of persecution in Afghanistan on grounds that would, if established, make them "refugees" to whom Australia owes protection obligations pursuant to the Refugee Convention. A refugee is any person who, according to Art 1.A(2) of the Refugee Convention:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being … outside the country of his

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1 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ; [1996] HCA 6, citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J; [1990] HCA 21.

2 *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at 711 [9] per Spigelman CJ.

> former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

4 An important protection obligation assumed by parties to the Refugee Convention, and relevant to this case, is that of "non-refoulement" embodied in Art 33.1 which provides:

> "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

It is an Article which[3]:

> "not only applies to refugees whether lawfully or unlawfully within the host territory, but also embraces all measures of return, including extradition, to a country where their lives or freedom would be threatened."

Article 33.1 nevertheless permits removal of a refugee to a "safe" third country, ie one in which there is no danger that the refugee might be sent from there to a territory where he or she will be at risk[4].

5 The plaintiffs are designated M70 and M106 respectively. M70 is an adult and M106 is a minor who arrived in Australia unaccompanied by any parent or guardian. Both plaintiffs profess to be Shi'a Muslims. Lacking visas, both are "unlawful non-citizens" within the meaning of the *Migration Act* 1958 (Cth) ("the Migration Act")[5]. As a result of amendments to the Migration Act, made by the *Migration Amendment (Excision from the Migration Zone) Act* 2001 (Cth) ("the 2001 Excision Act"), Christmas Island is designated, for the purposes

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3 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 171 [21] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; [2005] HCA 6, citing Shearer, "Extradition and Asylum", in Ryan (ed), *International Law in Australia*, 2nd ed (1984) 179 at 205.

4 Lauterpacht and Bethlehem, "The Scope and Content of the Principle of Non-refoulement: Opinion", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) 87 at 122, cited in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 172 [25] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

5 Migration Act, ss 5(1) and 14.

of the Migration Act, as an "excised offshore place"[6]. Having entered Australia at an excised offshore place, and being unlawful non-citizens, the plaintiffs are "offshore entry persons" within the meaning of the Migration Act[7]. That category was created by the 2001 Excision Act. The plaintiffs, upon arrival in Australia, became subject to discretionary detention under s 189(3) of the Migration Act, a subsection introduced by the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth) ("the 2001 Excision Consequential Provisions Act"). Section 189(3) provides that:

> "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."

Both plaintiffs were detained upon their arrival at Christmas Island by an officer of the Commonwealth acting pursuant to the power conferred by s 189(3).

6 As a consequence of their status as "offshore entry persons", and the operation of s 46A of the Migration Act, which was introduced by the 2001 Excision Act, neither plaintiff can make a valid application for a visa unless the Minister for Immigration and Citizenship ("the Minister") decides that it is in the public interest to let that plaintiff do so[8]. The Minister does not have a duty to consider whether to let the plaintiffs do so[9].

7 M70 travelled to Australia through Pakistan, Thailand, Malaysia and Indonesia. M106 travelled to Australia through Dubai, Thailand, Malaysia and Indonesia. The entry of each of them into Malaysia occurred without any authority under Malaysian immigration law.

8 Both plaintiffs are subject to a new administrative regime, established by the Commonwealth Government, for the transfer to Malaysia**,** without prior assessment of their protection claims, of up to 800 asylum seekers irregularly arriving in Australia by sea after 25 July 2011. The regime was established pursuant to an arrangement between Australia and Malaysia entered into on 25 July 2011 ("the Arrangement"). Under the Arrangement, assessment of the asylum seekers' claims for protection as refugees will be carried out in Malaysia by the United Nations High Commissioner for Refugees ("the UNHCR"). An officer of the Department of Immigration and Citizenship ("the Department")

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6 Migration Act, s 5(1).

7 Migration Act, s 5(1).

8 Migration Act, s 46A(1) and (2).

9 Migration Act, s 46A(7).

determined, on 7 August 2011, that M70 was liable for removal from Australia pursuant to the Arrangement and should be taken to Malaysia. In respect of M106, an officer of the Department assessed that the only impediment to his removal was the establishment in Malaysia of relevant support services for unaccompanied minors pursuant to the Arrangement. Neither plaintiff would go to Malaysia voluntarily. The proposed removal of M70 and M106 to Malaysia is to be carried out in purported reliance upon powers conferred by ss 198(2) and 198A(1) of the Migration Act.

9 Section 198(2) imposes on an officer a duty to remove from Australia as soon as reasonably possible an unlawful non-citizen who is in detention under s 189(3)[10]. As pointed out in *Plaintiff M61/2010E v The Commonwealth*[11], s 198(2) permits a person to be detained while steps are taken to determine whether the person should be allowed to make an application for a visa. Section 198(2) does not in terms condition the power of removal upon identification of the specific country to which the person is to be removed.

10 Section 198A, which was introduced into the Migration Act by the 2001 Excision Consequential Provisions Act, provides for offshore entry persons to be taken to specified countries. Section 198A(1) provides that:

> "An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3)."

Pursuant to s 198A(2) the power to "take" under s 198A(1) includes the power, within or outside Australia, to place and restrain a person on a vehicle or vessel, to remove a person from a vehicle or vessel and to use such force as is necessary and reasonable. As this Court observed in *Plaintiff M61*, the changes to the Migration Act effected by the enactment of ss 46A and 198A reflect "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."[12]

11 On 25 July 2011 a declaration with respect to Malaysia was made by the Minister purportedly acting under s 198A(3) of the Migration Act. That subsection, which is at the centre of these proceedings, provides:

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10 Migration Act, s 198(2), read with s 193(1)(c).

11 (2010) 85 ALJR 133; 272 ALR 14; [2010] HCA 41.

12 (2010) 85 ALJR 133 at 141 [34]; 272 ALR 14 at 23.

"The Minister may:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

(iv) meets relevant human rights standards in providing that protection; and

(b) in writing, revoke a declaration made under paragraph (a)."

Of particular significance is s 198A(4) which provides that:

"An offshore entry person who is being dealt with under this section is taken not to be in ***immigration detention***".

According to the Explanatory Memorandum for the 2001 Excision Consequential Provisions Bill those words mean that a person is not in "'immigration detention' … merely because the person is being dealt with under … section 198A."[13] They plainly do not and cannot bear that meaning. They explicitly exclude a person who is being dealt with under s 198A from being in immigration detention for any other purposes under the Act.

12 "Immigration detention" is defined in s 5(1) of the Migration Act. Relevantly, it means being in the company of, and restrained by, an officer or other person directed by the Secretary to accompany and restrain the detainee. It also means being held by, or on behalf of, an officer in a detention centre established under the Migration Act[14]. The term "officer" is defined by reference to various classes of person including officers of the Department[15]. The definition of "officer" is extended by s 198A(5), for the purposes of s 198A, to include a member of the Australian Defence Force.

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13 Australia, Senate, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001, Explanatory Memorandum at [27].

14 Migration Act, s 5(1)(a) and (b)(i) definition of "immigration detention".

15 Migration Act, s 5(1).

13 It is part of the historical background to s 198A that it was enacted shortly after the announcement of the so-called "Pacific Solution" by which asylum seekers on board the MV Tampa in Australian waters adjacent to the territory of Christmas Island, were removed to the Republic of Nauru[16]. It is an agreed fact in these proceedings that on 10 September 2001 the President of the Republic of Nauru and the then Australian Minister for Defence signed a "Statement of Principles" in relation to asylum seekers which provided the basis for joint cooperation in humanitarian endeavours relating to asylum seekers. On 18 September 2001 the 2001 Excision Consequential Provisions Act was introduced into the House of Representatives. It came into force on 27 September 2001. On 2 October 2001, the then Minister for Immigration made a declaration under s 198A(3)(a) relating to the Republic of Nauru. At the time Nauru was not a party to the Refugee Convention. Its domestic law did not make any specific provision relating to persons who could be classified as refugees or asylum seekers under international law**.** This background was referred to by the defendants who contended that it informed the construction of s 198A(3)(a)(i)-(iv) and in particular the question whether a declaration could be made, under s 198A(3), solely on the basis of the relevant country's administrative practices and executive undertakings. The Court, however, must look to the text, context and purpose of the relevant statutory provision. The invocation, in 2001, of s 198A to support a declaration in relation to the Republic of Nauru shortly after an agreement had been entered into between Australia and Nauru, cannot determine the construction of the section.

The plaintiffs' applications and their primary contentions

14 M70 and M106 commenced these proceedings on 7 August 2011, filing one application naming themselves and a number of other persons similarly situated as plaintiffs. They claimed, inter alia, an injunction and order in the nature of prohibition restraining the Minister and the Commonwealth from taking any steps to remove them from Australia.

15 On 8 August 2011, Hayne J made an interlocutory order restraining the Minister from removing from Australia any of the persons then named as plaintiffs until the hearing and determination of their application to this Court. The proceedings were amended to constitute separate applications made in respect of M70 and M106 only as plaintiffs[17]. The applications were referred, by

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16 See generally *Ruddock v Vadarlis* (2001) 110 FCR 491.

17 See s 486B(4) of the Migration Act which prohibits the joinder of plaintiffs or applicants or the addition of parties in migration proceedings. Its validity in relation to the constitutional jurisdiction conferred upon this Court has not been considered.

order of Hayne J, to the Full Court and proceeded upon the basis of an agreed statement of facts. An affidavit sworn by the Minister was also before the Court.

16 The common contentions of the plaintiffs are:

1. The only source of power to take them from Australia to Malaysia is s 198A of the Migration Act.

2. That power is conditioned upon the Minister making a valid declaration under s 198A(3) of the Migration Act.

3. The declaration made on 25 July 2011 was not validly made because:

   (i) the four criteria set out in s 198A(3)(i)-(iv) are jurisdictional facts which did not exist; or

   (ii) alternatively, they are facts of which the Minister had to be satisfied before making a declaration and he was not so satisfied because he misconstrued the criteria.

4. The exercise of the discretionary power conferred by s 198A(1) miscarried in relation to M70 and, unless restrained, will miscarry with respect to M106 because:

   (i) it was or would be unlawfully fettered by ministerial direction dated 25 July 2011 to all officers exercising that power; and

   (ii) the decision-maker failed or would have failed to consider the individual circumstances of M70 in relation to his liability for prosecution in Malaysia for an offence against Malaysian immigration law.

17 It was also submitted, on behalf of M106, that the Minister's statutory responsibilities as his guardian pursuant to s 6 of the *Immigration (Guardianship of Children) Act* 1946 (Cth) ("the IGOC Act") required that he consider the exercise of his powers under ss 46A and 195A of the Migration Act to allow M106 to apply for a visa. Moreover, his consent in writing was required pursuant to s 6A of the IGOC Act before M106 could be removed from Australia.

18 Before considering these contentions, it is necessary to review the establishment of the Arrangement, the basis upon which the Minister made his declaration and the determinations made by officers of the Department relating to the removal of M70 and M106 to Malaysia.

The Arrangement

19 On 7 May 2011, the Prime Ministers of Australia and Malaysia released a joint statement. They announced their commitment to enter into a bilateral arrangement in the form of a cooperative transfer agreement that would see up to 800 asylum seekers arriving by sea in Australia transferred to Malaysia for assessment of their claims to be refugees. In exchange, "Australia [would] expand its humanitarian program and take on a greater burden-sharing responsibility for resettling refugees currently residing in Malaysia."[18] Australia committed to resettling, over a period of four years, 4,000 refugees then residing in Malaysia. Senior officials of the two governments were asked to finalise a Memorandum of Understanding to set out detailed arrangements. Both countries were said to be working closely with the UNHCR and the International Organization for Migration "to operationalise the arrangement."

20 On 12 May 2011 the Minister wrote to the Secretary of the Department referring to the announcement. He said:

> "Flowing from that announcement, I am formally directing you that, until further notice, no processing of any asylum claims is to occur in relation to offshore entry persons who are intercepted or arrive directly in Australia after 7 May 2011. I do not wish to consider exercising any of my powers under the *Migration Act 1958* to give such individuals access to visas, in particular my powers pursuant to section 46A or section 195A.
>
> It is my expectation that such individuals will be taken to Christmas Island and removed from Australia as soon as reasonably practicable. In practice, this will involve individuals being removed to Malaysia or another country with which transfer or processing arrangements are agreed, with any asylum claims being assessed in that other country."

21 On 20 May 2011, the Minister received a submission from an officer of the Department recommending that, as a matter of routine, the Department use the removal power under s 198(2) of the Migration Act to remove, to a transfer country, offshore entry persons who arrive irregularly by sea. That recommendation was agreed to by the Minister. The officer also submitted to the Minister that there was merit in making a declaration under s 198A(3). Such a declaration, it was said, "would symbolise government confidence that the transfer arrangements are protection-sensitive and may ameliorate some potential public criticism that it is not so." It was said that the Minister's consideration of proposed declarations under s 198A(3) would be sought in separate submissions

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18 Joint Press Statement of Australia and Malaysia, 7 May 2011.

as transfer arrangements were finalised. The submission contemplated the possibility that there might be a number of declarations each relating to a different country.

22 The Arrangement, foreshadowed in the Joint Press Statement of Australia and Malaysia of 7 May 2011, was entered into on 25 July 2011 and signed by the Minister and the Malaysian Minister of Home Affairs. Key elements of the Arrangement, in so far as it applies to persons to be transferred from Australia to Malaysia, are as follows:

1. Australia will transfer certain persons seeking international protection to Malaysia for refugee status determination[19].

2. The transferees to be transferred to Malaysia will be those persons who, after the date of signing of the Arrangement, have travelled irregularly by sea to Australia or have been intercepted at sea by Australian authorities. They will be persons who:

   (i) the government of Australia determines should be transferred to Malaysia;

   (ii) under Australian law, may be transferred to a declared country for processing or taken to a place outside Australia or removed from Australia; and

   (iii) the Government of Malaysia provides consent and approval for the transfer[20].

3. Where a transferee is determined to be a refugee, he or she will be referred to resettlement countries pursuant to the UNHCR's normal processes and criteria[21].

4. The Government of Malaysia will accept up to an agreed maximum of 800 transferees[22].

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19 Arrangement, cl 1.2.

20 Arrangement, cl 4.1(a).

21 Arrangement, cl 6.

22 Arrangement, cl 7.1.

5. Transferees will be treated "with dignity and respect and in accordance with human rights standards."[23]

6. Special procedures will be developed and agreed to by the participants to deal with the special needs of vulnerable cases including unaccompanied minors[24].

7. Australia will meet all costs arising under the Arrangement in relation to, inter alia[25]:

- the health and welfare (including education of minor children) of transferees in accordance with the UNHCR's model of assistance in Malaysia;
- additional costs related to meeting special welfare needs of transferees;
- costs for registration of transferees and for their refugee status determination (and any appeal in relation to that determination) and assessment of other protection obligations; and
- costs related to the resettlement in a third country of transferees determined to be in need of international protection that are not met by the third country.

8. Australia will put in place an "appropriate pre-screening assessment mechanism in accordance with international standards before a transfer is effected."[26]

9. Malaysia will provide transferees with the opportunity to have their asylum claims considered by the UNHCR and will "respect the principle of non-refoulement."[27]

10. Malaysia will facilitate the transferees' lawful presence during any period that their claims to protection are being considered and, where they are

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23 Arrangement, cl 8.1.

24 Arrangement, cl 8.2.

25 Arrangement, cl 9.1.

26 Arrangement, cl 9.3.

27 Arrangement, cl 10.2(a).

determined to be in need of protection, during any period while they wait to be resettled[28].

11. While in Malaysia, transferees will enjoy standards of treatment consistent with those set out in the Operational Guidelines to Support Transfers and Resettlement to Malaysia ("the Operational Guidelines") contained in Annex A to the Arrangement[29].

12. If a transferee is found not to be a refugee and does not agree to return to his or her country of origin voluntarily, forced returns might be necessary[30]. Australia will assist Malaysia as may be agreed to facilitate the return of transferees[31].

13. In relation to any proposed forced return, the Government of Malaysia will provide the Government of Australia with an opportunity to consider the broader claims of any transferee to protection under other relevant human rights conventions. Should such claims be established, the Government of Australia will make suitable alternative arrangements for the removal of the transferee from Malaysia[32].

14. Operations under the Arrangement will be carried out "in accordance with the domestic laws, rules, regulations and national policies from time to time in force in each country and in accordance with [Australia and Malaysia's] respective obligations under international law."[33]

15. The Arrangement represents a "record of [Australia and Malaysia's] intentions and political commitments" but is not to be "legally binding on [Australia and Malaysia]."[34]

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28 Arrangement, cl 10.3(a).

29 Arrangement, cl 10.4(a).

30 Arrangement, cl 11.1(b).

31 Arrangement, cl 11.1(c).

32 Arrangement, cl 11.2.

33 Arrangement, cl 12.1.

34 Arrangement, cl 16.

16. The Arrangement is in effect for a period of four years from the date of signature by Australia and Malaysia[35].

23 The Operational Guidelines covered, inter alia, the transfer process from Australia to Malaysia, post-arrival arrangements for transferees in Malaysia, the situation of transferees during their temporary stay in Malaysia, the resettlement of refugees from Malaysia to Australia and the terms of reference and membership of a proposed joint committee and an advisory committee.

The making of the declaration under s 198A(3)

24 On 22 July 2011, three days before the Arrangement was executed, the Minister received a submission from an officer of the Department ("the Submission"), which included the following recommendations:

> "1. agree … that the Department will effect the duty to remove an unlawful non-citizen under s 198(2) of the *Migration Act 1958* (the Act) by exercising the power in s 198A(1) of the Act to transfer offshore entry persons from Australia to a third country;
>
> 2. agree, on the basis of the material in this submission, that Malaysia meets the criteria set out in subsection 198A(3) of the Act;
>
> 3. sign the instrument of declaration at Attachment D so as to make Malaysia a declared country for the purposes of section 198A of the Act".

25 The Minister was told in the Submission that, before making a declaration under s 198A(3) in respect of Malaysia, he should satisfy himself that Malaysia met the criteria set out in that subsection. The Submission stated:

> "7. The information you could use to satisfy yourself of these matters could come from a range of sources including agreements or undertakings between the Governments of Australia and Malaysia, advice from the Department of Foreign Affairs and Trade (DFAT), and consultation with the United Nations High Commissioner for Refugees (UNHCR)."

The Submission referred to three matters relevant to the statutory criteria:

- *The Arrangement* – according to the Submission, the Department was "satisfied" that the protections afforded to transferees under the Arrangement and the Operational Guidelines met the criteria of which the

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35 Arrangement, cl 19.

Minister was required to be satisfied before making a declaration under s 198A(3). Malaysia, it was said, had made "a clear commitment" under the Arrangement:

"that transferred persons will be provided with access to effective procedures for assessing their need for protection (through the UNHCR) (clause 10); that they will be provided with protection pending determination of their refugee status (clause 10); and that they will be treated with dignity and respect and in accordance with human rights standards (clause 8)."

Malaysia was also said to have made a "commitment" to "respect the principle of non-refoulment (clause 10)."

- *Advice from the Department of Foreign Affairs and Trade* ("DFAT") – the Minister was referred to an assessment provided by DFAT which was said to support the proposition that Malaysia is a country which the Minister could be satisfied met the criteria under s 198A(3) ("the DFAT assessment").

- *Consultation with the UNHCR* – the UNHCR indicated, by a covering note and aide memoire of 19 July 2011, that it assessed the final draft of the Arrangement and Operational Guidelines as "workable". The UNHCR would continue to engage with both countries in bringing the Arrangement into effect, albeit its support was conditional on the Arrangement being implemented with full respect for human rights standards and the UNHCR being satisfied with Australia's approach to pre-transfer assessments, on which the UNHCR was expected to provide detailed comment.

26 The Submission continued:

"13. Based on the information above, we think it is open to you to be satisfied that Malaysia meets the criteria set out in s 198A of the Act. Accordingly, we recommend you sign the proposed instrument of declaration at Attachment D, declaring Malaysia under s 198A(3) of the Act."

27 On 25 July 2011, the Minister made a declaration in relation to Malaysia under s 198A(3) of the Migration Act. On the same day he issued a direction to the Secretary of the Department, including the following:

"Until further notice, no processing of any asylum claims is to occur in relation to offshore entry persons who are intercepted or who arrive directly in Australia after 25 July 2011. I do not wish to consider exercising any of my powers under the *Migration Act 1958* to give such individuals access to visas, in particular my powers under s46A or s195A.

> It is my expectation that such individuals will be taken to Christmas Island and removed to Malaysia in accordance with the Arrangement, with any asylum claims being assessed in that country."

The directions superseded those contained in the letter of 12 May 2011[36].

The DFAT assessment

28 The DFAT assessment was organised under headings reflecting each of the criteria in s 198A(3) of the Migration Act. It made the following salient points:

- Malaysia is not a party to the Refugee Convention and does not itself grant refugee status or asylum or have in place legal protections for persons seeking asylum.
- Malaysian authorities nevertheless "generally cooperate with the UNHCR".
- There are, according to the UNHCR, "'credible indications that forcible deportations of asylum seekers and refugees had ceased in mid-2009.'"
- A number of "fundamental liberties" are contained in the Malaysian Federal Constitution and the Malaysian Human Rights Commission is active in fulfilling its mandate with respect to those rights, including inquiries about complaints.
- Illegal immigrants in Malaysia are liable to imprisonment and/or a fine and caning of not more than six strokes.
- Access to health care is provided to refugees with cards issued by the UNHCR at a discounted rate available to foreigners. However, the costs are generally beyond the means of refugees.
- Lack of official status has impeded access by refugees to sustainable livelihoods or formal education.
- Credible allegations have been made regarding inadequate standards in immigration detention centres.

