IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M 68 of 2015

BETWEEN

Plaintiff M68/2015

Plaintiff

and

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

10 First Defendant

COMMONWEALTH OF AUSTRALIA

Second Defendant

TRANSFIELD SERVICES (AUSTRALIA) PTY LTD (ACN 093114 553)

Third Defendant

OUTLINE OF SUBMISSIONS OF THE THIRD DEFENDANT

14349566/1
Date of Document 18 September 2015
Filed on behalf of: The Third Defendant
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Part I: Certification

1. These submissions are in a form suitable for publication on the internet. They adopt the defined terms in the special case.

Part II: Issues

2. The central issues in this proceeding are:

   2.1. Whether the plaintiff has standing to challenge the authority of the Commonwealth or the Minister to engage in past acts or conduct;

   2.2. Whether the plaintiff's detention arises as a result of the law of Nauru, and, if so, the consequences of that for the plaintiff's case;

   2.3. Whether, as a matter of construction, s 198AHA of the *Migration Act 1958* (Cth) (***Migration Act***) and/or s 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) (read with the relevant items of Sch 1AA to the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth)) (together the **Financial Framework Provisions**) authorise the executive action identified in Questions 1 and 6 of the special case;

   2.4. The validity of ss 198AHA and the Financial Framework Provisions;

   2.5. The propriety of answering questions about the validity of Nauruan laws;

   2.6. If the Court decides it is appropriate to address this issue, the validity of the relevant Nauruan law under art 5(1) of the Constitution of Nauru; and

   2.7. Whether s 198AD of the *Migration Act* authorises and requires the plaintiff to be taken to Nauru.

3. These submissions address each of these issues, except the issues of standing and the operation of 198AD. In relation to those issues, the third defendant (**Transfield Services**) adopts the Commonwealth's submissions.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. The plaintiff has given notices under s 78B of the *Judiciary Act 1903* (Cth). Transfield Services does not consider that any further notice is required.

Part IV: Facts

5. The facts are set out in the special case.

Part V: Applicable Provisions

6. Transfield Services does not wish to supplement the plaintiff's statement of applicable provisions as set out in Annexure A to the plaintiff's submissions.

Part VI: Argument

7. In summary, Transfield Services submits that:

7.1. the plaintiff's detention arises by reason of the law of Nauru **(paras 8 to 20)**;

7.2. section 198AHA of the *Migration Act*, either alone or together with the Financial Framework Provisions, authorises the Commonwealth to enter into the Transfield Contract, to make payments under it, and to engage in the other impugned executive actions **(paras 21 to 34)**;

7.3. section 198AHA of the *Migration Act* and the Financial Framework Provisions are valid laws of the Commonwealth **(paras 35 to 59)**;

10 7.4. the Court should decline to answer questions about the validity of Nauruan law under the Constitution of Nauru **(paras 60 to 71)**; and

7.5. if the Court decides to consider the validity of the impugned Nauruan law, it should find that, as a matter of Nauruan law, those laws are valid **(paras 72 to 88)**.

Threshold issue: The Plaintiff's detention arises by reason of the law of Nauru

8. The plaintiff's case substantially depends upon a characterisation of the facts regarding the regional processing arrangements in Nauru that is not open, because she asserts a level of Commonwealth responsibility for her detention that is inconsistent with the facts that have been agreed in the special case.

20 9. Nauru is a sovereign state, which determines the content of its own laws (**SC [84]**). Pursuant to those laws (and not any Australian law), it is unlawful for the plaintiff to leave or attempt to leave RPC3 without the permission of officials of Nauru, or persons authorised by Nauru to grant such permission (**SC [66]**). There is no factual foundation in the special case for the plaintiff's assertion that the Commonwealth procured or caused the creation of "the legal regime which purportedly supports the detention of the plaintiff".[1]

10. The Nauruan legal regime that brought about the plaintiff's detention during the period in which she was previously in Nauru has two main components.

11. **First**, at all material times, the Principal Immigration Officer of Nauru decided, acting
30 pursuant to Nauruan law,[2] to specify in the plaintiff's RPC visas that she must reside at the RPC (**SC [53]-[55], [66(a)]**). In addition, the conditions on the RPC visas granted to the plaintiff included a requirement that she remain at an RPC unless

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[1] Plaintiff's submissions at [54], which is in fact contrary to **SC [76]**.

