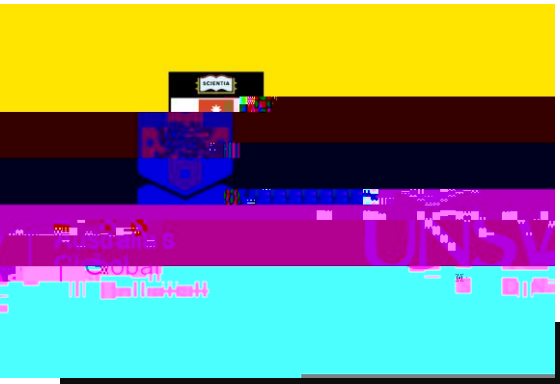

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pregnant women, survivors of torture or trauma, people with disabilities, the elderly, or

approval from an authorised officer, an Operational Manager or other authorised persons, except in the case of emergency or other extraordinary circumstance'.[10]

When the plaintiff was returned to Australia on 2 August 2014 she was approximately 20 weeks pregnant. She had applied to the relevant Nauruan authorities to be recognised as a refugee, but her application was yet to be determined. Back in Australia the plaintiff was detained, and gave birth to a daughter in Brisbane on 16 December 2014.

First development: insertion of s198AHA into the *Migration Act*

On 30 June 2015, the *Migration Amendment (Regional Processing Arrangements) Act* 2015 (Cth) entered into force, after passing both houses of parliament in record time with bipartisan support. This Act inserted s198AHA into the *Migration Act,* with retroactive effect from 18 August 2012. This new section granted broad power to the Australian government to enter into an arrangement with a 'person or body' for the purpose of 'regional processing', and to take 'any action' in relation to this regional processing arrangement.

The insertion of s198AHA into the *Migration Act* shifted the focus of this case from whether the impugned conduct was unlawful by reason of it not being supported by or based on a valid exercise of the non-statutory executive power under s61, to a case primarily concerned with the construction, scope and validity of the new statutory provision. Indeed the majority judges, having reached their respective conclusions about s198AHA, ultimately found it unnecessary to make a separate determination on the non-statutory executive power issue.

Second development: full open centre arrangements

The end of detention on Nauru

In early October 2015, immediately before the start of the hearing, the Nauruan government announced that the RPC would become a fully open centre 'to allow for freedom of movement of asylum seekers 24 hours per day, seven days per week'.[13] This announcement expanded an initial 'open centre arrangement' that had been introduced earlier in 2015, whereby asylum seekers detained at the RPC could be granted permission to leave on certain days, between certain hours and subject to certain conditions.[14] After the introduction of full open centre arrangements in October, the Nauruan regulations that required asylum seekers not to leave the RPC without permission were repealed, although asylum seekers were still required to 'reside' there.[15] The Nauruan government indicated that it intended to legislate for the full open centre arrangements at the next sitting of parliament.[16] However at the date of the hearing this had not yet occurred, and it remained a criminal offence for an asylum seeker to leave the RPC without prior approval from an authorised officer, an Operational Manager or

authorised by Australian law, and that this was 'not a hypothetical question' as it would 'determine the question whether the Commonwealth is at liberty to repeat that conduct if things change on Nauru and it is proposed, once again, to detain the plaintiff at the Centre'.[19] Bell J also noted that Nauru could choose at any time to revert to a scheme under which asylum seekers taken to it by Australia were detained, and thus that the declaratory relief sought by the plaintiff involved 'the determination of a legal controversy' in respect of which the plaintiff had a 'real interest'.[20] Keane J based his finding that the plaintiff had standing on the ground that interference with a person's liberty is 'sufficient to confer standing to seek a declaration of the legal position from a court even though no other legal consequences are said to attend the case' (while also noting that it was difficult not to be 'impressed with the view that really what is at issue is whether what has been done can be repeated').[21] Finally, Gageler and Gordon JJ rejected the Commonwealth parties' submission that the declaration would have no foreseeable consequences for the plaintiff, with Gageler J finding that she had a 'sufficient interest' in the case and Gordon J concluding that the declaration was indeed 'directed to a live legal question'.[22]

the *Lim* principles. The findings of the majority judges on this point, and Gordon J's dissent, are explored below.