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36 The Commonwealth submitted, in answer to a question from the Court, that the direction of 25 July 2011 did not constitute a direction for the purposes of s 499 of the Migration Act. Such a direction would need to have been laid before each House of the Parliament: Migration Act, s 499(3).

- Malaysia is not a party to the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights. It is a party to the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child.

The Minister's affidavit

29 The Minister swore an affidavit on 14 August 2011 in which he said, inter alia:

- The signing of the Arrangement followed intensive negotiations between Australia and Malaysia in which the Minister was personally involved.

- The Minister formed an "understanding" from his conversations with the Malaysian Minister of Home Affairs and other Malaysian officials that the Malaysian Government "was keen to improve its treatment of refugees and asylum seekers." The Minister considered this to be a "clear theme of the discussions." He said:

  "I formed a clear belief from these discussions that the Malaysian government had made a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers and had begun the process of improving the protections offered to such persons. It was also clear to me that the Malaysian government was enthusiastic about using the transfer of 800 persons under the proposed arrangement as a kind of 'pilot' for their new approach to the treatment of asylum seekers generally."

- Malaysia was "actively considering" allowing work rights for all asylum seekers. The Minister referred to a statement made by the Malaysian Minister of Home Affairs at the announcement of the signing of the Arrangement on 25 July 2011.

- The Minister said that in making the declaration he had regard to the Submission. He said:

  "In making the Declaration, I understood that I needed to consider whether Malaysia met the criteria set out in subsection 198A(3) of the *Migration Act* 1958 generally, and not only whether the particular persons transferred under the agreement would receive treatment in accordance with those criteria."

- The Minister said he took into account the material in the Submission and, in particular, the DFAT assessment, which reassured him that Malaysia

"did provide basic support and protection to asylum seekers." He also took into account his own knowledge of Malaysia's commitment to improving its processes for dealing with asylum seekers and his knowledge of the conceptual shift within Malaysia in its thinking about how it wanted to treat refugees, its desire to use the transfer of 800 persons as a "pilot" for its new arrangements, and its consideration of allowing work rights for all asylum seekers.

- The Minister said that he relied upon the Arrangement and the Operational Guidelines "as supporting the view I had formed that Malaysia was committed to a new approach to dealing with refugees." He considered the willingness of the Malaysian Government to enter into the Arrangement to be an indication of the seriousness of its commitment.

The *Immigration Act* 1959 (Malaysia) and the Exemption Order

30 It is an agreed fact that Malaysia does not recognise the status of refugees in domestic law. The *Immigration Act* 1959 (Malaysia) ("the Malaysian Immigration Act") does not contain any provisions or protections relating to persons who, under Australian or international law, would be classified as refugees or asylum seekers. Section 6 of the Act provides that no person other than a citizen shall enter Malaysia unless in possession of a valid entry permit or a valid pass, or exempted from the operation of the section by an order made under s 55. Any contravention of s 6 is an offence and a person is liable, on conviction, to a fine, imprisonment for a term not exceeding five years or both, and liable to whipping of not more than six strokes[37].

31 Prohibited immigrants are defined in s 8 of the Act to include any person who, in the opinion of the Director General, is a member of a prohibited class and is not a citizen[38]. The prohibited classes include[39]:

"any person whose entry into Malaysia is, or at the time of his entry was, unlawful under this or any other written law for the time being in force".

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37 Malaysian Immigration Act, s 6(3).

38 Malaysian Immigration Act, s 8(1)(a).

39 Malaysian Immigration Act, s 8(3)(h).

They also include[40]:

> "any person who is unable to show that he has the means to support himself and his dependants (if any) or that he has definite employment awaiting him, or who is likely to become a pauper or a charge on the public".

32 An exemption order may be made under s 55(1) of the Act which provides:

> "Notwithstanding anything contained in this Act, the Minister may by order exempt any person or class of persons, either absolutely or conditionally, from all or any of the provisions of this Act and may in any such order provide for any presumptions necessary in order to give effect thereto."

On 5 August 2011, an order was made by the relevant Malaysian Minister exempting from the requirements of s 6 of the Malaysian Immigration Act persons entering Malaysia through the Arrangement and allocated with serial numbers issued by the Department of Immigration of Malaysia to each such person. The exemption was to become void if any of the listed persons:

(a) had been registered as a "refugee" by the UNHCR;

(b) had been arranged to be repatriated to his country of origin;

(c) was found to be involved in any criminal activities or had been charged in any court in Malaysia;

(d) was found to be involved in any activity contrary to Malaysian law; and

(e) had been listed as a prohibited immigrant under s 8(1) of the Malaysian Immigration Act[41].

The subject matter of the conditions does not readily support the view that they are to be read cumulatively. It is difficult to see how pars (a) and (b) could stand together, or for that matter, pars (c) and (d).

33 It is an agreed fact that the plaintiffs will be subject to Malaysian law, including offences under Malaysian law for illegal entry to and exit from the country, subject to the effect, if any, of the terms of the exemption. There is

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40 Malaysian Immigration Act, s 8(3)(a).

41 Exemption order, cl 4.1.

nothing on the face of the exemption order to protect the plaintiffs from being charged and prosecuted in a Malaysian court for an offence against s 6 of the Malaysian Immigration Act associated with their entry into Malaysia on their way to Indonesia. On the assumption that the voiding criteria in the exemption order are to be read disjunctively, the laying of a charge would itself appear to vitiate the exemption order and raise the question whether the person charged would be liable to classification as a prohibited immigrant. So too would the listing of a person as a prohibited immigrant on account of his or her destitution. To raise these questions is not to express a concluded view on matters of Malaysian law or administrative practice. It is sufficient to observe that there was not, in the material before the Minister, evidence of any legal protection against such eventualities in relation to the plaintiffs or other "offshore entry persons".

Plaintiffs M70 and M106 – post-arrival detention and pre-removal assessment procedures

34 Upon the arrival of M70 and M106 in Australian territory, an immigration detention operations officer read to them and others a group statement and detained them under s 189(3) of the Migration Act. In the group statement it was said[42]:

> "If you are a child, I am satisfied that in all circumstances your detention is a measure of last resort. In accordance with Australian Government policy, you will be detained in alternative accommodation, not a detention centre."

35 A pre-removal assessment was completed in respect of M70 on 4 August 2011. The assessment was carried out by a departmental officer by reference to a number of departmental documents. These included a copy of the Arrangement and the Operational Guidelines annexed to it, and documents entitled Operational Guidelines – Pre-removal Assessment Process for Transfers to a Third Country for Processing ("the Pre-removal Assessment Guidelines"), Onshore Protection Interim Procedures Advice on Assessing International Obligations and Protection/non-refoulement Guidance for Pre-Removal Assessment Officers. The assessing officer also had a record of a Biodata and Personal Circumstances interview with M70 and a Fitness to Travel Assessment Questionnaire.

36 The Pre-removal Assessment Guidelines were to be applied to offshore entry persons to be transferred to a third country for processing, consistent with the Minister's direction of 25 July 2011. The document stated that there would be no broad exemption from transfer for defined groups, but also said:

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42 See Migration Act, s 4AA(1).

> "However, an assessment of individual circumstances will be undertaken to ensure both fitness to travel and compliance with Australia's international obligations prior to a person's removal from Australia."

37 The purposes of the pre-removal assessment were said to be to:

- identify protection claims – this was a reference to protection claims in relation to the country to which the person was to be taken; in this case Malaysia. There was no process for assessment of other protection claims;
- identify vulnerabilities and heightened risks in relation to all potential transferees but particularly in relation to unaccompanied children; and
- confirm fitness to travel.

There was also provision in relation to unaccompanied minors for an assessment of the best interests of the child. The assessments were to be provided to "Pre-Removal Assessment Team Leaders" who would make one of the following recommendations:

1. There are no impediments to removal.
2. There are impediments to immediate removal but removal can proceed subject to relevant actions being undertaken prior to removal in the future.
3. There are longer term impediments to removal.

The intended disposition of the last category of persons was not apparent. There was also provision for management of people not removed to a third country with the observation that "[o]ptions for dealing with these cases are being finalised."

38 The document entitled "Protection/non-refoulement Guidance for Pre-Removal Assessment Officers" directed officers that they were not to assess whether the person was a refugee under Art 1A of the Refugee Convention. The assessment was essentially as to whether the country (in this case Malaysia) was a "safe third country". That may be taken as a reference to a safe third country in relation to the person claiming asylum. Officers were referred to the Council of the European Union Council Directive on Minimum Standards on Procedures in Member States for granting and withdrawing Refugee Status. The officers were also given advice in the document, based on the terms of the Arrangement, that:

> "The Malaysian Government has made a clear commitment that Transferees will be in Malaysia lawfully and will not be considered illegal immigrants as they will have entered Malaysia lawfully."

Pre-removal assessment of M70

39 M70 claims to have a well-founded fear of persecution in Malaysia on account of his religion. However, no such claim was recorded in his pre-removal assessment. The officer conducting the pre-removal assessment found that his removal to Malaysia would not breach Australia's non-refoulement obligations. The officer referred to M70's Shi'a religion and, after reviewing the position with respect to Shi'a Muslims in Malaysia, found nothing to suggest that M70 "would be more at risk of harm than any other Shi'a Muslim in Malaysia." On that basis the officer found "there [was] not a real risk that [M70 would] be detained or prosecuted because he is a practising Shi'a Muslim if he were removed to Malaysia." The assessing officer found that "the Arrangement between Australia and Malaysia contains provisions that will provide [M70] with a sufficient level of support in Malaysia and ensure that he is treated with dignity and respect, in accordance with human rights standards."

Pre-removal assessment of M106

40 In his interview with the assessing officer, M106 expressed concern about his status as a minor and his belief that refugees in Malaysia were not well treated. Nevertheless, the assessing officer found that M106's removal to Malaysia would not breach Australia's non-refoulement obligations. He found that, having regard to the Arrangement, M106 would be treated with dignity and respect and in accordance with human rights standards. As an unaccompanied minor he would be monitored by the UNHCR Children at Risk Team. The officer was satisfied that the Arrangement contained provisions that would provide M106 with a sufficient level of support during the transit period and once he had settled in Malaysia. Nevertheless, the recommendation of the pre-removal assessment team leader was that:

> "[T]here are impediment(s) to immediate removal, however removal can proceed subject to the relevant actions being undertaken prior to removal, as outlined above."

The "relevant actions" referred to the requirement that support services for unaccompanied minors should be in place pursuant to the Arrangement prior to removal to Malaysia.

Sections 198 – legislative history

41 It was submitted for the plaintiffs that the only source of the Commonwealth's power to remove them to Malaysia was derived from s 198A(1) of the Migration Act. The Commonwealth, on the other hand, contended that it could act under s 198(2) of the Migration Act. The Court was referred to the legislative history of those provisions.

42 Section 54ZF of the Migration Act, now numbered s 198, was part of a suite of amendments introduced into the Act by the *Migration Reform Act* 1992 (Cth) ("the 1992 Act"). The 1992 Act created the visa as the authority under which a non-citizen could enter Australia. It provided for classes of visa to replace the entry permit system[43]. It introduced a particular class of temporary visas to be known as "protection visas"[44]. A criterion for the grant of such a visa, now embodied in s 36(2)(a) of the Migration Act, was[45]:

> "that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

The designation "temporary" qualifying the class of protection visas was removed in 1994[46].

43 The 1992 Act also introduced a regime for the mandatory detention and removal of unlawful non-citizens[47]. Today the detention regime is found in Div 7 of Pt 2 of the Migration Act comprising ss 188 to 197AG. The precursor of s 189, as enacted by the 1992 Act, was s 54W, imposing on officers a duty to detain unlawful non-citizens. Section 54ZD(1) provided, as does s 196(1) today, that an unlawful non-citizen detained under s 54W must be kept in immigration detention until he or she is removed from Australia under ss 54ZF or 54ZG, or deported or granted a visa. The removal regime is found in Div 8 which comprises ss 198 to 199. Section 54ZF(2) imposed a duty upon an officer to remove, as soon as reasonably practicable, an unlawful non-citizen who had been refused immigration clearance and either had not made a valid application for a substantive visa or had made such an application which had been finally determined. From its introduction in 1992, the scheme in which s 198(2) now takes its place linked the removal of unlawful non-citizens to the visa application process, including applications for protection visas.

44 In its application to unlawful non-citizens claiming protection as refugees, the mandatory detention and removal scheme therefore revolves, as counsel for

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43 1992 Act, s 10 enacting subdiv A of Div 2 of Pt 2.

44 1992 Act, s 10 enacting s 26B.

45 1992 Act, s 10 enacting s 26B.

46 *Migration Legislation Amendment Act* 1994 (Cth), s 9.

47 By the insertion of a new Div 4C in Pt 2 of the Migration Act comprising ss 54V-54ZE relating to mandatory detention and a new Div 4D, comprising ss 54ZF-54ZG relating to the removal of unlawful non-citizens: 1992 Act, s 13.

the plaintiffs put it, around processing their claims through the visa system and removing those who are unsuccessful. The assessment of claims for protection under the Refugee Convention and the grant of protection visas occur in a regime in which detention is mandatory. In this aspect of its operation the characterisation of the scheme is reflected in the observation of the Court in *Plaintiff M61*[48]:

> "[T]he *Migration Act* proceeds, in important respects, from the assumption that Australia has 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."

Safe third country provisions

45 Amendments to the Migration Act facilitating the removal of asylum seekers to safe third countries in order to comply with Australia's non-refoulement obligations were referred to by the defendants. They were relied upon to link the power conferred by s 198A to the power conferred by s 198(2). Subdivision AI of Div 3 of Pt 2 of the Migration Act, originally entitled "Certain non-citizens unable to apply for certain visas", now entitled "Safe third countries"[49], was enacted by the *Migration Legislation Amendment Act (No 4)* 1994 (Cth). The subdivision envisages agreements between Australia and other countries relating to persons seeking asylum. In the light of such an agreement the Minister can prescribe a country as a safe third country[50]. A person with a right to enter and reside in that country cannot validly apply for a protection visa[51] unless the Minister determines in the public interest to allow such an application[52]. As the defendants submitted, the effect of that regime is that, where it applies, a person cannot insist that claims for protection be assessed by Australia, whether or not that person is a refugee within the meaning of the Refugee Convention. Such a person, if detained as an unlawful non-citizen, is

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48 (2010) 85 ALJR 133 at 139-140 [27]; 272 ALR 14 at 21.

49 Migration Act, subdiv AI, Div 3 of Pt 2.

50 Migration Act, s 91D.

51 Migration Act, ss 91C(1)(b)(ii) and 91E.

52 Migration Act, s 91F(1).

liable to removal under s 198(7) of the Act subject to the conditions set out in that subsection[53].

46 The *Border Protection Legislation Amendment Act* 1999 (Cth) ("the 1999 Act") made amendments to the Migration Act "to prevent forum shopping"[54]. In a Supplementary Explanatory Memorandum to the Bill its purpose was explained thus[55]:

> "These amendments will ensure that persons who are nationals of more than one country, or who have a right to enter and reside in another country where they will be protected, have an obligation to avail themselves of the protection of that other country."

Section 36 of the Migration Act, which sets out the criteria for the grant of protection visas, was amended by the 1999 Act which added sub-ss (3) to (7) to give effect to that purpose. Broadly speaking, a person in the circumstances described in the Supplementary Explanatory Memorandum would not be a person to whom Australia was taken to have protection obligations and therefore would not be a person satisfying a necessary criterion for the grant of a protection visa under s 36(2) of the Migration Act.

47 The 1999 Act also enacted ss 91M to 91Q under subdivision AK headed "Non-citizens with access to protection from third countries"[56]. By s 91P, a non-citizen to whom the subdivision applies is unable to make a valid application for a protection visa while he or she remains in the migration zone. The subdivision applies, by operation of s 91N(2), to a non-citizen who has a right to re-enter and reside in a country in which the non-citizen has resided for a continuous period of at least seven days and in respect of which a declaration by the Minister is in effect under s 91N(3). The criteria for a declaration under s 91N(3) foreshadowed the criteria in s 198A(3). An unlawful non-citizen to whom subdiv AK applies, who is a detainee, must also be removed "as soon as reasonably practicable" pursuant to s 198(9) unless certain conditions are met, one of which may be that the person has made a valid application for a visa.

48 Subdivisions AI and AK do not in the end bear upon the operation of s 198A or its relationship to s 198(2). Those subdivisions are concerned with

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53 Migration Act, s 91A.

54 1999 Act, s 3, Sched 1, Pt 6.

55 Australia, Senate, Border Protection Legislation Amendment Bill 1999, Supplementary Explanatory Memorandum at [2].

56 1999 Act, s 3, Sched 1, item 67.

circumstances in which a safe third country can be identified for a particular asylum seeker. This identification necessarily involves assessment of the asylum seeker's claims notwithstanding that he or she cannot validly apply for a visa.

The relationship between ss 198(2) and 198A(1)

49 The changes made by the 2001 Excision Act and the 2001 Excision Consequential Provisions Act, the latter Act enacting s 198A, have already been described. As this Court said in *Plaintiff M61*[57]:

> "[T]he 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."

50 It was submitted for the defendants that s 198A could be construed as limiting the power conferred by s 198(2) only if both provisions are properly characterised as conferring "the same power". The constructional principle thereby invoked was discussed in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[58]. In that case, Gavan Duffy CJ and Dixon J said[59]:

> "When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

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57 (2010) 85 ALJR 133 at 141 [34]; 272 ALR 14 at 23.

58 (1932) 47 CLR 1; [1932] HCA 9.

59 (1932) 47 CLR 1 at 7. See also *R v Wallis; Ex parte Employers' Association of Wool Selling Brokers* (1949) 78 CLR 529 at 550-551 per Dixon J; [1949] HCA 30; *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678 per Mason J; [1979] HCA 26.

That decision and subsequent authorities were considered in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*[60]. Gummow and Hayne JJ observed in that case[61]:

> "*Anthony Hordern* and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the 'same power', or are with respect to the same subject matter, or whether the general power encroaches upon the subject matter exhaustively governed by the special power. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power." (footnotes omitted)

This approach has been described as one of "obvious good sense"[62]. It reflects a principle of wide application embodied in what Pearce and Geddes call the "difficult-to-translate maxim"[63], *expressum facit cessare tacitum*. Like all such principles, however, it must be applied subject to the particular text, context and purpose of the statute to be construed.

51 The defendants pointed to the differences between the circumstances in which the powers conferred by ss 198 and 198A arise, the persons to whom they apply and the places in respect of which they may be used. Those differences, they argued, demonstrated that ss 198A and 198(2) are two sources of power to remove offshore entry persons, albeit they have similar practical consequences. Section 198(2), they submitted, requires that an offshore entry person, detained under s 189(3), be removed from Australia as soon as reasonably practicable if no investigation or assessment for the purposes of s 46A or s 195A is being undertaken. "Taking" an offshore entry person from Australia pursuant to s 198A(1) amounts to "removing" that person from Australia so as to satisfy the requirements of s 198(2).

52 The plaintiffs contended that the 2001 Excision Act and the 2001 Excision Consequential Provisions Act introduced a new system for dealing with offshore

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60 (2006) 228 CLR 566 at 589 [59] per Gummow and Hayne JJ, see also at 571-572 [2] per Gleeson CJ, 612 [149] per Heydon and Crennan JJ; [2006] HCA 50.

61 (2006) 228 CLR 566 at 589 [59].

62 Pearce and Geddes, *Statutory Interpretation in Australia*, 7th ed (2011) at 145 [4.34].

63 *Statutory Interpretation in Australia*, 7th ed (2011) at 144 [4.34].

entry persons. They argued that the new system is a specific mechanism by which Australia seeks to meet its international obligations to offshore entry persons whose claims are not to be considered in this country. It differs from the mechanism of mandatory detention and removal under s 198. "Offshore entry persons" who are dealt with under s 198A will not have their claims to be refugees assessed in Australia but can be taken to another country where their claims will be assessed. Section 198A, it was submitted, is therefore not dependent upon or connected to s 198(2). Nor could it be connected to s 196 which requires "unlawful non-citizens" detained under s 189 to be kept in immigration detention until removed from Australia under ss 198 or 199 or deported or granted a visa.

53 The plaintiffs pointed to s 198A(4) and the cessation of immigration detention in relation to a person being dealt with under s 198A. They submitted that s 198A(4) is enlivened upon a decision being taken to consider an offshore entry person for removal from Australia under s 198A(1). Although such a person is not in immigration detention as defined in s 5(1), he or she can be detained as an incident of the power to take him or her to another country. The existence of that incidental power is indicated by the specific but non-exhaustive coercive powers conferred by s 198A(2). The cessation of immigration detention for persons being dealt with under s 198A(1) is consistent with the discretionary character of their detention as "offshore entry persons" under s 189(3).