[2] *Immigration Regulations 2013* (**SCB 282**), reg 9(6)(a); *Immigration Regulations 2014*, reg 9(6)(a) (**SCB 388**).

permitted to leave by a service provider in various circumstances.[3] Such a condition is unobjectionable, this Court having accepted in *Ruhani [No 2]* that "as a sovereign State, it is for the Republic of Nauru to annex what conditions it pleases to permission given to an alien to enter it. This is so whether the entry be voluntary or, as the appellant says was the case here, it be involuntary."[4] The plaintiff's emphasis on the fact that she did not consent to, or apply for, her RPC visas simply repeats an argument that was rejected by this Court in *Ruhani [No 2]*.

12. **Secondly**, s 18C(2) of the RPC Act (and not any Australian law) makes it an offence for a person in the plaintiff's position to leave or attempt to leave the RPC without the prior approval of the Operational Manager (a Nauruan official) or an authorised officer (which does not include any Commonwealth or Transfield Services employee (**SC [67]**)). Section 18C(2) also empowers a member of the Nauruan Police Force (but not any Commonwealth, Transfield Services or Wilson employee) to arrest a person for such an offence.[5] Consistently with that provision, it is an agreed fact that "if the plaintiff attempted to leave RPC3 without permission and Wilson Security staff were unable to persuade her not to do so, the staff would have sought to gain the assistance of the Nauruan Police Force to deal with her unauthorised departure from RPC3" (**SC [69]**).

13. If the Nauruan laws identified above are valid, the special case records the plaintiff's agreement that:

    13.1. "[b]y reason of the combined effect of" these laws, it was unlawful for the plaintiff to leave or attempt to leave RPC3 without the permission of the Operational Manager or an authorised officer under the RPC Act, or another authorised person[6] (**SC [66]**); and

    13.2. these laws of Nauru "required the plaintiff to remain within the Nauru RPC unless first granted permission to leave" and "authorised under the law of Nauru the imposition of the restrictions and other matters" set out in paragraphs 52 to 72 of the special case (being all the matters on which the plaintiff relies as constituting the restraints on her liberty (**SC [75(a)]**).

14. It is inherent in those agreed facts that, if valid, Nauruan laws authorised and required the plaintiff's detention at the RPC. Unless the plaintiff can obtain a ruling in this Court that the laws of Nauru identified above are invalid (a matter addressed

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[3] *Immigration Regulations 2013* (**SCB 282**), reg 9(6)(b), (c); *Immigration Regulations 2014*, reg 9(6)(b), (c). (**SCB 388**).

[4] *Ruhani v Director of Police [No 2]* (2005) 222 CLR 580, 588 [26].

[5] RPC Act s 18C, which was introduced by the *Asylum Seeker (Regional Processing Centre) (Amendment) Act 2014* (Nr) (see cl 7 of the schedule). That Act came into force on 21 May 2014.

[6] There is no fact in the special case to support the plaintiff's assertion at [57] that Commonwealth contractors are "other authorised persons".

in paragraphs 61 to 88 below), she is bound by her agreement to those facts, which establish that she was detained under, and by reason of, the law of Nauru.

15. The various facts to which the plaintiff points concerning the involvement of the Commonwealth in the regional processing arrangements in Nauru cannot change the fact that, while the Commonwealth was undoubtedly instrumental in causing regional processing to occur in Nauru (including by signing the MOU, and funding the arrangements), the regional processing regime in Nauru involves detention only because of Nauruan law and decisions of the Government of Nauru. Thus, it is an agreed fact that, if Nauru had not sought to impose the restrictions identified above, "none of the Commonwealth, the Minister, Transfield Services or its subcontractors would have sought to impose such restrictions in Nauru or asserted any right" to do so (**SC [76]**).

16. The plaintiff contends that "employees of Commonwealth contractors, who under the contracts were effectively managed and overseen by officers of the Commonwealth, had effective control over various aspects of the plaintiff's movement within and outside the centre".[7] That submission ignores the role of the Operational Manager of the RPC, who under the Administrative Arrangements is defined as "the person who is responsible for managing operations at a Centre" (**SCB 75**) and is "responsible for the day to day management of a Centre" (**SCB 79**), and who has numerous powers under the RPC Act to control the RPC. The extent to which the Operational Manager has, and exercises, power over the liberty of Transferees is demonstrated by the creation by the Operational Manager of the "open centre arrangements" described in the special case (**SC [88]-[89]**).

17. For the above reasons, the Court must answer the reserved questions on the basis that, were it not for the law of Nauru, the plaintiff would not be detained. The special case leaves no room to argue otherwise. In particular, it leaves no room for the findings urged by the plaintiff in paragraph 63 of her submissions.