Section 61 of the Constitution and non-statutory executive power

Section 61 of the Constitution vests federal executive power. This power includes statutory powers conferred on the executive as well as non-statutory executive powers, including the prerogative powers of the Crown and other powers that are necessary for the Commonwealth to function as a nation state. The plaintiff's original argument, which she maintained after the introduction of s198AHA, was that in the absence of clear statutory authorisation, s61 of the Constitution could not authorise the Commonwealth parties' conduct in detaining her in Nauru. The six majority judges, having found that s198AHA provided the requisite statutory authority to support the Commonwealth parties' conduct, concluded that it was not necessary to consider the hypothetical question whether, absent that authority, these parties would otherwise have been authorised by s61 or as a matter of non-statutory executive power to participate in Nauru's detention of the plaintiff.[24] Gordon J also found it unnecessary to make a separate determination on this point.[25]

Consideration of Nauruan law

If necessary, depending on its other findings, the plaintiff invited the court to consider whether she had been lawfully detained under Nauruan law, and in particular whether the relevant laws were valid in light of article 5(1) of the Nauruan Constitution (which provides that no person shall be deprived of his or her personal liberty, except as authorised by law in certain enumerated cases).[26] She submitted that it was necessary to agitate this question because the Commonwealth parties' primary defence to all of her claims was that her detention had been in accordance with and required by the laws of Nauru.[27] She also argued as a matter of construction that the authority to take action conferred on the Commonwealth parties by s198AHA should not be construed as referring to detention which is unlawful under the law of the country where it is occurring.[28]

The Court was reluctant to pronounce on the constitutional validity of a law of another country. On the basis of their earlier findings and the case presented, French CJ, Kiefel, Nettle and Bell JJ concluded that it was not necessary to make such a pronouncement.[29] Gageler J merely noted that the constitutional validity of the relevant laws were 'controversial'.[30] Gordon J insisted that the proceedings should be concerned only with the conduct of the Commonwealth parties, and that it was 'neither relevant nor appropriate for this Court to pass any judgment upon what the Government of Nauru has done or proposes to do'.[31] Keane J went into greatest depth, relying on international comity and judicial restraint, as well as a textual analysis of s198AHA, to support his finding that the outcome of the case did not rest on any finding as to validity of Nauruan law, and that the Court should not engage in such a task.[32]

Submissions on the Financial Framework (Supplementary Powers) Act *1997*

This case originally raised questions about how Australia was funding offshore processing in Nauru, and in particular the operation and validity of s32B of the *Financial Framework (Supplementary Powers) Act* 1997 (Cth). Because the six majority judges concluded that s198AHA was valid and provided the necessary authority, they found it unnecessary to

make a separate determination on this issue. Gordon J also concluded that it was unnecessary for her to address this issue because the provisions of this law 'cannot and do not repair the more fundamental deficiency' identified in her analysis of s198AHA.[33]

PART B: DISCUSSION OF ISSUES

Identifying a head of federal legislative power

The plaintiff argued that s198AHA was not supported by a head of legislative power under the Constitution. In relation to the aliens power in s51(xix), the plaintiff submitted that the definition of 'regional processing functions' in s198AHA was 'too broad to apply only to functions in relation to aliens', and that the breadth of that definition coupled with the breadth of the powers that section purported to confer meant that it did not have discriminatory operation in respect of aliens.[34] Since s198AHA does not single out 'aliens' in its text or in its practical operation, any connection with the enumerated subject matter was said to be 'too remote or insubstantial'.[35]

Six judges (Gordon J dissenting) dismissed this argument and declared s198AHA to be a law with respect to aliens. Noting that this section is concerned with the regional processing functions of a country designated by the Minister for that purpose, and that the actions and payments it authorises are closely connected to the removal of asylum seekers ('aliens') from Australia and the processing of their protection claims in Nauru, the majority were satisfied that there was a sufficient connection between the subject matter of aliens and s198AHA.[36] Keane J added that it was 'well settled' that s51(xix) does not require the law to operate *only* on aliens.[37] Gageler J noted that the reach of the aliens power 'is not subject to any territorial or purposive limitation' and held that it is sufficient for the 'substantial practical operation' of a law to 'discriminate in a manner which is peculiarly significant to aliens'.[38]

Gageler J also went one step further, finding that insofar as s198AHA authorises the Australian government to take action outside Australia in relation to an arrangement between it and the government of a foreign country, it is also a law with respect to external affairs under s51(xxix).[39]

The majority's application of the *Lim* principles to s198AHA

The extent of Australia's involvement in the detention of asylum seekers transferred offshore has been a contentious issue since the current processing arrangements were established in 2012. This issue arises in two related but distinct contexts: first, when considering whether Australia is sufficiently involved in (or exercising sufficient control over) detention such as to engage its obligations towards asylum seekers and refugees under international law; and secondly, when considering whether Australia's involvement could form the basis of a claim against the government under domestic law, or – as argued in this case – offends the exclusive vesting of judicial p