54 The plaintiffs' submissions should be accepted. The scheme of the 2001 Excision Act and the 2001 Excision Consequential Provisions Act is clear. An offshore entry person, claiming to be a refugee, and detained under s 189(3), cannot be taken from Australia other than pursuant to s 198A unless that person's claim for protection is assessed within Australia. Absent the possibility of removal to a declared country, the person cannot be removed from Australia before there has been an assessment of his or her claim to be a refugee. If the person is found to be a refugee, then removal under s 198(2) will necessarily have to accord with Australia's non-refoulement obligation. If the person is found not to be a refugee, then removal to his or her country of origin is open, or removal to some other country willing to accept the person.

55 Absent any assessment of their claims for protection as refugees, the plaintiffs can only be taken to Malaysia pursuant to s 198A and only if there has been a valid declaration made in relation to Malaysia under s 198A(3).

The declaration criteria – jurisdictional facts or jurisdictional tasks?

56 The Solicitor-General for the Commonwealth submitted on behalf of the defendants that in making a declaration under s 198A(3)(a) the Minister is required to form, in good faith, an evaluative judgment that what he declares is true. He would not have exercised the power if he had misunderstood the matters set out in sub-pars (i)-(iv) and thereby asked the wrong question in forming his

judgment. The plaintiffs' counsel contended, however, that the matters which are the subject of the declaration under s 198A(3) are jurisdictional facts. If any of the facts did not exist when the Minister made his declaration, the declaration would have been beyond power. Counsel pointed to a number of features of s 198A to support that submission, including the following:

- The absence of any reference to ministerial satisfaction or opinion in s 198A.

- The use of the word "declare" as an indication that Parliament intended the content of the declaration to be true as a matter of objective fact.

- The evident purpose of s 198A, which is to enable Australia's obligations under the Refugee Convention to be fulfilled by authorising the taking of a person to a country where that person's claims for protection under the Convention will be assessed and where that person will be given protection during that process, and afterwards if found to be a refugee.

- The nature of the task committed to the Minister under s 198A(3) which, it was said, is amenable to judicial review. This submission depended upon the contention, considered below, that s 198A(3) requires the Minister to make a determination about the legal protections afforded by a country to a person claiming refugee status. On this assumption, it was submitted that the relevant foreign law is simply a fact to be proved and there is nothing about that task which a court is unsuited to review.

- The fundamental rights of persons who are liable to be taken under s 198A(1) are at stake and are to be balanced against any inconvenience or other factor suggesting that the matters in s 198A(3)(a) are not jurisdictional facts.

57 The term "jurisdictional fact" applied to the exercise of a statutory power is often used to designate a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion. The criterion may be "a complex of elements"[64]. When a criterion conditioning the exercise of statutory power involves assessment and value judgments on the part of the decision-maker, it is difficult to characterise the criterion as a jurisdictional fact, the existence or non-existence of which may be reviewed by a court[65]. The

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64 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28] per Gleeson CJ, Gummow, Kirby and Hayne JJ; [2000] HCA 5.

65 *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303-304; [1997] HCA 10.

decision-maker's assessment or evaluation may be an element of the criterion or it may be the criterion itself. Where a power is expressly conditioned upon the formation of a state of mind by the decision-maker, be it an opinion, belief, state of satisfaction or suspicion, the existence of the state of mind itself will constitute a jurisdictional fact[66]. If by necessary implication the power is conditioned upon the formation of an opinion or belief on the part of the decision-maker then the existence of that opinion or belief can also be viewed as a jurisdictional fact. The primary submission on the part of the plaintiffs, however, looked to the existence of the matters set out in s 198A(3)(a) as conditioning the Minister's power to make a declaration.

58 The question is one of statutory construction[67]. The considerations advanced by the plaintiffs cannot overcome the language of s 198A(3). Moreover, clear language would be needed to support the primary characterisation for which they contend. The Minister is empowered under s 198A(3) to make a declaration, the content of which is defined by that subsection. Putting to one side the nature and scope of the "protection" referred to in each of sub-pars (i) to (iv), their language indicates the need for ministerial evaluative judgment. As explained below, consideration of the domestic law of the proposed receiving country and its binding commitments and obligations under international law is mandated. That consideration will necessarily be an evaluative task. The words "provide", "access", "effective procedures" and "meets relevant human rights standards" all point in that direction. The function conferred upon the Minister is an executive function to be carried out according to law. Absent clear words, the subsection should not be construed as conferring upon courts the power to substitute their judgment for that of the Minister by characterising the matters in sub-pars (i) to (iv) as jurisdictional facts.

59 On the other hand, the mere fact that it is the Minister who makes the declaration is not enough to secure its validity. The Solicitor-General was correct when he submitted that the Minister is required to form, in good faith, an evaluative judgment based upon the matters set out in s 198A(3)(a), properly construed. That the Minister properly construe them is a necessary condition of the validity of his declaration. Properly construed, they define the content of the declaration which the Parliament has authorised. If the Minister were to proceed

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66 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-654 [130]-[137] per Gummow J; [1999] HCA 21; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 609 [183] per Gummow and Hayne JJ; [2002] HCA 54.

67 *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 64 [39]-[42] per Spigelman CJ; *Woolworths Ltd v Pallas Newco Ltd* (2004) 61 NSWLR 707 at 710 [6] per Spigelman CJ.

to make a declaration on the basis of a misconstrued criterion, he would be making a declaration not authorised by the Parliament. The misconstruction of the criterion would be a jurisdictional error. As McHugh, Gummow and Hayne JJ said in *Minister for Immigration and Multicultural Affairs v Yusuf*[68]:

> "identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it."

A declaration under s 198A(3) affected by jurisdictional error is invalid. Another way of approaching the scope of the ministerial power under s 198A(3) is to treat it as being, by necessary implication, conditioned upon the formation of an opinion or belief that each of the matters set out in s 193A(a)(i)-(iv) is true. The requisite opinion or belief is a jurisdictional fact. If based upon a misconstruction of one or more of the matters, the opinion or belief is not that which the subsection requires in order that the power be enlivened.

60 The question that then arises is: Did the Minister properly construe the criteria under s 198A(3)(a)(i)-(iv)?

61 The temporal element of the Minister's judgment under s 198A(3)(a) is important. Each of the matters the subject of a declaration about a "specified country" is a statement about that country at the time of the declaration. It is, however, not only a snapshot of the present. The provision of access and protection and the meeting of human rights standards in providing protection must be judged by the Minister as more than merely transient. That is because the declaration enlivens a power to undertake future action: the taking of offshore entry persons to the specified country. The judgment required by the criteria is necessarily a judgment that the circumstance described by each of those criteria is a present and continuing circumstance. The temporal element points to the need for a legal framework to support the continuance of the matters the subject of the Minister's assessment.

62 The declaration must be a declaration about continuing circumstances in the specified country. It cannot therefore be a declaration based upon, and therefore a declaration of, a hope or belief or expectation that the specified country will meet the criteria at some time in the future even if that time be imminent. It is a misconstruction of the criteria to make a declaration of their

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68 (2001) 206 CLR 323 at 351 [82]; [2001] HCA 30.

subsistence based upon an understanding that the executive government of the specified country is "keen to improve its treatment of refugees and asylum seekers". Nor could a declaration rest upon a belief that the government of the specified country has "made a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers" or that it had "begun the process of improving the protection offered to such persons". Yet the Minister's affidavit suggested that, at least in part, this is how he approached the questions he had to ask himself before making the declaration.

63 The criteria in s 198A(3)(a) are dominated by the word "protection". It was submitted for the plaintiffs that the word is used in that context as a legal term of art to describe the rights to be accorded to a person who is, or who claims to be, a refugee under the Refugee Convention. At its heart it means protection from refoulement. The plaintiffs submitted that protective obligations applicable to refugees under the Refugee Convention also apply "until and unless a negative determination of [a] refugee's claim to protection is rendered."[69] The plaintiffs referred to a number of obligations said to be derived from the Refugee Convention and applicable to persons claiming to be refugees whose claims have not been assessed. They contended that asylum seekers should not be penalised for seeking protection. They should be provided with basic survival and dignity rights including rights to property, work and access to a social safety net. They should be provided with documentation and be given access to national courts to enforce their rights. They should not be the subject of discrimination and should be guaranteed religious freedom.

64 The use of the word "provides" was said to suggest not only the existence of laws which authorise or require protection to be afforded but also the existence of an effective judicial system capable of enforcing those laws. In so saying, the plaintiffs did not make any assertion that Malaysia does not have an effective judicial system. The point of difference between the plaintiffs and the defendants was that the defendants contended that the Minister could make a declaration in relation to a country which meets the criteria in s 198A(3) as a matter of fact, notwithstanding that it might lack particular laws ensuring that the relevant protection is provided.

65 It is not necessary to delineate all of the matters comprehended by the term "protection" in s 198A(3) or the particulars of "relevant human rights standards" mentioned in s 198A(3)(a)(iv). The Minister conceded, by way of the written submissions made on his behalf, that if the proper construction of

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69 Hathaway, *The Rights of Refugees under International Law*, (2005) at 278; *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (1992) at 9.

s 198A(3) meant that he was required to focus upon the laws in effect in Malaysia and not upon the "practical reality", then he would have erred in this case[70]. In my opinion, the Minister was so required and did so err.

66 The criteria for a declaration set out in s 198A(3)(a) are not limited to those things necessary to characterise the declared country as a safe third country. They are statutory criteria, albeit informed by the core obligation of non-refoulement which is a key protection assumed by Australia under the Refugee Convention. Attention must be directed to the statutory language. The questions the Minister must ask himself, about whether the relevant "access" and "protection" are provided and "human rights standards" are met, are questions which cannot be answered without reference to the domestic laws of the specified country, including its Constitution and statute laws, and the international legal obligations to which it has bound itself. The use of the terms "provides access … to effective procedures", "protection" and "relevant human rights standards" are all indicative of enduring legal frameworks. Having regard to the Minister's concession and what appears, in any event, from the submissions upon which the Minister acted and his affidavit, it is clear that he did not look to, and did not find, any basis for his declaration in Malaysia's international obligations or relevant domestic laws. There is no indication that the apparent legal fragility of the exemption order under the Malaysian Immigration Act and the associated risks to transferees were drawn to his attention. Important elements of his decision were the non-binding Arrangement, conversations he had undertaken with his ministerial counterpart in Malaysia, and observations by DFAT about contemporary practices with respect to asylum seekers in that country.

67 An affirmative answer to the questions posed by the criteria in s 198A(3)(a), reached by reference only to the specified country's laws and international obligations, is not the end of the necessary ministerial inquiry. Constitutional guarantees, protective domestic laws and international obligations are not always reflected in the practice of states. There are examples around the world of governments whose implementation of human rights standards fall short of the authoritative legal texts, be they constitutional or statutory, or embedded in treaties and conventions which, on the face of it, bind them[71]. The existence of a relevant legal framework which on paper would answer the criteria in s 198A(3) cannot therefore always be taken as a sufficient condition for the making of a declaration. The Minister must ask himself the questions required by the criteria on the assumption that the terms "provide" and "meet" require consideration of

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70 Submissions for the defendants at [81].

71 See eg Foster, "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State", (2007) 28 *Michigan Journal of International Law* 223 at 243.

the extent to which the specified country adheres to those of its international obligations, constitutional guarantees and domestic statutes which are relevant to the criteria.

Conclusion

68 The ministerial declaration of 25 July 2011 was affected by jurisdictional error. It was not a declaration authorised by s 198A of the Migration Act. The plaintiffs cannot therefore be taken to Malaysia pursuant to the power conferred by s 198A(1). Nor is it open to any officer of the Commonwealth to remove the plaintiffs to Malaysia pursuant to s 198(2) of the Migration Act without first assessing their claims to be persons to whom Australia owes protection obligations.

69 In relation to M106, I agree for the reasons explained in the joint judgment[72] that he cannot be removed from Australia without the prior consent in writing of the Minister under the IGOC Act. I agree with the orders proposed in the joint judgment.

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72 Joint judgment at [137]-[147].

70 GUMMOW, HAYNE, CRENNAN AND BELL JJ. The plaintiff in each of these matters arrived by boat at Christmas Island on Thursday, 4 August 2011. Each is a citizen of Afghanistan. The plaintiff in the second matter is 16 years of age. He arrived unaccompanied by his parents, any other adult relative or any person having guardianship of him. It is convenient to refer to him as the "second plaintiff".

71 Upon arrival at Christmas Island, an officer of the Commonwealth, acting in reliance on s 189(3) of the *Migration Act* 1958 (Cth) ("the Act" or "the Migration Act"), detained the plaintiffs. On Sunday, 7 August 2011, an officer of the Department of Immigration and Citizenship determined that the plaintiff in the first matter, and a number of other adults who had arrived at Christmas Island at the same time, should be taken to Malaysia. On the same day, each plaintiff (and others) sought and obtained an interim order of this Court restraining the first defendant ("the Minister") from effecting their removal from Australia.

72 In accordance with the terms on which interim relief was granted, the plaintiffs and others commenced proceedings in the original jurisdiction of this Court seeking interlocutory and permanent relief restraining their removal from Australia and other relief directed to the Minister and the Commonwealth concerning the validity of steps taken or intended to be taken by the Minister to detain the plaintiffs and effect their being taken from Australia.

73 On 8 August 2011, interlocutory orders were made restraining the Minister from removing the plaintiffs from Australia until the hearing and determination of the proceedings or further order.

74 Having regard to the provisions of s 486B(4) of the Act[73], the proceedings instituted by the plaintiffs were subsequently reconstituted as a series of separate applications for an order to show cause, each of which named only one person as plaintiff. Subject to some qualifications which are not now material, the

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73 "The following are not permitted in or by a migration proceeding:

(a) representative or class actions;

(b) joinder of plaintiffs or applicants or addition of parties;

(c) a person in any other way (but not including as a result of consolidation under subsection (2)) being a party to the proceeding jointly with, on behalf of, for the benefit of, or representing, one or more other persons, however this is described."

proceedings instituted by the present plaintiffs were referred for consideration by the Full Court. The two proceedings have been heard together and, apart from the need to consider separately the issues that are presented by the second plaintiff entering Australia as an unaccompanied minor, it will generally not be necessary to notice any distinction between the two proceedings.

75 In their amended applications for an order to show cause, each plaintiff alleged that his detention was and is unlawful. No argument in support of those allegations was advanced at the hearing and it follows that the allegations may be put aside from further examination.

76 Argument of the matters focused on grounds alleging that the plaintiffs could not lawfully be taken from Christmas Island to Malaysia. Those grounds can be generally described as being that (a) s 198A of the Act provides no power to take either plaintiff to Malaysia because no valid declaration of Malaysia has been made under s 198A; (b) s 198(2) does not in the circumstances of these cases give power to remove either plaintiff to Malaysia; and (c) the consent of the Minister, as guardian of the unaccompanied minor, is necessary before the second plaintiff could lawfully be taken from Australia. Other arguments both in amplification of and supplementary to those that have been identified were advanced on behalf of the plaintiffs but they need not be noticed.

77 It is convenient to begin consideration of the issues about the plaintiffs being removed or taken to Malaysia by identifying the relevant statutory provisions.

Removal from Australia – relevant statutory provisions

78 Each plaintiff is what the Act describes as an "unlawful non-citizen"[74] and an "offshore entry person"[75]. Section 198 of the Act provides for the removal from Australia of an unlawful non-citizen. In particular, s 198(2) provides:

> "An officer must remove as soon as reasonably practicable an unlawful non-citizen:
>
> (a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

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74 ss 5(1) and 14.

75 s 5(1).

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined."

It was not disputed that, if lawfully detained under s 189(3), each plaintiff is "an unlawful non-citizen … who is covered by … paragraph 193(1) … (c)". As stated earlier, no argument was advanced that the plaintiffs had not been lawfully detained under s 189(3).

79 Section 198A of the Act provides for the taking of an offshore entry person from Australia to another country. It provides:

"(1) An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).

(2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:

(a) place the person on a vehicle or vessel;

(b) restrain the person on a vehicle or vessel;

(c) remove the person from a vehicle or vessel;

(d) use such force as is necessary and reasonable.

(3) The Minister may:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

(iv) meets relevant human rights standards in providing that protection; and

(b) in writing, revoke a declaration made under paragraph (a).

(4) An offshore entry person who is being dealt with under this section is taken not to be in ***immigration detention*** (as defined in subsection 5(1)).

(5) In this section, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force."

Removal from Australia – the parties' arguments

80 The plaintiffs submitted that neither s 198A(1) nor s 198(2) provides power for the Minister to have either plaintiff taken from Christmas Island to Malaysia. They submitted that s 198A(1) does not provide that power because the Minister's declaration of Malaysia for the purposes of s 198A is legally infirm. They argued that it was not open to the Minister to make that declaration because (as was not disputed at the hearing of these matters) Malaysia has no legal obligation – whether internationally or as a matter of Malaysia's domestic law – to provide the access and protections described in s 198A(3)(a). The plaintiffs further submitted that they can be taken from Australia to Malaysia only pursuant to an exercise of power under s 198A(1) because, so they submitted, s 198(2) is not a source of power to remove offshore entry persons who claim to be persons to whom Australia owes protection obligations when those claims have not been assessed. That is, the plaintiffs submitted in effect that s 198A "explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed"[76] and therefore s 198A "excludes the operation of general

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76 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; [1932] HCA 9.

expressions in the same [statute] which might otherwise have been relied upon for the same power"[77].

81 The Minister and the Commonwealth submitted that the Minister's declaration of Malaysia was valid. They further submitted that s 198(2) and s 198A(1) each provide power for the Minister, by his officers, to take the plaintiffs from Christmas Island to Malaysia. That is, the Minister and the Commonwealth submitted that if, contrary to their primary submission, the Minister's decision to declare Malaysia were to be held to be legally infirm the plaintiffs could (and should) still be removed from Christmas Island to Malaysia pursuant to the power of removal given by s 198(2). The powers given by s 198(2) and s 198A(1) were said to be both available.

82 Before dealing with whether the Minister's declaration of Malaysia was, as the plaintiffs submitted and the Minister and the Commonwealth denied, a declaration that was not validly made, it is convenient to deal with whether s 198(2) and s 198A can have the operation which the Minister and the Commonwealth alleged.

Can s 198(2) be engaged?

83 The plaintiffs submitted that the only power that could be engaged to take either of them from Australia was that given by s 198A(1). They submitted that s 198(2) could not be engaged.

84 The argument had two distinct branches. First, the plaintiffs submitted that when proper regard is paid to the text of s 198A and s 198(2) it should be decided that s 198A provides a separate and distinct set of provisions with respect to offshore entry persons whose claims for asylum are not to be assessed in Australia. Second, they submitted that whether s 198(2) and s 198A(1) should be construed as providing what can conveniently be called cumulative powers of removal was to be determined by application of the principle of statutory construction usually associated with this Court's decision in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[78]. As was explained in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*[79], the relevant principle of construction has been identified by

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77 *Anthony Hordern* (1932) 47 CLR 1 at 7.

78 (1932) 47 CLR 1.

79 (2006) 228 CLR 566 at 586-589 [52]-[59]; [2006] HCA 50.

using a number of different terms. These have included whether the two powers are the "same power"[80] or are with respect to the "same matter"[81], or whether the general power encroaches upon the same subject matter exhaustively governed by the special power[82]. But the central question is whether "the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power"[83].

85 Consideration of both branches of the plaintiffs' argument requires close attention to the relevant statutory text.

86 The first branch of the plaintiffs' argument focused upon the following features of that text. First, s 198A(1) is expressed as a power, not an obligation: "An officer *may* take an offshore entry person from Australia …" (emphasis added). Second, s 198A(4) provides that:

> "An offshore entry person who is being dealt with under this section is taken not to be in ***immigration detention*** (as defined in subsection 5(1))."

Thus, so the argument proceeded, once an officer has decided that he or she will exercise the power given by s 198A(1) to take an offshore entry person from Australia, the conditions for the exercise of power under s 198(2) are no longer fulfilled. The conditions for the exercise of power under s 198(2) are not fulfilled because the offshore entry person (an unlawful non-citizen) is no longer covered by s 193(1)(c). That person is not covered by that provision because he or she is no longer detained under s 189(2), (3) or (4). In particular, the detention under s 189(3) that would have earlier existed has been brought to an end by operation of s 198A(4).

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80 *Anthony Hordern* (1932) 47 CLR 1 at 7.

81 *R v Wallis* ("the *Wool Stores Case*") (1949) 78 CLR 529 at 550, 553; [1949] HCA 30.

82 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678; [1979] HCA 26; *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Live-stock Corporation (No 2)* (1980) 44 FLR 455 at 468-469.

83 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589 [59].

87 While it may be accepted that these sequential steps are an accurate description of the operation of the relevant provisions, the accuracy of that analysis does not, without more, demonstrate that the power given by s 198(2) is not available in these cases. The analysis demonstrates only that, *if* s 198A(1) is relied on, s 198(2) is not available. It is an analysis that depends upon the course of events; it does not determine the proper construction of the relevant provision. The analysis does not show whether the power under s 198(2) could be used. Whether resort can be had to s 198(2) depends on the second branch of the plaintiffs' argument.