18. The special case acknowledges that the performance by Transfield Services of its contractual obligations requires the provision of services to people who are required to reside at the RPC by reason of Nauruan law (**SC [23]**). It is a fallacy to treat contractual provisions that were drafted in order to specify the services to be provided to persons who are detained under Nauruan law (including the various provisions on which the plaintiff relies[8]) as if those contractual provisions create the detention to which those contractual provisions respond.

19. The plaintiff submits that "it is not to the point that the restrictions applied to the plaintiff may also be regarded as a product of the independent exercise of the

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[7] Plaintiff's submissions at [57].

[8] Plaintiff's submissions at [59].

sovereign legislative and executive power by Nauru".[9] Two points may be made in response. First, that submission concedes that the restrictions on the plaintiff's liberty are a product of sovereign decisions of Nauru. Secondly, it is wrong to say that the exercise of sovereign power by Nauru, in Nauru, to impose those restrictions is "not to the point". It is factually relevant because the fact that another country (through its laws and executive acts) is exercising sovereign power to detain within that country strongly suggests that any part played by the Commonwealth in that detention must be a subordinate one. It is legally relevant because Australian law will need to take into account the law of the foreign state in the manner discussed below. Notwithstanding the plaintiff's attempt to sidestep these complexities, they are central to the Court's determination of the questions raised in the special case.

20. For the above reasons, the premise for most of the plaintiff's arguments, being that her detention is authorised, required, procured, caused or effectively controlled by officers of the Commonwealth executive,[10] cannot be established.

Power to spend, contract and take other executive action (Questions 2, 4, 6 and 8)

21. On the assumption that statutory authority is required before the Commonwealth would have authority to enter into the Transfield Contract,[11] to pay money pursuant to that contract, and to take any of the other actions identified in Questions 1 and 6 of the special case, such authority is provided by s 198AHA, either alone or together with the Financial Framework Provisions.

22. By subsection (1), s 198AHA applies if the Commonwealth enters into an "arrangement" with a "person or body", where the arrangement is "in relation to the regional processing functions of a country". When s 198AHA applies, subsection (2) confers power on the Commonwealth to do certain things in relation to either the "arrangement" or the "regional processing functions". Sub-paragraph (a) empowers the Commonwealth to "take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country". Sub-paragraph (b) empowers the Commonwealth to "make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country". Sub-paragraph (c) then confers power to "do anything else that is incidental or conducive to the taking of such action or the making of such payments".

23. It is notable that although s 198AHA only applies where the Commonwealth enters into an "arrangement with a person or body in relation to the regional processing functions of a country", the conferral of power in subsection (2) extends to the taking

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[9] Plaintiff's submissions at [68].

[10] Plaintiff's submissions at [51(b)], [53].

[11] *Williams v Commonwealth [No 2]* (2014) 252 CLR 416.

of action and the making of payments in relation to either "the arrangement" or "the regional processing functions of the country".

24. The purpose of subsection (3) is to ensure that subsection (2) is read as only conferring power on the Commonwealth to do certain things (take action, make payments) and not as purporting to cure or answer any other questions of lawfulness that may arise in relation to such conduct. Thus, s 198AHA(2) is concerned with the authority of the Executive to take action as a matter of the internal constitutional arrangements of the Commonwealth, but not with the lawfulness of the action that is taken in the exercise of that authority. This construction is supported by the second reading speech, in which it was said that the purpose of subsection (3) "is to assist readers to understand the purpose of these amendments, which are limited to providing the Commonwealth with express legislative authority to take action to assist foreign governments in regional processing countries".[12] By way of example, subsection (2) would prevent a person challenging the Commonwealth's power to make payments in relation to a contract to which s 198AHA applies, but would not cure any unlawfulness arising from the fact that a particular payment was a bribe.

25. The plaintiff's submissions in relation to s 198AHA focus on whether the MOU with Nauru is an "arrangement" that can trigger the operation of that section.[13] The Commonwealth had the power to enter into the MOU pursuant to s 61 of the Constitution.[14] Having done so, for the reasons advanced by the Commonwealth the MOU became an "arrangement" for the purposes of s 198AHA(1), meaning that s 198AHA(2) then empowered the Commonwealth to enter into the Transfield Contract,[15] to make payments under it, and to take the other actions identified in Questions 1 and 6 of the special case.