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assistance from Nauruan officials), where Australian officers had then handed over the relevant documents to complete her transfer;

- the Department was responsible for providing security infrastructure at the RPC, including perimeter fencing, lighting and entry gates;
- under the terms of its contract with the Australian government, Transfield was required to and did restrict the plaintiff's liberty. In particular, Transfield was required to provide a range of security services at the RPC, including ensuring that the security of the RPC perimeter was maintained at all times. These security functions were to be carried out in accordance with Department policies and procedures, as notified to Transfield by the Department from time to time;
- Transfield obtained approval from the Australian government to subcontract the provision of security and other services to Wilson Security. Wilson Security employees were appointed as 'authorised officers' for the purpose of the RPC Act (with powers to decide whether people detained at the RPC could leave or not).[44] The plaintiff was held in a compound surrounded by a high metal fence through which entry and exit was possible only through a checkpoint that was permanently staffed by Wilson Security employees, who monitored entry and exit;
- the Department had step-in rights under the Transfield contract, which allowed the Secretary of the Department, at his or her absolute discretion, to suspend the performance of any service performed by Transfield and arrange for the Department or a third party to take over and perform the suspended service; and
- Australia played a significant role in the governance structures overseeing the implementation of the MOU and the operation of the RPC, including a Ministerial Forum, a Joint Advisory Committee and a Joint Working Group. Australia also appointed a Department officer as a Programme Coordinator, who was stationed in Nauru and responsible for managing all Australian officers and ensuring that service providers delivered services to the appropriate standards.[45]

Based on these facts, Bell J held that the plaintiff's detention 'was, as a matter of substance, caused and effectively controlled by the Commonwealth parties'.[46] Gageler J held that Wilson Security staff 'exercised physical control over the plaintiff' so as to confine her to the RPC, and that they had done so 'in the course and for the purpose of providing services which the [Australian government] had procured to be performed under the Transfield contract'.[47] As such, Wilson Security staff had 'acted, in the relevant sense, as de facto agents of the [Australian government] in physically detaining the plaintiff in custody'.[48] Gordon J concluded that Australia 'did not discharge the Plaintiff from its detention' after taking her to Nauru, and that it 'intended to and did exercise restraint over the Plaintiff's liberty on Nauru, if needs be by applying force to her'.[49]

French CJ, Kiefel and Nettle JJ reached a different conclusion. While noting that Australia's involvement was 'materially supportive, if not a necessary condition, of Nauru's physical capacity to detain the plaintiff',[50] they ultimately found that the plaintiff had been detained by the executive government of Nauru, under Nauruan law. These judges were persuaded by the Commonwealth parties' submission that they could not have compelled or authorised Nauru to make or enforce the laws that required the plaintiff to be detained, if that country

had not done so itself.[51]

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unlawful.[71] Bell J accepted the plaintiff's submission (relying on her joint reasons with Hayne J in *CPCF v. Minister for Immigration and Border Protection & Anor*), that these constitutional limitations apply regardless of whether the detention takes place in Australia or a regional processing country.[72]

Having set out the principle as such, Bell J concluded that the plaintiff's detention in Nauru did not infringe it. She found that s198AHA did not confer an unrestrained authority to detain on the Commonwealth parties because the relevant authority 'is limited to action that can reasonably be seen to be related to Nauru's regional processing functions'.[73] However, Bell J did note that the Commonwealth parties' participation in the detention of asylum seekers in Nauru would cease to be lawful if it were to continue 'for a period exceeding that which can be seen to be reasonably necessary for the performance of those functions'.[74]

In reaching this conclusion Bell J rejected the plaintiff's submission that the purpose of her detention had been to deter others from irregular migration to Australia, and as such that it was punitive in nature. While the removal of asylum seekers to Nauru for processing advanced this purpose, Bell J was not satisfied that detention once there did so too.[75]

Gageler J reached a similar outcome, based also on a reaffirmation of *Lim,* but approached the question very differently. He started by looking at Chapter II of the Constitution, entitled 'The Executive', and undertaking an extensive consideration of the nature, scope and limitations of Com052>131.04.92 reW*nBW*nBT/F1 11 32 840y7>-4<0052>13<0003>-4<004600520051>14

effect the deportation of an alien from Australia, or to enable an application for an entry permit to be made and considered. In this case, Gordon J concluded that the plaintiff's continued detention in Nauru, after her removal to that country had been completed, went beyond what was reasonably necessary for either of these purposes.[85]