88 The obligation which s 198(2) imposes – "[a]n officer *must* remove as soon as reasonably practicable" (emphasis added) – is expressly addressed to cases in which an unlawful non-citizen has been detained "in an excised offshore place"[84]. It follows that the obligation imposed by s 198(2) and the power which the provision implicitly confers to enable fulfilment of that obligation are expressly directed to classes of persons which include offshore entry persons in detention. By contrast, the power conferred by s 198A(1) is power to take offshore entry persons to a specified country. Neither s 198(2) nor s 198A(1) could be engaged without an officer having lawful authority over the person of the individual who is to be removed or taken from Australia. Whether or not, as the Minister and the Commonwealth submitted, a distinction can be drawn between those in "immigration detention" (to which s 198(2) is said to apply) and those who are not (whether because s 198A(4) is engaged or otherwise), both ss 198(2) and 198A(1) are directed to persons under the lawful control of an officer. Section 198A(1) thus gives power to take from Australia a particular subset of the persons that the Minister now says may be removed under s 198(2).

89 It is important to observe that s 198 generally, and s 198(2) in particular, deal with the subject matter of removal "from Australia"[85] of the several classes of persons with whom the provisions deal. Section 198 does that without specifying *to where* those persons may be removed. By contrast, s 198A(1) does specify to where an offshore entry person may be taken: a country in respect of which a declaration under s 198A(3) is in force and which thus has been declared to have the characteristics described in s 198A(3)(a)(i) to (iv).

90 The ambit of the duty and power to remove unlawful non-citizens from Australia under s 198, when it is read with, and in the light of, s 198A, must be

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84 ss 189(3) and 193(1)(c).

85 Section 5(1) of the Act provides that "***remove*** means remove from Australia".

understood in a context provided by two considerations. First, as this Court said in *Plaintiff M61/2010E v The Commonwealth* ("the *Offshore Processing Case*")[86]:

> "[R]ead 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."[87]

As the Court pointed out[88] in the *Offshore Processing Case*, it may be that at times the Act goes beyond what is necessary to respond to Australia's international obligations[89]. But whether or not that is so, the Act:

> "proceeds, in important respects, from the assumption that Australia has 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*."[90] (emphasis added)

91 A second important consideration that bears upon the proper construction of s 198, read with and in the light of s 198A, is that the ambit and operation of a statutory power to remove an unlawful non-citizen from Australia must be understood in the context of relevant principles of international law concerning the movement of persons from state to state.

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86 (2010) 85 ALJR 133 at 139 [27]; 272 ALR 14 at 21; [2010] HCA 41.

87 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.

88 (2010) 85 ALJR 133 at 139-140 [27]; 272 ALR 14 at 21.

89 See *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 178-180 [54]-[59]; [2005] HCA 6.

90 *Plaintiff M61/2010E v The Commonwealth* ("the *Offshore Processing Case*") (2010) 85 ALJR 133 at 140 [27]; 272 ALR 14 at 21.

92 Australia's power to remove non-citizens from its territory is confined by the practical necessity to find a state that will receive the person who is to be removed. Ordinarily, Australia would look, in the first instance, to a person's country of nationality to receive that person. Australia would do that on the footing that it has long been accepted[91], as a principle of international law, that the national of a country has a right to re-enter the territory of that country and a country of nationality has a duty to admit its nationals to its territory. This principle of customary international law is reflected, but not in any way superseded, in many international instruments to which Australia is party[92].

93 The general expectation that Australia can and should look to the country of a person's nationality to receive that person on removal from Australia is necessarily subject to some qualifications. First, other considerations may arise where a person is stateless or where the controller of a vessel that carried a passenger denied entry to Australia may be compelled to remove that passenger[93]. But those kinds of case may be put aside from further examination in these matters.

94 The second and more relevant qualification is that Australia (and any other party to the Refugees Convention and the Refugees Protocol) would act in

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91 Oppenheim, *International Law: A Treatise*, 2nd ed (1912), vol 1 at 371 §294, 402 §326; H Lauterpacht (ed), *Oppenheim's International Law*, 5th ed (1937), vol 1 at 513-514 §294, 553 §326; Weis, *Nationality and Statelessness in International Law*, (1956) at 49-51; Higgins, "The Right in International Law of an Individual to Enter, Stay in and Leave a Country", (1973) 49 *International Affairs* 341 at 346; Weis, *Nationality and Statelessness in International Law*, 2nd ed (1979) at 45-47; Hannum, *The Right to Leave and Return in International Law and Practice*, (1987) at 60, 66-67; Brownlie, *Principles of Public International Law*, 7th ed (2008) at 384, 398.

92 International Covenant on Civil and Political Rights (1966), Art 12(4); International Convention on the Elimination of All Forms of Racial Discrimination (1969), Art 5(d)(ii); Convention on the Rights of the Child (1989), Art 10(2); Convention on the Rights of Persons with Disabilities (2006), Art 18(1)(d). See also Havana Convention on the Status of Aliens (1928) 132 LNTS 301, Art 6; Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948, Art 13(2). cf Convention for the Elimination of All Forms of Discrimination against Women (1979), Art 15(4).

93 Migration Act, s 217.

breach of its international obligations under those instruments if it were to expel or return "in any manner whatsoever" a person with a well-founded fear of persecution "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"[94]. Accordingly, for Australia to remove a person from its territory, whether to the person's country of nationality or to some third country willing to receive the person, without Australia first having decided whether the person concerned has a well-founded fear of persecution for a Convention reason may put Australia in breach of the obligations it undertook as party to the Refugees Convention and the Refugees Protocol, in particular the non-refoulement obligations undertaken in Art 33(1) of the Refugees Convention.

95 When it is observed that s 198A is directed to taking persons to a country which provides the access and protections identified in s 198A(3), including "access, for persons seeking asylum, to effective procedures for assessing their need for protection"[95], it becomes evident that s 198 should not be construed as requiring or permitting the removal from Australia of those described in s 198A as "persons seeking asylum"[96] before there has been what the same section calls a "determination of their refugee status"[97]. Such persons can be taken to another country *only* in accordance with s 198A. The Act confers only one power to take that action: the power given by s 198A. Section 198A deals with a subset of those to whom it is said s 198 applies. The generality of the power apparently conferred by s 198 must be confined by reference to the restrictions set out in s 198A.

96 That this is the proper construction of the relevant provisions is reinforced by consideration of the legislative history of ss 198 and 198A. Both of these provisions of the Act came into what is substantially the form in which they now stand as a result of the enactment in 2001 of six Acts[98] which affected the entry

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94 Refugees Convention, Art 33(1).

95 s 198A(3)(a)(i).

96 s 198A(3)(a)(i).

97 s 198A(3)(a)(ii).

98 *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*

(Footnote continues on next page)

into, and remaining in, Australia by aliens. As is recorded in the *Offshore Processing Case*[99], those six Acts were all assented to, and for the most part came into operation, on the same day. As is also recorded in the *Offshore Processing Case*[100], two of those Acts, the *Migration Amendment (Excision from Migration Zone) Act* 2001 (Cth) and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth), provided for the excision of certain Australian territory (including Christmas Island) from the migration zone and contemplated what became known in the Department as the "Pacific Strategy": processes by which offshore entry persons would have their claims for protection determined in a country declared under s 198A but according to procedures specified by the Department. As was said in the *Offshore Processing Case*[101], "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".

97 Section 198(2) should not be read as supplying a power to remove the present plaintiffs from Australia. Reading s 198(2) as supplying that power would allow the Minister to remove a person who claims to be a person to whom Australia owes protection obligations, but whose claims have not been assessed, to *any* country willing to receive that person. To read s 198(2) in that way would give s 198A(1) no separate work to do. A construction of that kind should not be adopted[102].

Legislation Amendment Act (No 5) 2001 (Cth); *Migration Legislation Amendment Act (No 6)* 2001 (Cth).

99 (2010) 85 ALJR 133 at 140 [29]; 272 ALR 14 at 21-22.

100 (2010) 85 ALJR 133 at 140-141 [30]-[33]; 272 ALR 14 at 22-23.

101 (2010) 85 ALJR 133 at 141 [34]; 272 ALR 14 at 23.

102 See, for example, *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ, 419 per O'Connor J; [1905] HCA 11; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 12-13 per Mason CJ; [1992] HCA 64; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 266 [39], 267 [41]-[42] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ, 278 [76], 280 [79] per Heydon J; [2010] HCA 23.

98 Further, to read s 198(2) of the Act as providing a power to remove from Australia to *any* country that is willing to receive the person concerned any offshore entry person who claims to be a person to whom Australia owes protection obligations, but whose claims have not been assessed, would deny the legislative intention evident from the Act as a whole: that its provisions are intended to facilitate Australia's compliance with the obligations undertaken in the Refugees Convention and the Refugees Protocol[103].

99 For these reasons, s 198A is the only legislative source of power for the Minister to take "persons seeking asylum" to another country for "determination of their refugee status".

100 Is that power available in these cases?

Declaration under s 198A(3)

101 On 25 July 2011, the Minister and the Minister of Home Affairs in the Government of Malaysia signed a document entitled "Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement" ("the Arrangement"). In its recitals, the Arrangement referred to an earlier joint statement by the respective Prime Ministers of Australia and Malaysia which "announced a commitment to enter into a groundbreaking new arrangement to help tackle people smuggling and irregular migration in the Asia-Pacific region". The announcement said that "core elements of this bilateral arrangement" would include transferring "800 irregular maritime arrivals … to Malaysia for refugee status determination" and, "in return, over four years, Australia [resettling] 4000 refugees already currently residing in Malaysia".

102 Clause 1 of the Arrangement signed by the Minister recorded that:

> "The Participants, subject to the terms of this Arrangement and the laws, rules, regulations and national policies from time to time in force in each country, endeavour to promote and develop co-operation in addressing migration issues of concern."

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103 As to the nature and extent of those obligations, see *NAGV and NAGW of 2002* (2005) 222 CLR 161 at 171-172 [22]-[26]; E Lauterpacht and Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNCHR's Global Consultations on International Protection*, (2003) 87.

103 Clause 16 of the Arrangement provided that:

> "This Arrangement represents a record of the Participants' intentions and political commitments but is not legally binding on the Participants."

It follows from both the provision denying that the Arrangement is legally binding on the parties and the reference to the participants' endeavour to promote and develop cooperation being subject not only to the terms of the Arrangement but also to "the laws, rules, regulations and national policies from time to time in force in each country" that the Arrangement is, as it records, no more than a statement of the participants' intentions and *political* commitments. It creates no obligation for the purposes of international law. The Minister and the Commonwealth did not submit to the contrary.

104 Following the signing of the Arrangement, the Minister declared that Malaysia is a country that has the four characteristics set out in s 198A(3)(a). The text of s 198A is set out earlier in these reasons. It will be recalled that s 198A(3)(a) provides that the Minister may declare in writing that a specified country provides access of a kind described[104], provides protections of kinds stated[105] and "meets relevant human rights standards in providing that protection"[106].

105 The plaintiffs submitted that the declaration of Malaysia was not validly made. That submission was put in a number of different ways and on a number of distinct bases. It is necessary to deal in any detail with only one: that the declaration was not validly made because the access and protections referred to in s 198A(3)(a)(i) to (iii) must be, but are not, access and protections that the country in question is legally bound to provide. It is necessary to begin consideration of this issue by construing s 198A(3)(a).

The construction of s 198A(3)(a)

106 Section 198A(3) provides that the Minister "may: (a) declare … that a specified country" has the four characteristics identified in sub-pars (i) to (iv) of that paragraph. Section 198A(3)(a) does not refer to the Minister being *satisfied* of the existence of those criteria or provide that the Minister's forming of an

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104 s 198A(3)(a)(i).

105 s 198A(3)(a)(ii) and (iii).

106 s 198A(3)(a)(iv).

opinion about those matters is a condition for the exercise of the discretion to make a declaration. Rather, the Minister is given a discretion, and thus has power, to declare that a specified country *has* the relevant characteristics. On its face, it is not a power to declare that the Minister *thinks* or *believes* or *is satisfied* that the country has those characteristics.

107 The plaintiffs submitted that the criteria in sub-pars (i) to (iv) of s 198A(3)(a) are jurisdictional facts. They submitted that the matters stated in the criteria must be satisfied before a declaration could validly be made. Their primary position was that each was to be understood as a jurisdictional fact "in an objective sense": "a fact that must exist, objectively, before an administrative jurisdiction to exercise a power is enlivened" or, as the plurality put it in *Enfield City Corporation v Development Assessment Commission*[107], "that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion". Their alternative submission was that s 198A(3) "requires the Minister to be satisfied of the s 198A(3) criteria".

108 By contrast, the Minister and the Commonwealth submitted that "[i]t is the existence of the Minister's declaration itself, not the truth of the content of that declaration, that engages the operation of s 198A(1)". They further submitted that the *only* constraints on the Minister's power to make a declaration are that the power is exercised in good faith and within the scope and for the purpose of the statute.

109 It may readily be accepted that requirements to exercise the power in good faith and within the scope and for the purposes of the Act constrain the exercise of the Minister's power[108]. But the submissions on behalf of the Minister and the Commonwealth that sub-pars (i) to (iv) of s 198A(3)(a) are not jurisdictional facts should not be accepted. To read s 198A(3)(a) in that way would read it as validly engaged whenever the Minister bona fide thought or believed that the relevant criteria were met[109]. So to read the provision would pay insufficient regard to its text, context and evident purpose. Text, context and purpose point

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107 (2000) 199 CLR 135 at 148 [28]; [2005] HCA 5. See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 [130]; [1999] HCA 21.

108 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 523 [59]; [2009] HCA 4.

109 cf *Liversidge v Anderson* [1942] AC 206.

to the need to identify the relevant criteria with particularity. It may be noted that s 198A(3)(b) says only that the Minister may "in writing, revoke a declaration made under paragraph (a)". But it is unsurprising that the power given by s 198A(3)(b) to revoke a declaration is not bounded by particular criteria. That is not surprising given the evident purpose of s 198A and the great breadth of circumstances, legal and factual, that might reasonably be thought to warrant revocation of a declaration.

110 There remains for consideration, however, the identification of the content of the criteria stated in sub-pars (i) to (iv) of s 198A(3)(a). That is another question that requires attention to the proper construction of s 198A.

111 Each of the criteria stated in sub-pars (i) to (iv) of s 198A(3)(a) is a "complex of elements"[110]. Of most immediate concern in these matters is whether all of those elements are wholly factual, as the Commonwealth parties submitted, or, as the plaintiffs submitted, they include any element of legal obligation.

112 It may be accepted, for the purposes of argument, that each of the relevant criteria contains a factual element that requires a judgment to be made about what happens in the relevant country. That may be most clearly seen in connection with the fourth criterion: that the country in question "*meets* relevant human rights standards in providing that protection" (emphasis added). That criterion could be understood as directing attention to matters that include what has happened, is happening or may be expected to happen in that country.

113 To the extent to which s 198A(3)(a) does direct attention to matters of fact, there may be a difficult question about the proper temporal ambit of the inquiry permitted or required. It is plain that s 198A(3)(a) directs attention to whether the country in question meets all of the stated criteria *at the time of the declaration*. But to the extent to which consideration of those criteria permits or requires some factual determination, is the relevant inquiry to be directed to the present, the immediate past, or some (and if so what) future period? Those questions need not be and are not examined further.

114 It is to be emphasised that, because it is not necessary to decide whether any of the criteria stated in s 198A(3)(a) contains any factual element, nothing in these reasons should be understood as expressing any view about whether

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110 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28].

Malaysia in fact "meets relevant human rights standards", let alone whether asylum seekers in that country are treated "fairly" or "appropriately". Those are issues that, if they are presented by s 198A, need not be and are not examined in these matters.

115 Rather, the issue determinative of the present litigation arises from construing s 198A(3)(a) and in particular sub-pars (i) to (iii). What is meant in those sub-paragraphs by the phrases "provides access" and "provides protection"? Do those phrases refer only to a particular state of facts, or to observations of or conclusions about facts or behaviour (as the Minister and the Commonwealth submitted), or must the access and protection be legally assured in some way?

116 Contrary to the submissions of the Minister and the Commonwealth, the matters stated in s 198A(3)(a)(i) to (iii) are not established by examination only of what has happened, is happening or may be expected to happen in the relevant country. The access and protections to which those sub-paragraphs refer must be provided as a matter of legal obligation.

117 When s 198A(3)(a) speaks of a country that provides access and protections it uses language that directs attention to the kinds of obligation that Australia and other signatories have undertaken under the Refugees Convention and the Refugees Protocol. Reference has already been made to the non-refoulement obligation imposed by Art 33(1) of the Refugees Convention. But signatories undertake other obligations. Those obligations include:

– to apply the provisions of the Convention to refugees without discrimination as to race, religion or country of origin[111];

– to accord to refugees within a signatory's territory treatment at least as favourable as that accorded to its nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children[112];

– to accord to a refugee free access to the courts of law[113];

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111 Art 3.

112 Art 4.

113 Art 16(1).

– to accord to refugees lawfully staying in its territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment[114];

– to accord to refugees the same treatment as is accorded to nationals with respect to elementary education[115]; and

– to accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances[116].

The extent to which obligations beyond the obligation of non-refoulement (and the obligations under Art 31 of the Refugees Convention concerning refugees unlawfully in the country of refuge) apply to persons who claim to be refugees but whose claims have not been assessed is a question about which opinions may differ[117]. It is not necessary to decide that question. What is clear is that signatories to the Refugees Convention and the Refugees Protocol are bound to accord to those who have been determined to be refugees the rights that are specified in those instruments including the rights earlier described.

118 The references in s 198A(3)(a)(i) to (iii) to a country that provides access to certain procedures and provides protections of certain kinds must be understood as referring to access and protections of the kinds that Australia undertook to provide by signing the Refugees Convention and the Refugees Protocol. In that sense the criteria stated in s 198A(3)(a)(i) to (iii) are to be understood as a reflex of Australia's obligations.

119 This is most clearly evident from consideration of the requirement of s 198A(3)(a)(iii): that the country in question "provides protection to persons *who are given refugee status*, pending their voluntary repatriation to their country

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114 Art 17(1).

115 Art 22(1).

116 Art 26.

117 See, for example, Grahl-Madsen, *The Status of Refugees in International Law*, (1972), vol 2 at 223-225 §199; Hathaway, *The Rights of Refugees under International Law*, (2005) at 156-192; Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd ed (2007) at 412-413.

of origin or resettlement in another country" (emphasis added). As already noted, Australia, as a party to the Refugees Convention and the Refugees Protocol, is bound to accord to "persons who are given refugee status" the rights there identified. Those rights include, but are by no means limited to, rights relating to education, the practice of religion, employment, housing and access to the courts. If, as the Minister and the Commonwealth submitted, the only relevant inquiry presented by s 198A(3)(a)(iii) is whether, as a matter of fact and regardless of legal obligation, there is a real risk that a person who is given refugee status in the country to which he or she is taken will be expelled or returned to the frontiers of a territory where that person's life or freedom would be threatened on account of a Convention reason, that person may have none of the other rights which Australia is bound to accord to persons found to be refugees. Moreover, the person concerned would have no right to resist (no protection against) refoulement by the country to which he or she is taken. Thus when s 198A(3)(a)(iii) speaks of a country that "provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country" it refers to provision of protections of all of the kinds which parties to the Refugees Convention and the Refugees Protocol are bound to provide to such persons. Those protections include, but are not limited to, protection against refoulement. And because the protections contained in the Refugees Convention and the Refugees Protocol include according certain rights to those who are found to be refugees, the protections must be provided pursuant to a legal obligation to provide them. This construction is confirmed by consideration of the reference in s 198A(3)(a)(iv) to the country concerned meeting relevant human rights standards in providing "*that* protection": the protection mentioned in both sub-par (ii) and sub-par (iii). To confine "that protection" to the obligation of non-refoulement would give little or no practical operation to s 198A(3)(a)(iv).

120 The Minister and the Commonwealth submitted that there were several reasons to reject a construction of the relevant provisions that required consideration of anything more than what was likely to happen, in fact, with those who were taken to Malaysia under the Arrangement.

121 First, they submitted that "[t]he matters described in subparagraphs (i) to (iii) go to the *practical reality* of the 'protection' afforded by a country" (emphasis added). This was said to be the approach that has long been accepted in the Federal Court in what was described as "the analogous context" of the "'safe third country' scheme"[118].

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118 *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443 at [26]; *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR

(Footnote continues on next page)

122 It is greatly to be doubted that the analogy which it is sought to draw is apposite. The Act makes a number of different provisions relating to the subject of "safe third countries". Subdivision AI (ss 91A-91G) of Div 3 of Pt 2 of the Act, which is entitled "Safe third countries", was enacted, as s 91A records:

> "because the Parliament considers that certain non-citizens who are covered by the [Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees, held at Geneva, Switzerland, from 13 to 14 June 1989], or in relation to whom there is a safe third country, should not be allowed to apply for a protection visa or, in some cases, any other visa".

Subdivision AK (ss 91M-91Q) of Div 3 of Pt 2, entitled "Non-citizens with access to protection from third countries", deals with non-citizens who can avail themselves of "protection from a third country, because of nationality or some other right to re-enter and reside in the third country"[119]. Both subdivisions deal with subjects different from that addressed in s 198A. Both subdiv AI and subdiv AK require an assessment, *under the Act*, of whether a non-citizen can avail himself or herself of protection in a third country. By contrast, s 198A is concerned with taking non-citizens to another country for an assessment *in that other country* of their need for protection.