26. In addition to the MOU, the Transfield Contract is also an "arrangement" that triggers the operation of s 198AHA, because Transfield Services is a "person or body", the Transfield Contract falls within the broad and non-exhaustive definition of "arrangement" in s 198AHA(5),[16] and the Transfield Contract relates to the "regional processing functions" of Nauru (including the implementation of "any law or policy" or the taking of "any action" by a country "in connection with the role of the country as a regional processing country", regardless of whether the implementation or taking of action occurs in that country or another country). The Transfield Contract satisfies that description in that it involves the Commonwealth engaging Transfield

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[12] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2015, 7489 (Mr Dutton).

[13] Plaintiff's submissions at [70]-[76].

[14] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 193 (Gibbs CJ), 212 (Stephen J), 237-240 (Murphy J).

[15] Section 198AHA is taken to have commenced on 18 August 2012, by reason of the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth), s 2.

[16] By subsection (5), "arrangement" includes an arrangement, agreement, understanding, promise or undertaking, whether or not it is legally binding.

Services to provide specified services for persons transferred to a regional processing country, for sites occupied by such persons in regional processing countries, and for sites occupied by personnel on regional processing countries.[17] It follows that, provided the Commonwealth had power to enter into the Transfield Contract, s 198AHA(2) empowers the Commonwealth to take action and make payments in relation to that contract, even where such action involves restraints on liberty (s 198AHA(5)(a)).

27. Section 198AHA(2) cannot, of course, confer power to enter into the very arrangement that must exist in order to engage the operation of that section. As a consequence, unless the MOU is an "arrangement", s 198AHA would not have empowered the Commonwealth to enter into the Transfield Contract (as opposed to empowering it to take action under that contract once it was entered into, and thereby became an "arrangement").

28. But even if s 198AHA did not empower the Commonwealth to enter into the Transfield Contract, the Financial Framework Provisions did so. In the case of "an arrangement under which relevant money or other CRF money is, or may become, payable by the Commonwealth",[18] s 32B provides the Commonwealth with a supplementary power to make, vary or administer the arrangement. This power is only available if s 32B(1)(b) is satisfied, which can occur in one of three ways: if the arrangement is specified in the regulations; if the arrangement is included in a class of arrangements specified in the regulations; or if the arrangement is for the purposes of a program specified in the regulations.[19]

29. The Transfield Contract satisfies s 32B(1)(b)(iii) in that it is an arrangement for the purposes of the programs specified in items 417.021, 417.027, 417.029 and 417.042 of Sch 1AA to the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth). Item 417.042 is of particular importance. It refers to a program for "regional processing and resettlement arrangements", with the stated objective of providing funding "for costs associated with regional processing and resettlement arrangements", including "funding for accommodation, support, health, management services and claims processing for unauthorised maritime arrivals transferred to regional processing countries".

30. The plaintiff contends that none of items 417.021, 417.027, 417.029 or 417.042 "expressly or impliedly authorises the making of arrangements or payments concerning detention, or at least not with the requisite clarity".[20] The plaintiff does not explain the basis for the reference to "requisite clarity". The test is simply

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[17] See the Recitals at **SCB 608**, and Schedule 1 (Statement of Work) at **SCB 624-649**.

[18] *Financial Framework (Supplementary Powers) Act 1997* (Cth), s 32B(1)(a)(i).

[19] *Financial Framework (Supplementary Powers) Act 1997* (Cth), s 32B(1)(b).

[20] Plaintiff's submissions at [77].

whether the arrangement (here, the Transfield Contract) "is for the purposes of a program specified" in those items. As long as there is a program specified in the relevant item and the Transfield Contract is for the purposes of that program, the "requisite clarity" will have been achieved.

31. Item 417.042 describes a "regional processing and resettlement arrangements" program. The description of the program is sufficient to meet the statutory condition that the program be "specified in the regulations". Item 417.042 makes clear the nature of the program (to provide funding for regional processing and resettlement arrangements) and goes on to provide a non-exhaustive list of the permitted purposes for the funding included in the program (for example, accommodation, support, health, management services and claims processing).

32. The plaintiff's principal reason for contending that the Financial Framework Provisions are not a source of statutory power is that none of the relevant items of Sch 1AA authorise the making of arrangements or payments concerning detention.[21] This argument is founded on the erroneous premise that the Commonwealth is authorising the detention of Transferees. However, the analysis properly begins with what the Commonwealth is actually doing that requires authority under the Financial Framework Provisions. What it is doing is entering a contract for the provision of a wide range of services to persons transferred to a regional processing centre and for sites occupied by them and by personnel. Many of those services plainly do not involve detention (eg the provision of food, recreational programs or internal security). Such services are provided to people who are in fact detained, but the detention is not created by the contract (**SC [23]**). Further, services must be provided under the Transfield Contract whether or not the Transferees are detained.[22] The question is whether the Financial Framework Provisions confer power to enter into such a contract. Looking in particular at item 417.042, the answer must be "yes".