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Regional Resettlement Arrangement', media release, 19 July 2013, <http://pandora.nla.gov.au/pan/79983/20130731-0937/www.pm.gov.au/press-office/australia-and-papua-new-guinea-regional-settlement-arrangement.html>

In a 'special one-off arrangement' in December 2014, the Australian government approved a rare exception to this policy for thirty one babies born in Australia and their families, all of whom had been transferred back to Australia from Nauru for the births before 4 December 2014. All babies born in Australia after this date to asylum seeker families that arrived in Australia by sea after 19 July 2013 have been subject to removal offshore. For more information see: Stephanie Anderson, 'Asylum seeker babies to stay in Australia under Muir deal', *News,* SBS, 18 December 2014, <http://www.sbs.com.au/news/article/2014/12/18/asylum-seeker-babies-stay-australia-under-muir-deal>; Scott Morrison, 'Babies born to IMAs transferred from Nauru to remain in Australia', press release, 18 December 2014, <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm220187.htm>

[4] Exceptions to the rule that everyone in this second cohort must be transferred offshore and never be resettled

authorities before the asylum seeker to whom it related entered Nauru. Applications for RPC visas could only be made by an Australian officer, and the visas would be valid for a maximum period of three months. Nauruan authorities could grant subsequent RPC visas, also for maximum periods of three months each, and also on the request of an Australian officer. Each three-month RPC visa carried a fee of $3,000 (Schedule 2, part 1), payable by Australia when a demand for its payment was made by Nauru (reg 5(7)). On 30 January 2014, shortly after the plaintiff was transferred to Nauru, the Immigration Regulations 2014 (Nauru) came into effect, providing for the grant of RPC visas in relevantly identical terms.

[9] Immigration Regulations 2013, reg 9(6)(a); Immigration Regulations 2014, reg 9(6)(a).

[10] The Centre Rules were published in the Republic of Nauru Government Gazette on 16 July 2014, pp. 2-7 (available at <http://ronlaw.gov.nr/nauru_lpms/files/gazettes/76554e71ea2ca72dc7fc11747ef60d3c.pdf>).

[11] Transfield was renamed Broadspectrum Limited in 2015 after Transfield Holdings, a privately held company owned by the sons of Transfield's founder Franco Belgiorno-Nettis, withdrew Transfield's rights to use the Transfield name, reportedly because of the controversy over the company's contracts in Nauru and on Manus Island: Jenny Wiggins and Michael Smith, 'Transfield Services to change name to Broadspectrum as founders sever ties', *Sydney Morning Herald,* 25 September 2015, <http://www.smh.com.au/business/transfield-services-to-change-name-to-broadspectrum-as-founders-sever-ties-20150924-gjum0b.html>

[12] The Department concluded a series of heads of agreement and contracts with Transfield from 2012 onwards. For the purpose of this proceeding, only the contract dated 24 March 2014, and the payments made under that

[32] *Plaintiff M68,* Keane J at [248]-[258]. See also French CJ, Kiefel and Nettle JJ at [52].

[33] *Plaintiff M68*, Gordon J at [367].

[34] *Plaintiff M68,* plaintiff's amended submissions, [91]. For the plaintiff's other arguments concerning the external affairs and Pacific islands powers, see [86]-[90].

[35] *Plaintiff M68,* transcript of proceedings, 7 October 2015, [2015] HCATrans 255 at [2390] (Lenehan).

[36] *Plaintiff M68,* French CJ, Kiefel and Nettle JJ at [42]; Bell J at [75]-[77]; Gageler J at [182]; Keane J at [259].

[37] *Plaintiff M68,* Keane J at [259] (emphasis in original).

[38] *Plaintiff M68,* Gageler J at [182].

[39] *Plaintiff M68,* Gageler J at [182].

[40] David Hume, 'Plaintiff M68-2015 – offshore processing and the limits of Chapter III', *AusPubLaw Blog,* 26 February 2016, <https://auspublaw.org/2016/02/plaintiff-m68-2015/>

[41] *Plaintiff M68,* transcript of proceedings, 7 October 2015, [2015] HCATrans 255 at [740] (Merkel QC).

[42] *Plaintiff M68,* transcript of proceedings, 8 October 2015, [2015] HCATrans 256 at [4020]-[4025] (Gleeson SC).

[43] *Plaintiff M68,* submissions of the first and second defendants, [69].

[44] On 17 October 2015, after the case had been heard in full, the defendants disclosed additional documents to the plaintiff documenting the fact that staff members of Wilson Security had been sworn in as reserve officers of the Nauru Police Force Reserve in