123 Thus, contrary to the submissions of the Minister and the Commonwealth, any analogy that is to be drawn between the provisions of subdivs AI and AK and the provisions of s 198A is at best tenuous and remote. And no useful guidance for construing s 198A(3)(a) is to be had from considering the way in which subdiv AK generally, or s 91N(3) in particular, is drawn[120].

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549 at 558-559 [42], [46]; *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119 at 124 [14], 131 [36]-[37].

119 s 91M.

120 Section 91N(3) provides:

> "The Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees:
>
> (a) declare in writing that a specified country:
>
> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(Footnote continues on next page)

124 In any event, if it were appropriate to draw some analogy between the provisions mentioned, the analogy would suggest no more than that there may be factual questions presented by the criteria stated in s 198A(3)(a)(i) to (iv), and, as noted earlier, it is not necessary to determine what factual elements there may be in those criteria. Nor is it necessary to determine whether or to what extent judicial review of a Minister's determination that such factual elements were met would be available. Recognising that there may be such factual elements does not determine whether the criteria stated in the provision contain a further element: that the access and protections in question are made available in satisfaction of an obligation that the country has undertaken either as a matter of international or domestic law.

125 A country "provides access" to effective procedures for assessing the need for protection of persons seeking asylum of the kind described in s 198A(3)(a)(i) if its domestic law provides for such procedures or if it is bound, as a matter of international obligation, to allow some third party (such as the United Nations High Commissioner for Refugees – "UNHCR") to undertake such procedures or to do so itself. A country does not provide access to effective procedures if, having no obligation to provide the procedures, all that is seen is that it has permitted a body such as UNHCR to undertake that body's own procedures for assessing the needs for protection of persons seeking asylum.

126 A country does not provide protections of the kind described in s 198A(3)(a)(ii) or (iii) unless its domestic law deals expressly with the classes of persons mentioned in those sub-paragraphs or it is internationally obliged to provide the particular protections. In particular, a country does not provide protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country, unless the country in question provides to persons who have been given refugee status rights of the kind mentioned in the Refugees Convention. Not only did the Arrangement not oblige Malaysia to provide any of those rights, no provision

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(ii) provides protection to persons to whom that country has protection obligations; and

(iii) meets relevant human rights standards for persons to whom that country has protection obligations; or

(b) in writing, revoke a declaration made under paragraph (a)."

was made in the Arrangement that (if carried out) would provide any of those rights.

127 The Minister and the Commonwealth also submitted that the circumstances in which s 198A was enacted pointed against the adoption of this construction of the section. They submitted that s 198A was enacted with a view to declaring that Nauru is a country specified for the purposes of s 198A and that it was known, before the enactment of s 198A, that Nauru was not a signatory to the Refugees Convention or the Refugees Protocol.

128 Two points may be made about this submission. First, it is by no means clear what use the Minister and the Commonwealth sought to make in the proper construction of the provision of what they asserted to be facts known to those who promoted the legislation. The facts asserted do not identify any mischief to which the provision was directed. Rather, it seemed that the facts were put forward as indicating what those who promoted the legislation hoped or intended might be achieved by it. But those hopes or intentions do not bear upon the curial determination of the question of construction of the legislative text[121]. Second, even assuming them to be in some way relevant, the arrangements made with Nauru were very different from those that are now in issue. Not least is that so because Australia, not Nauru as the receiving country, was to provide or secure the provision of the assessment and other steps that had to be taken, as well as the maintenance in the meantime of those who claimed to be seeking protection. Thus it was Australia, not the receiving country, that was to provide the access and protections in question. Further, although the arrangement between Australia and Nauru was recorded in a very short document, the better view of that document may be that it created obligations between the signatory states. But whether or not the arrangements with Nauru had the various features that have been identified, the question of statutory construction should be resolved in the manner indicated.

Making the declaration

129 For the purposes of these proceedings the parties agreed that, in declaring Malaysia, the Minister had regard to a submission prepared by his Department to which there was attached (among other things) advice from the Department of Foreign Affairs and Trade ("DFAT"), together with some documents from UNHCR.

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121 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 462 [423]-[424]; [2005] HCA 44.

130 The focus of the submission from the Minister's Department was the Arrangement with Malaysia. Thus the submission said, among other things, that the Department was satisfied that "the protections afforded to Transferees" under the Arrangement and associated Operational Guidelines satisfied the criteria stated in s 198A(3)(a). The submission asserted that, by the Arrangement, the Government of Malaysia had made several "commitments" in respect of the treatment of persons dealt with under the Arrangement. Nowhere in the submission did the Department advert to the fact that those "commitments" were not binding obligations.

131 The advice from DFAT did address each of the criteria in s 198A(3)(a). That advice can be summarised as follows:

(a) In answer to the question "Does Malaysia provide access, for persons seeking asylum, to effective procedures for assessing their need for protection?" it was said: "Yes, Malaysia generally allows the UNHCR access to persons seeking asylum including to assess their need for protection."

(b) In answer to the question "Does Malaysia provide protection for persons seeking asylum, pending determination of their refugee status?" it was said: "As a non-signatory to the Refugee Convention, Malaysia does not itself provide legal status to persons seeking asylum, but it does allow them to remain in Malaysia while the UNHCR undertakes all activities related to the reception, registration, documentation and status determination of asylum seekers and refugees."

(c) In answer to the question "Does Malaysia provide protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country?" it was said: "Not being a party to the Refugee Convention, Malaysia does not grant refugee status or asylum or have in place legal protections; however, Malaysian authorities generally cooperate with the UNHCR and, as noted above, according to the UNHCR, 'there were credible indications that forcible deportations of asylum seekers and refugees had ceased in mid-2009.'"

(d) Finally, in answer to the question "Does Malaysia meet relevant human rights standards in providing that protection?" it was said: "A number of fundamental liberties are enshrined in Malaysia's Federal Constitution and [Malaysia's] national human rights commission, SUHAKAM, is active in fulfilling its mandate with respect to these rights, including inquiring into complaints. … Internationally, Malaysia is not a party to the two primary

> human rights instruments: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It is a party to three international human rights treaties: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), [the] Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC)."

132 That is, the DFAT advice that was placed before the Minister reflected what the parties to these proceedings agreed is the position. First, the Government of Malaysia is not bound to and does not itself recognise the status of refugee in its domestic law. Second, the Government of Malaysia does not itself undertake any activities related to the reception, registration, documentation or status determination of asylum seekers and refugees. Third, the Government of Malaysia generally permits UNHCR to undertake those tasks within the territory of Malaysia and allows asylum seekers to remain in Malaysia while UNHCR undertakes those activities.

133 The role played by UNHCR in performing these tasks was amplified in the documents emanating from that organisation that were annexed to the briefing paper that went to the Minister. Nothing turns for present purposes on the particular content of those papers or the role that UNHCR has played or would play under the Arrangement.

134 The observations and judgments made in the DFAT advice demonstrated, and the facts that have been agreed for the purposes of these proceedings demonstrate, that none of the first three criteria stated in s 198A(3)(a) was or could be met in the circumstances of these matters.

135 As already explained, the references in s 198A(3)(a) to a country that provides access and provides protection are to be construed as references to provision of access or protection in accordance with an obligation to do so. Where, as in the present case, it is agreed that Malaysia: first, does not recognise the status of refugee in its domestic law and does not undertake any activities related to the reception, registration, documentation and status determination of asylum seekers and refugees; second, is not party to the Refugees Convention or the Refugees Protocol; and, third, has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments; it was not open to the Minister to conclude that Malaysia provides the access or protections referred to in s 198A(3)(a)(i) to (iii). The Minister's conclusions that persons seeking asylum have access to UNHCR procedures for assessing their need for protection and that neither persons seeking asylum nor persons who are given refugee status are ill-treated pending determination of their refugee status

or repatriation or resettlement did not form a sufficient basis for making the declaration. The jurisdictional facts necessary to making a valid declaration under s 198A(3)(a) were not and could not be established.

136 The Minister's declaration was made beyond power. It follows that s 198A(1) cannot be engaged to take either plaintiff from Australia to Malaysia. And as earlier demonstrated, s 198 does not supply any power to remove either plaintiff from Australia to Malaysia.

The second plaintiff

137 The conclusions that have already been reached, to the effect that offshore entry persons seeking asylum whose need for protection has not been assessed by Australian authorities may be taken to another country only in exercise of the power given by s 198A of the Act and that it was not open to the Minister to declare Malaysia to be a country specified for the purposes of that section, may be thought to make it unnecessary to consider the particular issues that arose in connection with the second plaintiff. However, the issues were fully argued and their resolution affects the nature of the relief which the second plaintiff should have. In particular, it is necessary to consider the intersection between the *Immigration (Guardianship of Children) Act* 1946 (Cth) ("the IGOC Act") and s 198A(1) of the Migration Act. The Administrative Arrangements Order made by the Governor-General on 14 October 2010 and currently in force provides for the administration of both statutes by the Minister[122].

138 Section 6 of the IGOC Act provides:

> "The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens."

139 Section 4AAA(1) of the IGOC Act provides that, subject to some exceptions which were not relevant in the present matter:

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122 *Commonwealth of Australia Gazette*, GN 41, 20 October 2010, 2372.

"a person (the ***child***) is a non-citizen child if the child:

(a) has not turned 18; and

(b) enters Australia as a non-citizen; and

(c) intends, or is intended, to become a permanent resident of Australia."

140 Section 6A of the IGOC Act provides that:

"(1) A non-citizen child shall not leave Australia except with the consent in writing of the Minister.

(2) The Minister shall not refuse to grant any such consent unless he or she is satisfied that the granting of the consent would be prejudicial to the interests of the non-citizen child.

(3) A person shall not aid, abet, counsel or procure a non-citizen child to leave Australia contrary to the provisions of this section.

Penalty: Two hundred dollars or imprisonment for six months.

(4) This section shall not affect the operation of any other law regulating the departure of persons from Australia."

141 The second plaintiff has not turned 18, entered Australia by landing at Christmas Island as a non-citizen and evidently intends (if he is permitted to do so) to become a permanent resident of Australia. It was not disputed that he is a "non-citizen child" for the purposes of the IGOC Act.

142 The Minister has not given consent in writing, under the IGOC Act, for the plaintiff to leave Australia. The Minister, by his delegate appointed under the Migration Act, determined that persons other than the unaccompanied minors who arrived at Christmas Island when the plaintiffs did should be taken to Malaysia. There has been no determination under the Migration Act that the second plaintiff, or any of the other unaccompanied minors, should be taken to Malaysia. Such examination of his circumstances as departmental officers have undertaken does not, so far as the agreed facts go, show any consideration of whether the Minister's consent is necessary or whether taking the second plaintiff from Australia would be in his interests. Rather, the departmental records show that it is intended that a "best interests of the child assessment" should be undertaken by UNHCR, in Malaysia.

143 A determination by the Minister (or his delegate) that an unaccompanied minor should be taken from Australia to a country declared under s 198A(3)(a) of the Migration Act would not constitute a consent in writing of the kind required by s 6A of the IGOC Act. Nor would the exercise of power to take an offshore entry person to another country pursuant to s 198A(1) fall within the operation of s 6A(4) of the IGOC Act and its provision that s 6A "shall not affect the operation of any other law regulating the departure of persons from Australia".

144 Laws providing for the compulsory removal of certain persons from Australia or taking such persons to another country are not laws "regulating the departure of persons from Australia". The subject matter of the kinds of law first mentioned cannot be described as "the *departure* of persons from Australia". And when s 198A provides power to take persons falling within the class of persons identified in that section to a country identified in accordance with the section it is not a law that is aptly described as "regulating" that subject matter. Just as it may often be necessary to distinguish between regulating and prohibiting[123], it is necessary in the present case to recognise the distinction between a law regulating the departure of persons from Australia and a law which gives power to remove persons from Australia.

145 If, as the Minister and the Commonwealth submitted, what was said in the opinion of four members of the Court in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* were to be understood as suggesting a different construction of s 6A(4), the construction and operation of that particular provision were "irrelevant to the question of construction raised by [that] appeal"[124].

146 Accordingly, removal of a person from Australia who is a "non-citizen child" within the meaning of the IGOC Act, or the taking of that child to another country pursuant to s 198A, cannot lawfully be effected without the consent in writing of the Minister (or his delegate). The decision to grant a consent of that kind would be a decision under an enactment and would therefore engage the provisions of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and, in particular, the provisions of that Act concerning the giving of reasons as well

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123 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 61; [1945] HCA 41; *McCarter v Brodie* (1950) 80 CLR 432 at 495; [1950] HCA 18; cf *Hughes and Vale Pty Ltd v State of New South Wales* (1954) 93 CLR 1 at 26; [1955] AC 241 at 299-300.

124 (2004) 79 ALJR 94 at 102 [42]; 210 ALR 190 at 201; [2004] HCA 50.

as the availability of review on any of the grounds stated in that Act. The Minister and the Commonwealth accepted that this would be so.

147 No consent in writing having been given by the Minister under the IGOC Act for the second plaintiff to leave Australia, there need be no further consideration of the questions presented by the possible engagement of the *Administrative Decisions (Judicial Review) Act*. Nor is it necessary to examine any wider question about the content or application of the Minister's duties as guardian. It is enough to observe that the removal of the second plaintiff without that consent would be unlawful. The power to take to another country that is given by s 198A(1) can be exercised only if that taking is not otherwise unlawful.

Conclusion and orders

148 For the reasons that have been given, the Minister's declaration that Malaysia is a specified country for the purposes of s 198A of the Act was made without power. There should be a declaration to that effect. The Minister may not lawfully take either plaintiff from Australia to Malaysia and the Minister should be restrained accordingly. In addition, in the case of the second plaintiff, the Minister should be further restrained from taking the second plaintiff from Australia without there being a consent in writing of the Minister given under s 6A(1) of the IGOC Act. The defendants should pay the plaintiffs' costs of the proceedings to date before Hayne J and the Full Court.

149 HEYDON J. There are background matters to be noted at the outset[125].

Background matters

150 The Australian Human Rights Commission intervened in support of the second plaintiff in these proceedings. Its President is the Hon Catherine Branson. In her affidavit she described the Commission as "Australia's National Human Rights Institution" – an expression not appearing in the *Australian Human Rights Commission Act* 1986 (Cth). When sitting as a member of the Full Court of the Federal Court of Australia she said that the Refugees Convention "does not create any general right in a refugee to enter and remain in the territory of a Contracting State."[126] She also said[127], using some words of Lord Mustill, that Australia "is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries."[128] She asserted these propositions to be true in relation to both the Refugees Convention and the Act[129]. Branson J also said that s 36 of the Act "does not give an entitlement to a protection visa to every 'non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention'"[130]. Among those obligations is that created by Art 33: Australia is obliged not to expel a "refugee" to the "frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The question whether the Refugees Convention imposes on the states which are parties to it an obligation to assess protection claims need not be considered. Whether or not the Refugees Convention does impose that obligation, the only obligations on the Minister in Australian law are those which are found in the Act. Whatever obligation Art 33 imposes on Australia, it is an obligation which stems from a treaty. The treaty has no force in Australian law until it or any part of it is enacted. Subject to the

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125 The central facts and legislative provisions are set out in the plurality judgment. The abbreviations employed in the plurality judgment are employed below.

126 *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 345 [14] (Beaumont and Lehane JJ agreeing).

127 *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 346 [14].

128 See *T v Immigration Officer* [1996] AC 742 at 754.

129 *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 346 [15].

130 *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 349 [32].

contrary terms of any enactment, Australian law is as Lee J, sitting in the Full Court of the Federal Court of Australia, described it in *Al-Rahal v Minister for Immigration and Multicultural Affairs*[131]: "Australia, by Executive act, or by legislation enacted by Parliament, may provide for persons to be expelled, or returned, without determining whether they are refugees." At the time the propositions referred to in this paragraph were enunciated in the Full Court of the Federal Court of Australia, there was no enactment to the contrary. Since then s 198A of the Act has been enacted. It is not to the contrary either.

151 Indeed there are various provisions in the Act which contemplate that the Minister need not assess the claims of a non-citizen seeking protection where the non-citizen is able to reside in another country where he or she will not be persecuted. For example, an applicant for refugee status cannot insist that claims for protection be assessed by or in Australia where s 36(3) applies. The same is true where Pt 2 Div 3 subdiv AI (ss 91A-91G) applies (in which case an unlawful non-citizen must be removed as soon as reasonably practicable: s 198(7)). And the same is true where Pt 2 Div 3 subdiv AK (ss 91M-91Q) applies (in which case an unlawful non-citizen must be removed as soon as reasonably practicable: s 198(9)). These provisions point against the existence of any limitation on the power of the Executive to remove non-citizens even though their protection claims have not been assessed here.

152 In international law, as French J said in *Patto v Minister for Immigration and Multicultural Affairs*[132], the return of a person to a third country will not contravene Art 33 even though the person has no right of residence there and even though it is not a party to the Convention, provided that it can be expected, nevertheless, "to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason."[133]

153 Assuming but not deciding that that proviso is correct, whether Malaysia can be expected to afford effective protection to asylum claimants which it has

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131 (2001) 110 FCR 73 at 79 [27].

132 (2000) 106 FCR 119 at 131 [37]. See also Lauterpacht and Bethlehem, "The scope and content of the principle of non-refoulement: Opinion" in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) 87 at 122, quoted in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 172 [25]; [2005] HCA 6.

133 *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 at 559 [43]-[48]; *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 159 [39].

agreed to receive from Australia goes to Australia's compliance with the Refugees Convention. It does not go to the legality of the Minister's conduct in domestic law unless an enactment provides otherwise. It is true that legislation is to be construed so as to avoid, if possible, a breach of Australia's international obligations. But if the language is sufficiently clear, effect must be given to it.

154 The Act has not incorporated the totality of the Refugees Convention into Australian municipal law so as to make it a direct source of rights and obligations under that law[134]. But the Act does incorporate the Refugees Convention in part. For example, from 1992 it created (in the present ss 36 and 65) the protection visa as "the mechanism by which Australia offers protection to persons who fall under [the Refugees Convention]"[135]. How far the Act has incorporated the Refugees Convention is a matter of construction of the Act[136].

Must the criteria stated in s 198A(3)(a) be objectively established?

155 The plaintiffs' primary submission on s 198A was that a taking under s 198A(1) depends on the existence of a valid declaration under s 198A(3). The validity of a declaration depends on proof that each of the four conditions listed in s 198A(3)(a)(i)-(iv) exist as a matter of fact. The plaintiffs submitted that it was insufficient to examine what happens in practice in Malaysia. They said that the four conditions could only exist if Malaysia had legal obligations under both its domestic law and international law to provide the access described in sub-par (i), to secure the protection described in sub-pars (ii) and (iii) and to meet the standards set out in sub-par (iv), and also if Malaysia supplied a judicial system capable of ensuring that those obligations are enforced. The plaintiffs specifically eschewed any submission that Malaysia lacked an effective judicial system, but maintained that it was not bound by any appropriate rules of domestic or international law.

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134 *SZ v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 342 at 348 [28].

135 See *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 176 [40], quoting the Explanatory Memorandum to the *Migration Reform Act* 1992 (Cth).

136 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 16 [45]; [2002] HCA 14; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 172 [26]; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14 [33], 16 [34]; [2006] HCA 53; *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at 69 [55]; [2006] HCA 54.

156 Against the eventuality that that first submission might be rejected, the plaintiffs put a secondary submission: that the validity of the declaration depended on the Minister's satisfaction as to the existence of the circumstances described in s 198A(3)(a)(i)-(iv). The plaintiffs put a further submission, to be considered later, that the Minister had not been satisfied because, by misconstruing s 198A(3)(a), he had posed the wrong questions.

157 The argument of the plaintiffs was put in more detail as follows. Important human rights of the plaintiffs were at stake – freedom from the use of force in taking them to Malaysia and freedom of movement. (They also referred to liberty, but the success of their arguments means that that is not something they will achieve for some time, if ever, in Australia, unlike Malaysia.) The Refugees Convention is a pact between states. If Australia decides not to process claimants to refugee status onshore, it must tell the other states who are parties to the Refugees Convention that it will process claimants offshore in places where the same standards apply. The same standards include not only the right of non-refoulement pursuant to Art 33 but many other rights such as what were described as "basic survival and dignity rights, including rights to property, work and access to a social safety net", rights not to be discriminated against, and rights to be guaranteed religious freedom. It followed that the Minister had to be sure as a matter of fact that Malaysia was complying with all those standards.

158 Initially the defendants advanced a submission that all that was required was that the Minister "form, in good faith, an evaluative judgment that what he declares is true." It was said that the significance of "good faith" is to require the Minister to endeavour to take into account the four conditions, but no more. A failure of the Minister to do that would invalidate the declaration, with the result that s 198A(3)(a) would impose greater obligations than those which would exist if the Minister had a simple power to declare countries for the purposes of s 198A(1). But at a later stage the defendants advanced a less extreme submission. While it was necessary that the Minister form in good faith an evaluative judgment that what he declares is true, endeavouring to ask the correct question was not enough: the endeavour must succeed, and a failure to ask the correct question "would vitiate the exercise of the power under" s 198A(3)(a). This becomes indistinguishable in substance from the plaintiffs' secondary submission.

159 It is not necessary to decide whether the more extreme of the defendants' two submissions is correct. It is sufficient to decide this case by reserving the position in relation to the more extreme submission, holding that the primary position of the plaintiffs is wrong and holding that at least the less extreme submission of the defendants is correct.

160 The reasons why the primary submission of the plaintiffs is not sound are as follows.

161 First, s 198A(3)(a) does not expressly provide that the validity of the declaration depends on proof of the four conditions as a matter of fact[137]. The Minister may "declare" the four conditions: this points to the view, contrary to a submission of the plaintiffs, that while he is to assert them as matters of fact, the process by which he makes the assertion is a task for his personal assessment, taking into account the four conditions. If the courts are satisfied that they have been taken into account, it is not for the courts to examine that assessment further.

162 Secondly, the statutory language does not in terms refer to legal obligations or courts of law. The references to providing access, securing protections, and meeting human rights standards, are more apt to suggest practical access, practical protections, and a meeting of standards in practice. The language centres on what does happen, and not on the domestic machinery which makes this happen; indeed that domestic machinery could change over time while still securing the same practical results. Even less does the language suggest that Malaysian adherence to the Refugees Convention has any materiality – for while there is room for a presumption that the Malaysian authorities will comply with their domestic law, no basis has been demonstrated for giving room for any presumption that they would have complied with the Refugees Convention unless it either operated directly in Malaysian law or had been legislatively incorporated into Malaysian law. In the absence of clear words, to read the language as calling for legal obligations to achieve the results stated in s 198A(3)(a) and for courts to enforce them is to add a fifth wheel to the coach. What matters is the achievement of results in fact, not the identification of formal structures conforming to the ideal standards of an Abbé Sieyès which may or may not achieve them.

163 Thirdly, a decision to make a declaration under s 198A(3)(a) is a decision which pertains to the conduct of Australia's external affairs. It concerns dealings between Australia and friendly foreign states. Those dealings are within the province of the Executive. Intrusion by the courts into those dealings may be very damaging to international comity and good relations. The Minister is accountable to Parliament for his conduct of those dealings. He may be questioned. He may be criticised. He may be condemned by Parliamentary resolutions. He may have to resign. His conduct may lead to the passing of a motion of no confidence in the Government of which he is a part, and thence to the fall of that Government. As a practical matter he is also liable to condemnation before the court of public opinion. But, unless it can be shown that he has not formed in an evaluative judgment, after asking the correct

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137 *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029 at [49] per French J.

questions, that what he declared was true, he is not accountable to courts of law. Of course there are circumstances in which Australian courts are at liberty and are obliged to make pronouncements about the acts of a foreign sovereign. But as the Federal Court of Australia has said, it takes clear language to create this liberty and this obligation to embark on the potentially dangerous course of making "judgements with public effect about whether other countries meet relevant human rights standards."[138]

164 Fourthly, the subject matter of the four conditions is significant. As French J has said[139]:

> "The form of the section suggests a legislative intention that the subject matter of the declaration is for ministerial judgment. It does not appear to provide a basis upon which a court could determine whether the standards to which it refers are met. Their very character is evaluative and polycentric and not readily amenable to judicial review."

Another judge of the Federal Court of Australia has described the provision as "broad ranging and subjective"[140]. A third has said that the existence or non-existence of the conditions in a given case are matters "very much of degree rather than indisputable fact"[141]. The largest single part of the Federal Court of Australia's work is migration law. It has incomparably greater experience in migration law than this Court. These pronouncements in the Federal Court of Australia suggest that questions as to whether the conditions actually exist are not apt for resolution by a process of adjudication and are not thrown up by s 198A(3)(a).

165 A fifth consideration is that it is relevant, in interpreting legislation, to consider not only the pre-existing state of the law which it amends, but the continuing law which surrounds it, with which it must co-exist and with which

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138 *Sadiqi v Commonwealth (No 2)* (2009) 181 FCR 1 at 49 [223] per McKerracher J.

139 *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029 at [49]. For discussions about the concept of "polycentricity", see Campbell and Groves, "Polycentricity in administrative decision-making" in Groves (ed), *Law and Government in Australia*, (2005) at 213; Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed (2009) at 454 [7.180]; King, "The pervasiveness of polycentricity", [2008] *Public Law* 101.

140 *Sadiqi v Commonwealth (No 2)* (2009) 181 FCR 1 at 49 [224] per McKerracher J. See also *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518 at 537 [69].

141 *Plaintiff P1/2003 v Ruddock* (2007) 157 FCR 518 at 537 [68], where Nicholson J saw the proposition as arguable.

there should be some coherence. The legal context in which s 198A was enacted supports the defendants' position. Section 198A was introduced into the Act in 2001. In discussing other provisions of the Act, dealing with comparable problems, several decisions of the Federal Court of Australia approved a test stated by Emmett J (which was itself derived from a judgment of von Doussa J) as a test for what a "safe third country" is in relation to a non-citizen. Emmett J said that it was necessary that there be "effective protection" but that this did not require that there be any "legally enforceable right"[142]. In *Patto v Minister for Immigration and Multicultural Affairs* French J said[143]:

> "A right of residence in a third country is not a condition of its characterisation as a safe third country if it be a party to the Convention which will honour its obligations thereunder. Nor it is necessary that the third country be a party to the Convention if it will otherwise afford effective protection to the person. In *Al-Sallal*[144] the Full Court expressly approved and adopted … the approach of Emmett J in *Al-Zafiry*[145]:
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> > '… so long as, as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and to live in a third country where he will not be under any risk of being refouled to his original country, that will suffice.'"

Thus at the time when s 198A was introduced into the Act a test of "practical reality and fact" had been employed successively by von Doussa J, Emmett J, Heerey J, Carr J, Tamberlin J and French J. There is an inference that the meaning of s 198A(3) turns on the same test.

166 The plaintiffs submitted that the word "protection" in s 198A(3)(a)(i)-(iv) included what was said to be Art 33 protection against removal of claimants for refugee status to a country where a person fears persecution on a Refugees

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142 *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443 at [20] and [23].

143 (2000) 106 FCR 119 at 131 [36]. See also *Al-Rahal v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 73 at 97 [91] per Tamberlin J.

144 *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 at 558-559 [42] per Heerey, Carr and Tamberlin JJ; see also at 559 [46].

145 *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443 at [26]. See also *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 562 per von Doussa J.

Convention ground. Let it be assumed that Art 33 does give that protection[146], even though it is expressed to be in favour of "refugees", not of persons who have not been established to be refugees. The submission went on to contend that the word "protection" in s 198A(3)(a) also included other rights. These were rights not to be penalised for seeking protection; rights to be provided with basic survival and dignity rights, including the right to property, work and access to a social safety net (see Arts 13, 17, 18, 19, 21, 23 and 24); rights to be provided with documentation (see Arts 27 and 28); rights to be given access to national courts to enforce their rights (see Art 16); rights not to be discriminated against as to race, religion or country of origin (see Art 3); and rights to be guaranteed religious freedom (see Art 4). The plaintiffs submitted that "protection" was a "legal term of art" used "to describe the rights to be accorded to a person who is or *claims to be* a refugee" (emphasis added).

167 This was so ambitious a submission as to cast doubt not only on its own validity, but also on the validity of other arguments advanced to support the construction of s 198A which the plaintiffs advocated. It is extremely improbable that the legislative language picks up all the rights referred to. Even in the Refugees Convention they are expressed to be rights of "refugees" – not persons making a claim to refugee status which has not yet been approved and might never be approved. There is no basis in the Act for treating the rights of those who have not yet successfully claimed refugee status as being equivalent to all the rights of those who have. In Australia it can take a long time for the claim of an asylum seeker to be a refugee to be examined before it is either accepted or rejected. The same may well be true in other countries which may be declared under s 198A(3)(a). It cannot be correct that s 198A(3)(a) prevents a country from being declared unless it accords to refugee claimants the same social security rights, for example, as it accords to its own nationals (Art 24) – for the world, unfortunately, contains enormous numbers of refugee claimants, many resident in countries which did not consent to their entry and which find it extremely difficult to fund social security for their own nationals.

168 Further, the power of revocation given by s 198A(3)(b) is not expressed to be subject to any conditions. That suggests that the power to exercise it arises whenever the Minister perceives that conditions have relevantly changed: it does not require the Minister to establish that, as a matter of fact, they have changed. A construction of s 198A(3)(a) which requires establishment of the listed conditions as a matter of fact would make the power to make a declaration

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146 As asserted in Hathaway, *The Rights of Refugees Under International Law*, (2005) at 157-160 and 278; Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (1992) at 9.

subject to much more stringent conditions than a power to revoke it. This anomalous result points against the plaintiffs' construction. Ordinarily a power to make an instrument on conditions is to be construed as including a power to revoke it on the same conditions: *Acts Interpretation Act* 1901 (Cth), s 33(3).

169 The plaintiffs submitted that s 198A was part of a legislative scheme the "purpose" of which is:

> "not simply to enable [the] taking of a person to another country, nor to enable removal per se, but to fulfil Australia's obligations under the Refugees Convention by authorising the taking of a person to a country where their claim for protection under the Refugees Convention will be assessed and determined and they will be given protection both during that process, and afterwards if they are found to be refugees. That purpose is not advanced by interpreting s 198A(3) as enabling a declaration to [be] made in relation to a country that does not in fact fulfil the s 198A(3) criteria."

By "in fact fulfil the s 198A(3) criteria", the submission meant "in fact have a legal system providing for those criteria and a court system enforcing them". Apart from making some perhaps controversial assumptions about what Australia's obligations actually are, the rather general considerations to which the submission points are outweighed by the factors stated above. And the submission, which turns on statutory purpose, is inconsistent with the statutory context. On 1 September 2001, the Australian Prime Minister announced a decision to establish a processing centre for refugees on Nauru. On 10 September 2001, the Republic of Nauru and Australia signed a "Statement of Principles" in relation to asylum seekers, which was to provide the basis for joint cooperation in humanitarian endeavours relating to asylum seekers. Eight days later (on 18 September 2001) the Bill for the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth), which contains s 198A, was introduced into Parliament by the Minister for Immigration and Multicultural Affairs. On 27 September 2001, Parliament enacted that Bill in the terms in which it had been introduced. Five days later, on 2 October 2001, the Minister for Immigration and Multicultural Affairs made a declaration under s 198A(3) in relation to Nauru. There are several references in the Parliamentary Debates to the taking of asylum seekers to Nauru[147]. At that time, Nauru was not a party to the Refugees Convention, the Refugees Protocol, the International Convention on the Elimination of all Forms of Racial Discrimination (1966), the

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147 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 September 2001: see, for example, at 30969, 30976, 31013 and 31015; Australia, Senate, *Parliamentary Debates* (Hansard), 24 September 2001: see, for example, at 27698, 27724 and 27727.

International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), or the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990). The domestic law of Nauru did not contain any specific provisions or protections relating to persons who under international law would be classified as refugees or asylum seekers. In the light of those circumstances, it is unlikely that the meaning of s 198A(3)(a) is that the Minister only has power to make a declaration if the country to which the declaration relates is party to treaties, and has domestic laws, of that kind. It is not a question of subjective intention or purpose. The true interpretation of s 198A(3)(a) depends on the meaning of the words as they were used at the time of its enactment. That meaning cannot have changed. In the context which existed when s 198A was introduced, the language employed by those who procured its enactment had, on its true interpretation, an application to the Republic of Nauru. That was so despite the fact that the Republic of Nauru was not party to the listed treaties and despite the state of its domestic law. Although Australia was to bear the costs of activities involved in implementing the "Statement of Principles", and although all activities were to be conducted in accordance with the relevant *domestic* laws of the two countries, the "Statement of Principles" said nothing about obligations under *international* law. Nor, whatever actually happened, did the "Statement of Principles" in terms say that Australia, rather than Nauru, would meet the s 198A(3)(a) criteria. And the "Statement of Principles" said nothing about court systems. The contemporary meaning of s 198A(3)(a) was that it enabled a declaration to be made in relation to a country that had no obligations in international law to comply with the Refugees Convention and without any stipulation as to its court system. That contradicts the plaintiffs' submission.

Did the Minister ask the wrong questions?

170 The plaintiffs submitted that the Minister asked one wrong question: whether the s 198A(3)(a) conditions were satisfied only in relation to the 800 persons whom it is proposed will be transferred to Malaysia pursuant to the Arrangement. They submitted that he should have asked how all asylum seekers are treated in Malaysia, but that he did not.

171 The first contention advanced in support of the submission that the Minister erred in this way was that the declaration was only made after the Arrangement with Malaysia had been concluded and this signified a focus by the Minister on only the 800 transferees. This is not a valid criticism: there would have been no point in making the declaration before the Arrangement was concluded.

172 The second contention advanced in support of the submission that the Minister erred in this way turned on the terms of a submission made to the

Minister by his Department and a reading of parts of the Minister's affidavit. What was submitted to the Minister is not decisive. What he said about his decision-making process in his affidavit is important. Fairly read as a whole, that affidavit reveals that he did not apply a wrong test. The plaintiffs' reading of it is, with respect, the result of an advocacy slant.

173 The plaintiffs also said that the Minister asked the wrong question in failing to consider what the existing position in Malaysia was, as distinct from some possible turn away from that position in the future. This criticism is misplaced. The time of the relevant state of affairs is the time the transferees arrive in the declared country. No earlier time has any significance. So far as the Minister spoke of shifts in the thinking of the Malaysian Government, for example, which might lead to changes in future, he was directing himself to that time. On the plaintiffs' submission, a s 198A(3) declaration could be made if the conditions referred to in s 198A(3)(a) existed at the time of the declaration even though they were expected to change shortly thereafter – an irrational outcome.

174 The plaintiffs then submitted that the Minister asked the wrong question because he had before him the answers given to four questions by the DFAT. The plaintiffs then expressed disagreement with various aspects of the answers. But a complaint about the answers to questions does not demonstrate incorrectness in the questions.

175 Finally, the plaintiffs submitted that the Minister misinterpreted s 198A(3)(a) by treating it as limited to practical conditions on the ground, not matters of legal obligation. That was not a misinterpretation[148].

Was s 198A(1) correctly applied?

176 The plaintiffs submitted that the decision to take the first plaintiff to Malaysia under s 198A(1) was flawed on the supposed ground that the relevant officer failed to consider the first plaintiff's individual circumstances by not taking into account the operation of Malaysian immigration law upon him as a result of his having spent three days in Malaysia en route to Australia. These submissions fail for the following reasons.

177 The plaintiffs said they did not seek to make a case that Malaysian law would in fact be applied in a particular way so that the first plaintiff would be prosecuted and convicted of offences. The plaintiffs described their argument as "a considerations argument". But for this "considerations argument" to succeed, it would be necessary to have some sense of the extent to which, as a matter of practical reality, there would be prosecutions.

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148 See above at [162].

178 There is nothing in s 198A(1) or any other part of the Act making it mandatory for the relevant officer to consider whether the first plaintiff had committed any offences under Malaysian immigration law. There are no express words to that effect. Nor is there any material "implication … in the subject-matter, scope and purpose of the Act"[149] – that is, the subject matter, scope and purpose to be ascertained from the statutory words. Since the Act does not specify prior offences against Malaysian immigration law as a relevant consideration, it is, as Deane J said in *Sean Investments Pty Ltd v MacKellar*[150], "largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards."

179 Even if it were mandatory to consider the question of possible past offences against the migration aspects of the general criminal law of Malaysia, and even if the relevant officer thought it was relevant, it would be relevant also to consider three other things. One is the Arrangement. Another is the Guidelines[151] to give effect to the Arrangement. The third is the Exemption Order[152] made, pursuant to the Guidelines, by the relevant Malaysian Minister under s 55 of the *Immigration Act* 1959 (Malaysia) ("the Immigration Act").

180 The Arrangement and the Guidelines were considered by the relevant officer. They are not legally binding, but they are solemn and detailed indications by the Malaysian Government of what is likely to happen to the transferees in Malaysia. The relevant officer was entitled to treat these indications as a solid basis for drawing an inference about what would actually happen. Under cl 10(3) of the Arrangement, Malaysia agreed that the Government of Malaysia would facilitate the "Transferees' lawful presence during any period [when] Transferees' claims to protection are being considered and, where Transferees have been determined to be in need of protection, during any period while they wait to be resettled". Under cl 10(4) of the Arrangement, it was agreed that "[w]hile in Malaysia Transferees will enjoy standards of treatment consistent with those set out in the [Guidelines]." Clause 2.2.2(b) of the Guidelines provided that transferees who seek asylum will be permitted to

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149 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J; [1986] HCA 40.

150 (1981) 38 ALR 363 at 375. See also *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 606 [126]; [2006] HCA 50.

151 That is, the Operational Guidelines to Support Transfers and Resettlement.

152 That is, the Immigration (Exemption) (Asylum Seekers) Order 2011 (Malaysia).

remain in Malaysia under an "exemption order." Clause 2.3.1(a) of the Guidelines provided that transferees are "permitted to remain in Malaysia and will not be liable to being detained and arrested due to their ongoing presence in Malaysia under this Arrangement." Clause 3 of the Guidelines provided that "[d]etailed guidance concerning the operation of the Arrangement as it relates to Transferees will be provided to law enforcement agencies and other relevant authorities to ensure … that their treatment will be in accordance with this Arrangement".

181 The plaintiffs' submission that the relevant officer was required to consider whether the first plaintiff would be prosecuted for past immigration offences in Malaysia would mean that she was required to make her decision on the assumption that Malaysia would not comply with its commitments under the Arrangement and the Guidelines. That cannot be correct. It is not for relatively junior officers of the Commonwealth to make an assumption of that kind about the behaviour of a friendly foreign government. Those assumptions relate to the external affairs of the Commonwealth. In the absence of clear statutory language to the contrary, they are only to be made by Ministers who are responsible to Parliament for their conduct.

182 The plaintiffs' submissions are also incorrect in relation to the Exemption Order. The background to the Exemption Order is that it was referred to in cl 2.2.2(b) of the Guidelines. It was made under s 55 of the Immigration Act. It exempts persons transferred to Malaysia under the Arrangement from s 6 of the Immigration Act. By s 6(1)(a)-(c) of the Immigration Act non-citizens are prohibited from entering Malaysia without an appropriate pass or order unless exempted, pursuant to s 6(1)(d), from s 6 by an order made under s 55.

183 The plaintiffs submitted that the Exemption Order only operates for the period 8 August 2011 to 7 August 2013. They pointed out that this period began after the first plaintiff had passed through Malaysia on his way to Australia. But on its true interpretation the Exemption Order applies during that period in relation to earlier conduct. A contrary interpretation would, considered in the context which gave rise to the Exemption Order, render it entirely futile, and is thus to be rejected.

184 The plaintiffs also submitted that cl 4(a) of the Exemption Order had the effect that it ceased to operate in favour of a transferee if the transferee were "registered as 'refugee' by United Nations High Commissioner for Refugees". They also submitted that cl 4(e) of the Exemption Order provided that it ceased to operate in favour of a transferee if the transferee were "listed as prohibited immigrant under subsection 8(1)" of the Immigration Act. The plaintiffs submitted that a person can be listed as a prohibited immigrant if the person was "unable to show that … definite employment [is] awaiting him" or is "likely to become a pauper" (Immigration Act, s 8(3)(a)). This submission does not deal with the fact that the word "and" appears between the fourth and fifth conditions

in cl 4. Thus the defendants submitted that the conditions appear to be cumulative, not disjunctive. The plaintiffs did not deal with this submission either in writing or orally. Even if the conditions are disjunctive, and even if the plaintiffs' suggestion that the listing of a person as a prohibited immigrant is technically possible under s 8(3)(a) of the Immigration Act, it would seem very unlikely that the Malaysian authorities would rely on s 8(3)(a) in view of what is said in cl 10(3) of the Arrangement and cl 2.3.1(a) of the Guidelines. A relevant officer considering the s 198A(1) discretion would be entitled to assume that the Malaysian authorities would not depart from the essential structure of the Arrangement in the fashion suggested.

185 The plaintiffs also complained that the Exemption Order only exempted transferees from s 6 of the Immigration Act. That, however, is the primary relevant source of potential criminal liability. The plaintiffs submitted that the first plaintiff's arrival in Malaysia also breached s 5, but the conduct was in substance the same as that involved in s 6. It may be true that the Exemption Order does not in terms cover a possible offence against s 5 when the first plaintiff left Malaysia, but in all the circumstances the possibility of a prosecution under s 5 alone is far-fetched.

186 The plaintiffs submitted that transferees were exposed to the risk of whipping in Malaysia in relation to immigration offences, and that the relevant officer had only considered this risk in relation to religious offences, not immigration offences. Apart from the role of the Exemption Order in relation to illegal entry to Malaysia under s 6 (and s 5), and the extreme improbability of a prosecution for illegal departure under s 5, the parties agreed as a fact that Malaysian courts "generally exercise their discretion not to order whipping of a person who is registered as a refugee with the UNHCR and has a UNHCR file number."

Section 198A(1): fettering of discretion

187 The plaintiffs submitted that the discretion conferred on relevant officers under s 198A was unlawfully fettered by a letter of 25 July 2011 from the Minister to the Secretary of his Department in which the following appeared:

> "Until further notice, no processing of any asylum claims is to occur in relation to offshore entry persons who are intercepted or who arrive directly in Australia after 25 July 2011. I do not wish to consider exercising any of my powers under the [Act] to give such individuals access to visas, in particular my powers under s46A or s195A. It is my expectation that such individuals will be taken to Christmas Island and removed to Malaysia in accordance with the Arrangement, with any asylum claims being assessed in that country."

188 The short answer to the submission that the Minister fettered the discretion of officers under s 198A(1) is that the letter did not do this. The only part of the letter that related to the taking of transferees to Malaysia under s 198A(1) was the last sentence quoted. The Minister there was not issuing a direction to those who would have to make decisions under s 198A(1). He was only expressing an expectation as to what the outcome of that decision-making process would be. There is nothing to suggest that departmental officers considered that they had no discretion under s 198A(1). The relevant guidelines issued to them made it plain that there were four possible recommendations. The first was: "There are no barriers to removal." The second was: "Removal can proceed with identified support." The third was: "There are barriers to removal but removal can occur at some point in the future." The fourth was: "There are barriers to removal that cannot be mitigated." There is no categorical statement that officers were not to make the fourth recommendation.

189 The plaintiffs also submitted that the letter was a fettering by the Minister of his own powers under ss 46A and 195A of the Act. The Minister was under no duty to consider whether to exercise his powers under ss 46A and 195A (see ss 46A(7) and 195A(4)). The letter is not evidence that the Minister fettered – excluded the possibility of – any future exercise by him of his ss 46A and 195A discretions. The relevant part of the letter is to be found in the two sentences beginning "[u]ntil further notice". That phrase positively excludes the suggestion that the direction is immutable.

190 The only criterion for the exercise of the powers in ss 46A and 195A is the "public interest". This is an extremely broad and diffuse criterion. The correct interpretation of legislation conferring a non-compellable discretionary power in those terms, on a political officer who is obliged to table in the Parliament exercises of the power under ss 46A(6) and 195A(6), and to submit to questioning and debate about them, is that the issues to be considered or not considered in connection with possible exercises of the discretions are to be a matter for the repository of the power. It is open to the Minister to decide in advance the circumstances in which he is prepared to consider exercising the power, and to issue instructions to the Department that only cases of a certain kind are to be brought to his attention, or that, for a time, no cases at all are to be brought to his attention.

191 Even if any relevant error on the part of the Minister could be identified, mandamus would not lie to require the Minister to take any action pursuant to ss 46A and 195A. The utility of a declaration, which the second plaintiff seeks, that the Minister erred in law in this respect is questionable.

Section 6 of the IGOC Act

192 The second plaintiff put, with respect, very detailed and sophisticated arguments about ss 6 and 6A of the IGOC Act. It is, however, possible to deal with them briefly.

193 The second plaintiff submitted that to take him to Malaysia was not in his best interests, and that the Minister had failed in his fiduciary duty as guardian under s 6 of the IGOC Act by not giving consideration to an exercise of his powers under ss 46A and 195A of the Act[153].

194 The first problem with these submissions, as already discussed, is that the Minister, by reason of the very clear terms of ss 46A(7) and 195A(4), is not obliged to give consideration to an exercise of those powers[154].

195 The second problem with these submissions is that the general powers conferred by s 6 of the IGOC Act on a guardian do not extend to interference with the Minister in carrying out his very specific statutory functions under the Act[155]. That remains the case even though the Minister is also the guardian.

Section 6A of the IGOC Act

196 The plaintiffs submitted that the second plaintiff was being taken from Australia without the Minister's written consent, contrary to s 6A(1). There is a certain technicality in this argument considered independently of s 6. Although the defendants did not identify any free-standing written consent by the Minister relating specifically to the second plaintiff, the Minister had shown by his conduct that he consents to the taking of the second plaintiff from Australia. He has signed pieces of paper, for example his affidavit, which are being deployed in order to remove any obstruction to that taking. The Minister signed his affidavit after the second plaintiff had advanced his case on why taking him to Malaysia would be adverse to his interests. Despite that, it is clear that the Minister most

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153 See generally Taylor, "Guardianship of child asylum-seekers", (2006) 34 *Federal Law Review* 185.

154 See above at [189].

155 See, on a different but related point, *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 79 ALJR 94 at 102 [42]; 210 ALR 190 at 201; [2004] HCA 50. See also *Sadiqi v Commonwealth (No 2)* (2009) 181 FCR 1 at 51 [242]-[243], a decision on the interrelationship between s 6 of the IGOC Act and s 198A of the Act.

strongly consents to the second plaintiff's departure, and to speak in that fashion is to speak euphemistically.

197 But the defendants did not rely on the technicality of the second plaintiff's point, and technicality is no bar to success in migration litigation.

198 The fundamental difficulty in the second plaintiff's position is that s 6A(4) provides that the section does not affect the operation of any other law "regulating the departure of persons from Australia." Section 198A is a law of that kind. The Australian Human Rights Commission submitted that s 6A(4) referred only to "laws of general application which regulate the departure (such as laws requiring appropriate travel documentation or otherwise affecting the capacity to travel)." This is to substitute for the provision which the legislature has enacted a different provision which the Australian Human Rights Commission may think more desirable, but which the legislature has not enacted. The category of laws "regulating" departure from Australia is not restricted to laws imposing limits on departure or procedures for voluntary departure. It extends to laws removing the need for the Minister's consent, and laws creating a self-contained regime for departure, like s 198A of the Act. A law may be said to regulate departure whether it places conditions on it, forbids it, permits it, or requires it. And to leave Australia is to depart from it, whether one departs voluntarily or whether one departs because one is taken away against one's will. Most of the provisions in the Act dealing with departure relate to involuntary departure. That was true of its predecessor, which was in force when s 6A of the IGOC Act was introduced in 1948 – the *Immigration Act* 1901 (Cth). There is no reason to suppose that s 6A, or for that matter s 6, overrode the 1901 Act, or that they override s 198A of the Act.

Conclusion

199 It is not necessary to deal with an alternative argument advanced by the defendants which relied on s 198 of the Act.

200 Each Amended Application should be dismissed with costs.

201 KIEFEL J. Plaintiff M70 is a citizen of Afghanistan. On 4 August 2011, he arrived at Christmas Island by boat (designated SIEV 258) from Indonesia which had been organized by persons he describes as "smugglers". He was detained upon arrival pursuant to s 189(3) of the *Migration Act* 1958 (Cth) ("Migration Act"). On 7 August 2011 the Assistant Secretary, Status Resolution South and West, of the Department of Immigration and Citizenship ("DIAC"), determined that he was liable to removal under s 198(2) of the Migration Act and that he should be taken to Malaysia pursuant to s 198A(1).

202 Plaintiff M106 is also a citizen of Afghanistan and travelled on the same boat as Plaintiff M70. He is a minor, 16 years of age, and travelled unaccompanied by any member of his family or any other person having guardianship of him. A decision to take Plaintiff M106 to Malaysia has not been made, but it is apprehended that it will be.

203 Each of the plaintiffs has made claims that they have a well-founded fear of persecution in Afghanistan for reasons specified in the Convention Relating to the Status of Refugees ("the Refugees Convention") and the Protocol thereto[156] (I shall refer to these instruments collectively as "the Convention"). The plaintiffs have sought Australia's protection. They also claim to have a fear of persecution in Malaysia on account of their religion. Each of them is a Shia Muslim. They have expressed fears of physical harm if they are taken to Malaysia. They seek injunctive and other relief to prevent them being taken to that country on the ground that their removal would be unlawful.

204 Section 198A of the Migration Act provides:

> "(1) An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3).
>
> (2) The power under subsection (1) includes the power to do any of the following things within or outside Australia:
>
> (a) place the person on a vehicle or vessel;
>
> (b) restrain the person on a vehicle or vessel;
>
> (c) remove the person from a vehicle or vessel;
>
> (d) use such force as is necessary and reasonable.

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156 Convention relating to the Status of Refugees (1951); Protocol relating to the Status of Refugees (1967). Australia acceded to the Convention and the Protocol on 22 January 1954 and 13 December 1973, respectively.

(3) The Minister may:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

(iv) meets relevant human rights standards in providing that protection; and

(b) in writing, revoke a declaration made under paragraph (a).

(4) An offshore entry person who is being dealt with under this section is taken not to be in ***immigration detention*** (as defined in subsection 5(1)).

(5) In this section, ***officer*** means an officer within the meaning of section 5, and includes a member of the Australian Defence Force."

205 On 25 July 2011 the Minister for Immigration and Citizenship ("the Minister") signed an "Instrument of Declaration of Malaysia as a Declared Country", purporting to be made under the powers given by s 198A(3)(a) and by which it was declared that Malaysia met its criteria ("the declaration"). The principal issue in these proceedings is whether that was the case and whether therefore there was power to make the declaration.

206 The declaration was made following the signing, also on 25 July 2011, of an "Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement" by the Minister and the Minister of Home Affairs of Malaysia ("the Arrangement"). The Arrangement recorded an understanding that the Government of Australia would transfer to Malaysia certain persons who had travelled irregularly by sea to Australia and who had been intercepted by the Australian authorities in the course of attempting to reach Australia. By cl 7(1) of the Arrangement, the number of such persons was not to exceed 800. By cl 7(2) of the Arrangement, Australia, for its part, was to resettle 4,000 persons in Malaysia who held "UNHCR Cards" (a reference to cards provided by the United Nations High Commissioner for Refugees ("UNHCR") to persons who have been assessed to be refugees (cl 5)) and who fulfilled certain

other requirements. By the Arrangement, the Government of Malaysia undertook certain commitments with respect to the "Transferees" to be sent from Australia[157]. The Arrangement was said to be subject to "the laws, rules, regulations and national policies" in each country (cl 1.1) and to be "a record of the Participants'[158] intentions and political commitments but … not legally binding on the Participants" (cl 16).

Common issues concerning s 198A

207 The plaintiffs' primary argument is that the four criteria in s 198A(3)(a)(i)-(iv) are jurisdictional facts[159] which are necessary to the exercise of the power given by s 198A(3)(a) to make a declaration, and that they may be objectively ascertained by the Court. Section 198A(3)(a), properly construed, requires that the processes and protections to be provided to asylum-seekers and refugees be secured by legal obligations on the part of the declared country, both international and domestic. The plaintiffs contend that Malaysia does not have obligations of this kind.

208 The Minister and the Commonwealth[160] submit that the criteria may be determined by the Minister by reference to what is provided to asylum-seekers and refugees in Malaysia in a practical sense. This necessitates the formation of an opinion by the Minister about what is provided to refugees and asylum-seekers from a number of sources within Malaysia and not just by the Government. According to the Minister this opinion is required to be reached in good faith.

209 The Minister also raises a threshold question as to whether the power of removal provided by s 198(2), which does not require the making of a declaration for its exercise, may be relied upon in addition to the power given by s 198A(1). If this contention is correct there may be no utility in making the orders sought by the plaintiffs, that the declaration made is invalid.

210 The plaintiffs' alternative argument is that the Minister misdirected himself as to the matters necessary to be addressed in s 198A(3)(a). It is

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157 Clause 2 of the Arrangement defines "Transferee" to mean "a person transferred from Australia to Malaysia under [the] Arrangement".

158 "Participants" is defined in the recital as the Governments of Australia and Malaysia.

159 See *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 148 [28]; [2000] HCA 5.

160 In the balance of these reasons I shall refer to both defendants as "the Minister".

contended that he asked himself the wrong question, in failing to address the absence of Malaysia's legal obligations with respect to refugees. This contention assumes the correctness of the plaintiffs' primary argument. A further jurisdictional error of this kind contended for by the plaintiffs has a temporal aspect. It is that s 198A(3)(a) requires an assessment of what is provided by the country in question at the time the declaration is made. Assurances in the Arrangement as to what might be provided in the future will not suffice. In addressing himself to the Arrangement, in considering the criteria, the Minister again asked himself the wrong question.

211 These questions require consideration of the purpose of s 198A(3)(a) and the context in which it was made. A central question is whether, and to what extent, that provision reflects a continuing commitment to Australia's obligations under the Convention. Such a question necessitates a review of the provisions made, historically, in the Migration Act in connection with those obligations and to more recent changes.

Convention obligations and the Migration Act

212 In *Plaintiff M61/2010E v The Commonwealth*[161] this Court said that the provisions of the Migration Act, read as a whole, are directed to the purpose of responding to Australia's obligations under the Convention. The Migration Act provides power to respond to those obligations "by granting a protection visa in an appropriate case and by not returning [a] person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason."[162] The Court also observed in that case that changes which had been made to the Migration Act in 2001, which included the insertion of s 198A[163], were to be seen as reflecting a legislative intention to adhere to Australia's obligations under the Convention[164]. It may be observed that at the time the

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161 (2010) 85 ALJR 133; 272 ALR 14; [2010] HCA 41.

162 *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at 140 [27]; 272 ALR 14 at 21.

163 Effected by item 6 of Sched 1 to the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act* 2001 (Cth). Parliament enacted five other Acts in 2001 to change the *Migration Act* 1958 (Cth), which are outlined in *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at 140 [29] fn 11; 272 ALR 14 at 21.

164 *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at 141 [34]; 272 ALR 14 at 23.

legislative amendments were proposed in 2001 the relevant Minister said that "Australia will continue to honour our international protection obligations."[165]

213 Obligations owed under the Convention are to be understood as owed to other States parties to the Convention ("Contracting States")[166], rather than as providing a right which might be enforced by an asylum-seeker or refugee against a State of which he or she is not a national but from which protection is sought. A "refugee" is defined, in relevant part, by Art 1A(2) of the Convention, as a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

214 One of the principal obligations undertaken by the Contracting States to the Convention is that contained in Art 33, which is entitled "Prohibition of Expulsion or Return ('Refoulement')". It requires that a Contracting State not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." It therefore prohibits a Contracting State from whom asylum is sought from returning asylum-seekers to the country from which they have fled and to any other country where they would be exposed to the same harm[167].

215 It appears to have been accepted in *Minister for Immigration and Ethnic Affairs v Mayer*[168] that another obligation arising under the Convention is to determine whether an asylum-seeker is a refugee. Mason, Deane and Dawson JJ considered that that question is not to be determined in the abstract. If the person is found to be a refugee a Contracting State is to define what that State's actual

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165 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 September 2001 at 30870.

166 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 294; [1985] HCA 70; *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 169 [16], 181-182 [67]; [2005] HCA 6.

167 See Lauterpacht and Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) 87 at 122 [113], [115].

168 (1985) 157 CLR 290 at 300 per Mason, Deane and Dawson JJ, 305 per Brennan J.

obligations are in respect of the particular person given the circumstances in which he or she is placed[169]. The obligation arises solely from the Convention[170].

216 The Convention obliges Contracting States to accord certain treatment and rights to a refugee[171]. As Professor Hathaway observes, an asylum-seeker may be disadvantaged where some or all of those rights are withheld pending the determination of a person's status as a refugee[172]. The obligation to accord these rights would appear to provide the basis for a logical inference that an obligation, on the part of the Contracting State, to determine the status of a person claiming to be a refugee, arises from the Convention. Given the prohibition on refoulement, such an obligation would most clearly arise when a Contracting State intended to refoul an asylum-seeker or send them to a third country where, having regard to their claims, they might be at risk[173]. If a Contracting State does nothing towards a determination of refugee status, but continues to fulfil its obligation of non-refoulement, for example in a situation where a person cannot be removed, the fulfilment of the non-refoulement obligation is regarded as functionally equivalent to the grant of asylum[174].

217 It is well accepted that the Convention leaves the establishment of any particular procedures for determining whether an asylum-seeker has the status of a refugee to the governments of the Contracting States[175]. Mechanisms for the determination of refugee status will vary as between States. The mechanisms chosen in Australia have varied from time to time. Before 1980 a determination of a person's refugee status was a matter of executive discretion and there was no

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169 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 300.

170 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 305 per Brennan J.

171 Articles 3, 4, 16, 17, 22 and 26 of the Refugees Convention.

172 Hathaway, *The Rights of Refugees under International Law*, (2005) at 156-159.

173 And see Goodwin-Gill and McAdam, *The Refugee in International Law*, 3rd ed (2007) at 391, commenting upon customary international law.

174 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 171 [23], quoting Taylor, "Australia's 'Safe Third Country' Provisions: Their Impact on Australia's Fulfilment of its Non-Refoulement Obligations", (1996) 15 *University of Tasmania Law Review* 196 at 200-201.

175 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 294, 305.

statutory provision dealing with such matters[176]. Whilst still within the province of executive discretion, in 1980 provision was made, by the insertion of s 6A into the Migration Act[177], for the grant of an entry permit to a person who "has the status of refugee within the meaning of the Convention"[178]. Later provisions in the Migration Act defined "refugee" as having the same meaning as in Art 1A of the Convention[179]. There was then a period when the Minister, if satisfied that a person was a "refugee", which term was defined by reference to the Convention, could declare that person to be a refugee[180]. Section 36(2) of the current Migration Act[181], provides, relevantly, that a criterion for a protection visa is that a visa applicant is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Convention. In *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[182] it was observed that the Explanatory Memorandum to the Bill for the *Migration Reform Act* 1992 (Cth) stated that the protection visa was "intended to be the mechanism by which Australia offers protection to persons who fall under [the Convention]".

218 The foregoing references to obligations arising under the Convention are not intended to suggest that they automatically have the status of a domestic law and are enforceable as such. No such obligations, of non-refoulement or to determine a claim to refugee status, are expressly stated in the Migration Act. Nevertheless provisions of the Migration Act reflect an acceptance of these obligations.

219 In argument the Minister pointed to amendments to the Migration Act, subdiv AI (ss 91A-91G) and subdiv AK (ss 91M-91Q) ("the Subdivisions"),

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176 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 294.

177 Section 6A was introduced by the *Migration Amendment (No 2) Act* 1980 (Cth), s 6.

178 See s 6A(1)(c) of the *Migration Act* 1958, discussed in *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 293.

179 Section 11ZD(1)(d) of the *Migration Act* 1958. Section 6 of the *Migration Legislation Amendment Act* 1989 (Cth) replaced s 6A(1) with s 11ZD.

180 Section 22AA, introduced into the *Migration Act* 1958 by s 8 of the *Migration Amendment Act (No 2)* 1992 (Cth).

181 And its predecessor, s 26B(2), introduced by s 10 of the *Migration Reform Act* 1992 (Cth).

182 (2005) 222 CLR 161 at 176 [40].

which relate to safe third countries[183]. They contain provisions which have the effect of denying the ability of an asylum-seeker to apply for a protection visa where that person is able to enter and reside, and claim the protection of, a safe third country[184]. A determination that there is such a country available to an asylum-seeker exposes that person to removal under either sub-ss (7) or (9) of s 198 to that country.

220 The Minister submitted that the prohibition on refoulement does not extend to sending an asylum-seeker to a country where he or she would not be at risk of persecution or harm. The Minister submitted that the provisions of the Subdivisions reflect an understanding that Australia's obligations under the Convention may be limited to non-refoulement, from which it follows that the ability to send an asylum-seeker to such a country is not inhibited by any obligation to process that person's claim to the status of refugee. Section 198A(3)(a) is to be construed in this light, the Minister submitted.

221 The contention would appear to be contrary to what was said in *Mayer*, to which reference has been made, and to the obligations which seem naturally to follow from the obligation of a Contracting State to provide, in addition to protection against refoulement, certain rights and benefits to a person who is found to be a refugee within the meaning of the Convention. In any event, a consideration of what is required for removal under the Subdivisions does not lend support for any narrow view of s 198A(3)(a) so far as concerns that provision's purpose in fulfilling Australia's obligations under the Convention.

222 The Subdivisions refer to processes by which a country is to be considered safe for the return of an asylum-seeker. Section 91N(3), in subdiv AK, is in terms similar to s 198A(3)(a), in that it provides that the Minister may make a declaration with respect to a specified country. By this means a country is taken to be an "available country", in respect of which a right of re-entry and residence may be exercised. However, in s 91N(3) the specified country is one which has "protection obligations", which must be taken to be obligations relevant to refugees and asylum-seekers, and the declaration is made after considering any advice received from the UNHCR.

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183 Sections 91A-91F introduced by item 1 of the Schedule to the *Migration Legislation Amendment Act (No 4)* 1994 (Cth); s 91F amended and s 91G introduced by the Schedule to the *Migration Legislation Amendment Act (No 2)* 1995 (Cth); ss 91M-91Q introduced by item 67 of Sched 1 to the *Border Protection Legislation Amendment Act* 1999 (Cth).

184 *Migration Act* 1958, ss 91E and 91P.

223 Provisions within the Subdivisions do not contemplate the determination of an application for a Protection (Class XA) Visa ("protection visa") with respect to asylum-seekers to whom the Subdivisions apply. That position is subject to the qualification that under subdiv AI the Minister may permit such an application to be made[185]. The reservation of this power to the Minister is not unimportant. In any event whilst an application for a protection visa may not be considered and determined in each case, a person's claim to refugee status is given consideration. The application of the Subdivisions would require a finding that a person was able to enter and reside in a third country which is considered to be safe and capable of providing protection. Such a determination might amount to a rejection of that person's claim that Australia's protection obligations under the Convention extend to them. Such a determination would mean that the criterion for the grant of a protection visa under s 36(2) could not be met.

224 Section 198A(3)(a) addresses both the protection which is provided to an asylum-seeker or refugee, which includes protection against refoulement, by a country that might be the subject of a declaration, and the making of a determination of a claim to refugee status. Section 198A(3)(a)(i) clearly requires the latter, albeit that the determination is to be made in the declared country. It is not necessary presently to determine whether that constitutes strict adherence to the Convention. It is sufficient to observe that that criterion, like the others in s 198A(3)(a), is directed towards fulfilment of the content of the Convention obligations in question.

225 In 2001 further changes were made to the Migration Act. They included the excision of certain external territories of Australia, including the territory of Christmas Island, from Australia's migration zone[186]. Persons who entered Australia at places excised from the migration zone (as is here the case) became "offshore entry persons"[187] as part of what was called the "Pacific

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185 *Migration Act* 1958, s 91F.

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

187 Section 5(1) of the *Migration Act* 1958 defines an offshore entry person as a person who:

> "(a) entered Australia at an excised offshore place after the excision time for that offshore place; and
>
> (b) became an unlawful non citizen because of that entry".

Section 5(1) of the Act also defines "entered", "entry", "excised offshore place", "excision time" and "unlawful non-citizen".

Strategy"[188]. It is well-known that some such persons were taken to the island of Nauru. It is an agreed fact in these proceedings that the Republic of Nauru was the subject of a declaration, said to have been made under s 198A(3)(a), by the then Minister for Immigration and Multicultural Affairs. However, the circumstances pertaining to that country have no bearing upon the construction of s 198A(3)(a) and its requirements.

226 A further change made to the Migration Act in 2001 was the insertion of s 46A, by which an offshore entry person who is in Australia and an unlawful non-citizen was rendered unable to make a valid application for a protection visa[189], unless the Minister determined that the provision having that effect ought not apply[190]. As was observed in *Plaintiff M61*, the Minister retained the power to give that consideration[191]. The changes effected, by the insertion of s 46A and s 198A, were to be seen as reflecting a legislative intention to adhere to an acceptance of Australia's obligations under the Convention[192]. These observations do not convey that s 198A is to be construed by incorporating Convention obligations within it, as the Minister pointed out in submissions. The intention spoken of is gleaned by the ordinary processes of statutory construction.

Section 198(2) – an alternative source for removal?

227 Before turning to the requirements of s 198A(3)(a) and the making of the declaration, it is necessary to consider the submission by the Minister that the removal of the plaintiffs could be effected under s 198(2) without resort to s 198A(1).

228 Section 198(2) was considered in *Plaintiff M61*. It is in general terms and provides, relevantly, that an officer "must remove as soon as reasonably practicable an unlawful non-citizen", to whom s 193(1)(a)(i), (ii) or (iii) or s 193(1)(b), (c) or (d) applies, who has not been immigration cleared and who has not made a valid application for a substantive visa. Section 193(1)(c) applies

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188 *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at 140-141 [32]; 272 ALR 14 at 22.

189 *Migration Act* 1958, s 46A(1).

190 *Migration Act* 1958, s 46A(2).

191 *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at 140-141 [32]; 272 ALR 14 at 23.

192 *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at 141 [34]; 272 ALR 14 at 23.

to the plaintiffs because they are detained under s 189(3) (or at the least there is no issue between the parties about their detention pursuant to s 189(3)).

229 It was said in *Plaintiff M61* that the obligation to remove "as soon as reasonably practicable" in s 198(2) can be understood to accommodate the consideration by the Minister whether to exercise the powers given to him by s 46A (or s 195A, which allows the Minister to grant a visa whether an unlawful non-citizen applies or not)[193]. The additional factor here in play is that the Minister gave a direction, on 25 July 2011, to the Secretary of his Department that no processing of asylum claims is to occur in relation to offshore entry persons who arrived after 25 July 2011 and that:

> "I do not wish to consider exercising any of my powers under the *Migration Act 1958* to give such individuals access to visas, in particular my powers under s 46A or s 195A. It is my expectation that such individuals will be taken to Christmas Island and removed to Malaysia in accordance with the Arrangement, with any asylum claims being assessed in that country."

230 It was, however, pointed out by the Minister in submissions that the direction did not preclude any further consideration by the Minister as to whether to exercise his discretion under ss 46A or 195A. The general direction was qualified by the words "[u]ntil further notice".

231 The plaintiffs argued that s 198(2) cannot apply because of the terms of s 198A(4). Section 198A(4) provides that an offshore entry person "who is being dealt with under this section" is taken not to be in immigration detention. Such detention is a prerequisite to removal under s 198(2). The argument does not, however, address the question which arises if the plaintiff's contention, that the declaration was not made in the exercise of the powers given by s 198A(3), is correct. In that circumstance it could not be said that the person "is being dealt with" under s 198A. Section 198A(4) could not be said to apply where acts in connection with the taking of the person are unlawful and ineffective. In that situation the person remains in immigration detention.

232 The Minister's position with respect to the removal of the plaintiffs pursuant to s 198(2), if the declaration is not valid, may be stated shortly. It is that there is an obligation expressed in s 198(2) to remove persons to whom it refers and that there is no impediment to that obligation being fulfilled. In particular, the removal of the plaintiffs cannot be held up by the imposition of an obligation upon the Minister to consider removing the impediment created by

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193 *Plaintiff M61/2010E v The Commonwealth* (2010) 85 ALJR 133 at 141 [35], 147 [71]; 272 ALR 14 at 23, 31.

s 46A(1) so as to permit them to apply for a protection visa, in order that their status as refugees might be assessed. To do so, it is submitted, would impermissibly involve reading an international law obligation into domestic law when the domestic law makes plain that no such obligation is accepted. The Migration Act may give the Minister power to provide a procedure for the assessment of the plaintiffs' refugee status, as *Plaintiff M61* recognises, but it does not impose any duty upon him to do so, the Minister submitted.

233 Section 198(2) does not refer to any particular country to which a person may be removed. The use of the powers in s 198(2) to remove a person to another country, without an assessment of whether that country is safe and without a determination of whether the person is a refugee, would appear to place Australia in breach of its obligations under the Convention. In this regard it may be observed that a Contracting State contemplating the removal of an asylum-seeker to another country is obliged to undertake a proper assessment of the country to which that person is to be sent and the protections it affords[194].

234 An assessment is provided for in s 198A(3)(a), albeit that the determination as to refugee status is left to the country the subject of the declaration. Section 198A(3)(a) appears to be directed to compliance with Australia's Convention obligations of non-refoulement and determination of refugee status. So much is apparent by its reference to the protection of asylum-seekers and refugees and to the provision of access to effective procedures to determine refugee status. It may be inferred from s 198A(3)(a) that it is not intended to remove any person where that person's status as a refugee is undetermined. Even then it is intended to do so only where the country declared will provide the necessary protection, including against refoulement.

235 The power under s 198A(1), like that in s 198(2), is directed to an "officer"[195]. It is to remove a person to another country. The use of the verb "take" in s 198A(1) does not indicate a power of a different kind. Section 198(2) would be understood to carry with it such powers as are necessary to effect a removal. In the context of s 198A such powers are found in s 198A(2). The difference between the two provisions is that s 198A(1) requires that a declaration be made, by reference to the criteria in s 198A(3)(a), before the power can be exercised.

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194 See Lauterpacht and Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) 87 at 122 [116].

195 Defined by s 5(1) of the *Migration Act* 1958.

236 In *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[196] it was said that:

> "When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

This reflects a general principle to be applied to the construction of a statute. In *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*[197] it was explained that different terms have been used to identify the principle and that what the cases reveal is that:

> "it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions."

237 Here there is but one power, the power of removal. Section 198(2) expresses that general power. The particular power given by s 198A(1) would appear to fall within the description of the general power, but it is plain that s 198A(1) is directed to a particular set of circumstances, where the country to which an asylum-seeker is yet to be taken is to be assessed as to whether it meets the criteria stated in s 198A(3)(a). The Minister must be satisfied as to this and that the country will provide for the determination of refugee status and provide protection to asylum-seekers and refugees. It could not have been intended that s 198(2) was to be a source of power to effect the removal of asylum-seekers to a country without any assessment of the protections that would be provided to such persons by that country. To do so would involve Australia in a breach of its obligations under the Convention and it is these obligations to which s 198A(3)(a) is addressed.

238 This construction of ss 198A(1) and 198(2) is not affected by the circumstance that the power of removal under s 198(2) may be exercised where no determination of an application for a protection visa has been made. The Minister refers in this regard to the Subdivisions earlier discussed, which, it will be recalled, relate to countries which are taken to be safe third countries and in

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196 (1932) 47 CLR 1 at 7; [1932] HCA 9; see also *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678; [1979] HCA 26.

197 (2006) 228 CLR 566 at 589 [59]; [2006] HCA 50.

which countries some asylum-seekers may have a right of entry and residence. A determination that an asylum-seeker is a person to whom the Subdivisions apply would appear to amount to a rejection of their claim to Australia's protection obligations, as explained earlier in these reasons[198]. The Subdivisions are not directed to the situation with which s 198A(3) is concerned.

239 It follows that removal under s 198(2) is not an option, unless each plaintiff's status as a refugee is considered and rejected. Such assessments as have been undertaken of the plaintiffs, preparatory to their removal, were not determinative of that status. They were not directed to the question whether Australia owed protection obligations to them as refugees, such as would be considered in connection with an application for a protection visa.

The requirements of s 198A(3)(a)

240 Section 198A(3)(a) has the effect of shifting some of the responsibilities undertaken by Australia under the Convention to another country. Its evident concern is that Australia's obligations under the Convention are not breached in that process. Its terms contemplate that a country specified in the declaration will provide some of that which Australia would have provided had the asylum-seeker remained in its territory. Section 198A(3)(a) requires, at the least, that the country the subject of a declaration provide for a determination of the removed asylum-seeker's refugee status (sub-pars (i) and (ii)) and provide for that person's protection whilst an asylum-seeker (sub-par (ii)), and as a refugee (sub-par (iii)), if that status is accorded. Because that person is an asylum-seeker or refugee, the protection spoken of must, at the least, be protection against persecution and refoulement. In providing that protection the country specified must meet "relevant" human rights standards (sub-par (iv)), which may be taken to refer to standards required by international law.

241 The direct language used in s 198A(3)(a), that "a specified country … provides protection" to asylum-seekers and refugees and "a specified country … meets relevant human rights standards in providing that protection" clearly enough identifies the country proposed to be declared as the provider of the protections. A requirement that a country to which an offshore entry person may be taken under s 198A(1) provide such protections is explicable having regard to Australia's protection obligations under the Convention. If asylum-seekers are removed from Australia to another country, s 198A(3) has the effect that at least the provisions thereby required to be made, which will meet some of Australia's obligations, are made by the State to which an onshore entry person may be taken.

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198 At [223] of these reasons.

242 Sub-paragraph (i) of s 198A(3)(a) cannot be taken merely to require that a country ensure that an asylum-seeker has access to an assessment of refugee status undertaken by a non-government agency. Such a construction would not be consistent with the language of the balance of par (a), which clearly contemplates the determination of refugee status by the country the subject of a declaration. Whilst it is known that the UNHCR conducts such assessments, sub-par (i) is not limited in its terms to a recognised body. If it is not taken to refer to the determination of refugee status by the government in question, it would leave a matter of great importance to be determined by any means. The requirement that procedures be "effective"[199] would be an insufficient safeguard.

243 The requirement that the declared country itself undertake the determination of refugee status has an important consequence, namely, that it is bound to that outcome. It necessarily implies that the country recognises the status of refugee and gives effect to it. The requirement is consistent with the characteristics of a country to which s 198A(3)(a) refers. It refers to a country which recognises the status of refugees, for that country is to provide protection to persons claiming that status or who are determined to have that status. The objective of the provision, that protection be provided to asylum-seekers or refugees, can only be achieved if the country declared recognises the status of refugee and provides protection against refoulement and persecution. It is to be inferred, by reference to Australia's obligations under the Convention to which s 198A(3) is directed, that it is intended that the Minister have this level of assurance before a declaration is made.

244 The recognition and protection of refugees by a country is effected by its laws. It is a country's laws to which regard is had by other countries in determining the extent to which recognition and protection of refugees might be provided. In terms of ordinary language it is difficult to see how it can be said that a country provides protection, in a concrete sense, if its laws contain no such provisions. It may not be necessary that a country be a party to the Convention in order that it recognise and protect refugees, although it is more likely that a country's domestic laws will provide for that recognition and protection if they are a Contracting State. Section 198A(3)(a) must be taken to require that a country "provide" the necessary recognition and protection pursuant to its laws. It is by reference to its laws that a country may be taken to be under an obligation to provide that recognition and protection.

245 A country's practices which affect refugees may also be relevant to the enquiry under s 198A(3)(a). The Minister may, in accordance with s 198A(3)(a), scrutinise what is done in practice to ensure that the country's laws are carried into effect and to ensure that the country can be relied upon to recognise refugee

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199 *Migration Act* 1958, s 198A(3)(a)(i).

status and provide the necessary protections[200]. Such an assessment may extend to whether the country meets relevant human rights standards whilst providing asylum-seekers and refugees with protection against persecution and non-refoulement, as well as to whether the country's laws regarding refugees are carried into effect. Such assessments may be based upon information from a number of sources and require the formation of an opinion on the part of the Minister. If the country's laws providing for recognition and protection of refugees are not carried into effect, the Minister may well conclude that the necessary protections are not in fact provided as required by s 198A(3)(a). However, a positive assessment of the practical provisions which are made for refugees in a country cannot replace the requirement that the country has obliged itself, through its laws, to provide the necessary recognition and protection. That legal obligation is the minimum requirement of a country which may continue to fulfil the content of the Convention obligations earlier mentioned, of the protection of refugees from non-refoulement and from persecution.

246 This construction of s 198A(3)(a) most closely accords with the fulfilment of Australia's Convention obligations and it is to be preferred to one which does not.

247 In *Polites v The Commonwealth*[201] it was accepted that a statute is to be interpreted and applied, so far as its language permits, so that it is in conformity, and not in conflict, with established rules of international law[202]. In *Minister for Immigration and Ethnic Affairs v Teoh*[203], Mason CJ and Deane J took the proposition to apply to favour the construction of a statute which is in conformity, and not in conflict, with Australia's international obligations, at least so far as the language of the legislation permits. The ambiguity, to which such a construction was relevant, should not be viewed narrowly, in their Honours' view. Their Honours went on to say[204]:

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200 Hathaway, *The Rights of Refugees under International Law*, (2005) at 326-327.

201 (1945) 70 CLR 60 at 68-69 per Latham CJ (citing *Maxwell on the Interpretation of Statutes*, 8th ed (1937) at 130), 77 per Dixon J and 81 per Williams J; [1945] HCA 3.

202 A similar approach had been applied in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J (citing *Maxwell on the Interpretation of Statutes*, 3rd ed (1896) at 200); [1908] HCA 95.

203 (1995) 183 CLR 273 at 287; [1995] HCA 20.

204 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288. See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 [100]; [2003] HCA 6.

> "So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations."

The rule of construction stated in *Teoh* has been applied in *Kartinyeri v The Commonwealth*[205], *Plaintiff S157/2002 v The Commonwealth*[206], and *Coleman v Power*[207]. However, if it is not possible to construe a statute conformably with international law rules, the provisions of the statute must be enforced even if they amount to a contravention of accepted principles of international law[208]. Such a position is not reached after construing s 198A(3)(a).

Exercise of the power under s 198A(3)(a)?

248 The Minister was provided with information to assist his assessment under s 198A(3)(a) from three sources: advice from the Department of Foreign Affairs and Trade ("DFAT"); communications from the UNHCR; and advice from DIAC concerning the Arrangement, about which the Minister, in any event, had personal knowledge. The Minister's attention was directed, by a DIAC submission ("the DIAC Submission")[209], to the criteria and he was advised that he was required to satisfy himself of those matters.

249 That information did not confirm the existence of the necessary facts concerning Malaysia. As DFAT advised, Malaysia is not a party to the Convention. It does not recognise, or provide for the recognition of, refugees in its domestic law. It therefore does not provide any procedures for the determination of claims to refugee status. DFAT's advice was that Malaysia generally allowed the UNHCR access to persons claiming that status. Malaysia does not bind itself, in its immigration legislation, to non-refoulement. The DFAT advice made mention of forcible deportations of asylum-seekers which had occurred in Malaysia, although it said that there were "credible indications" that they had ceased in mid-2009. It mentioned the prosecution of illegal

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205 (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ; [1998] HCA 22.

206 (2003) 211 CLR 476 at 492 [29] fn 64 per Gleeson CJ; [2003] HCA 2.

207 (2004) 220 CLR 1 at 27-28 [19] per Gleeson CJ; [2004] HCA 39.

208 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ, citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204; [1982] HCA 27.

209 Attached to this document was the DFAT advice referred to above.

immigrants, which would include asylum-seekers who had entered Malaysia without any permits (as the plaintiffs had done).

250 The communications from the UNHCR were not addressed to the questions arising under s 198A(3)(a). They merely stated its position with respect to the Arrangement, namely, that it preferred the asylum-seeker in question to be processed in Australia, consistently with "general practice", and that its position respecting the Arrangement was conditional upon proper protection and vulnerability safeguards determining the pre-removal assessment process in Australia being put in place.

251 The Arrangement may be seen to address some issues which are relevant to asylum-seekers and in respect of which Malaysian domestic law either provides no accommodation or might be exercised against asylum-seekers as illegal entrants. By the Arrangement the Government of Malaysia committed itself, among other things, to provide Transferees with the opportunity to have their claims considered by the UNHCR (cl 10(2)(a)), to respect the principle of non-refoulement (cl 10(2)(a)) and to facilitate the presence of Transferees while their claims were being considered and, where they were found to be refugees, during any period thereafter while they awaited resettlement (cl 10(3)(a)). The commitment spoken of is to be understood in the sense referred to in the Arrangement itself, which is to say as a political but not a binding, legal, commitment (cl 16).

252 In the annexure to the Arrangement it was said that Transferees claiming asylum would be entitled to remain in Malaysia under an exemption order (cl 2.2.2(b)). It is to be inferred from the parties' Agreed Statement of Facts that such an order might operate to prevent persons, such as the plaintiffs, from being prosecuted for immigration offences committed by their earlier entry into Malaysia, en-route to Indonesia and Australia, without the necessary permits. The order was not in place at the time the declaration was made, but was made shortly thereafter.

253 In his affidavit the Minister said that he took into account "the material in the [DIAC Submission], and in particular, the advice from DFAT which reassured me that Malaysia did provide basic support and protection to asylum seekers". The Minister said that he also took into account his "own knowledge of Malaysia's commitment to improving its processes for dealing with asylum seekers" and his knowledge of matters gleaned during the course of negotiations in connection with the Arrangement. The Minister said that he believed the Government of Malaysia had made:

> "a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers and had begun the process of improving the protections offered to such persons. It was also clear to me that the Malaysian government was enthusiastic about using the transfer of

> 800 persons under the proposed arrangement as a kind of 'pilot' for their new approach to the treatment of asylum seekers generally."

He said that, in making the declaration:

> "I relied upon the Arrangement and associated Operational Guidelines as supporting the view I had formed that Malaysia was committed to a new approach to dealing with refugees. To my mind, the willingness of the Malaysian government to enter into the Arrangement was an indication of the seriousness of its commitment."

254 Neither the bona fides of the parties to the Arrangement nor the commitment of them to the matters contained in it is in question in these proceedings. It remains the case that Malaysia does not have laws which recognise and protect refugees from refoulement and persecution. Although the Arrangement attempted to address some of the problems which face asylum-seekers in that country, it could not alter that state of affairs.

255 The facts necessary for the making of a declaration under s 198A(3)(a) did not exist. There was no power to make the declaration. It is invalid.

256 It may also be concluded that the Minister misconceived the nature of the enquiry posed by s 198A(3)(a) in the respects mentioned by the plaintiffs, although the plaintiffs' claims to relief do not require resort to this additional ground. The Minister, in relying upon what was to be provided by the Arrangement, did not address the correct questions. The enquiry under s 198A(3)(a) is as to the state of the laws of the country proposed to be the subject of a declaration and it is to be undertaken at the date of such declaration. In directing himself to the assurances in the Arrangement, as to what was to occur in the future, the Minister disclosed that he misunderstood what was required by s 198A(3)(a). His decision was therefore attended by jurisdictional error[210].

The Minister's guardianship of Plaintiff M106

257 It is not strictly necessary to deal with the additional limb of the argument put for Plaintiff M106. It was that by reason of the prohibition contained in s 6A of the *Immigration (Guardianship of Children) Act* 1946 (Cth) against a "non-citizen child" leaving Australia without the consent of his or her guardian,

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210 *Craig v South Australia* (1995) 184 CLR 163 at 177-180; [1995] HCA 58; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82]; [2001] HCA 30; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 574 [72]; [2010] HCA 1.

any removal of him from Australia without that consent would be unlawful. The Minister is Plaintiff M106's guardian under that Act and has not given such consent. I agree that Plaintiff M106's removal from Australia absent that consent would be unlawful, for the reasons given in the joint judgment.

Conclusion and orders

258 There was no power to make the declaration of 25 July 2011. Because the declaration is invalid, there is no power to remove the plaintiffs to Malaysia. Any attempt to do so would be unlawful. In the case of Plaintiff M106, his removal from Australia to any country is also unlawful absent the consent of the Minister in his capacity as guardian of Plaintiff M106.

259 I agree with the orders proposed in the joint judgment.