33. In summary, if the MOU is an "arrangement" for the purposes of s 198AHA(1), then s 198AHA(2) plainly authorised entry into, and payments under, the Transfield Contract, together with the various other impugned executive actions. But even if the MOU is not an "arrangement", the Financial Framework Provisions authorised the Commonwealth to enter into the Transfield Contract, which was thereafter an "arrangement" attracting the powers set out in s 198AHA(2) in relation to actions in respect of both the Transfield Contract and the regional processing functions of Nauru. Questions 2 and 6 should therefore be answered "yes".

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[21] Plaintiff's submissions at [77].

[22] The services under the Transfield Contract are to be provided within the "parameters" of Offshore Processing, which is expressed in cl 1.1.5 of Schedule 1 as including "Host country legislation". This, together with clauses such as cl 4.2.1 of Schedule 1, make clear that Transfield Services is obliged to work within the Nauruan legal framework but is not predicated on that framework involving detention.

34. The conclusions set out above concerning the construction of s 198AHA and the Financial Framework Provisions (and how they relate to the Transfield Contract) do not depend upon the lawfulness of the plaintiff's detention under the law of Nauru. These provisions concern the conferral of capacity or authority on the Commonwealth executive. The legality of the plaintiff's detention under the laws of Nauru (whatever they may be from time to time) has no bearing on that conferral of capacity or authority. As subsection (3) confirms, s 198AHA(2) does not purport to affect the lawfulness of action taken pursuant to the authority it confers. Indeed, subsection (3) in terms draws a distinction between capacity and authority, on the one hand, and lawfulness on the other. There is therefore no basis for reading the word "restraint" in s 198AHA(5) as meaning "lawful restraint". If action (including a restraint on liberty) is unlawful in the place where it occurs, then consequences would no doubt follow (for example, exposure to a suit for false imprisonment). But as a matter of Australia's internal constitutional arrangements, the effect of subsection (3) is that the taking of action (such as entry into a contract) is authorised by s 198AHA regardless of whether that action is lawful under the law of the country where it takes place. Accordingly, Questions 4 and 8 should also be answered "yes".

Validity of s 198AHA and the Financial Framework Provisions (Questions 5 and 9)

35. Both s 198AHA and the Financial Framework Provisions are valid laws of the Commonwealth. They are supported by s 51(xix), (xxix) and (xxx) and they are not contrary to Chapter III of the Constitution.

Head of power

36. As to the aliens power, a law authorising the detention, removal, departure or status of aliens is a law "with respect to ... aliens" within the meaning of s 51(xix).[23] In more general terms, a law imposing burdens upon aliens[24] or excluding them from Australia and the Australian community is also a law under s 51(xix).[25] Section 198AHA must be characterised in the context of Subdivision B on regional processing as a whole, "by reference to the rights, powers, liabilities, duties and privileges which it creates" and the "practical as well as the legal operation of the law".[26] The legal and practical effect of the making and implementation of the Transfield Contract, and of any other action of the Commonwealth Executive in Nauru in connection with regional processing, is directly concerned with aliens, and thus falls squarely within the core of the aliens power. The plaintiff's submissions[27]

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[23] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 690, 696 [24].

[24] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 19 [43] (McHugh J), 55 [149] (Gummow J), 76 [223] (Hayne J) (***Woolley***); *Al-Kateb v Godwin* (2004) 219 CLR 562, 583 [41] (McHugh J) (***Al-Kateb***).

[25] *Woolley* (2004) 225 CLR 1, 75 [222] (Hayne J).

[26] *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 [16].

[27] Plaintiff's submissions at [91]. This submission, and [93], effectively collapse the head of power argument into the argument concerning Chapter III.

that s 198AHA(5) is too broad to apply only in relation to aliens, or that the section does not have a "discriminatory operation in respect of aliens", is wrong, for aliens are the subject matter of the regional processing arrangements. And if s 198AHA is valid, the plaintiff's submission that it "does not validly pick up the MOUs", for reasons apparently connected to the external affairs power, is misconceived.[28] There is no need for a separate head of power to support an "arrangement" for the purposes of s 198AHA(1) if the section as a whole is a law with respect to aliens.

37. As to the external affairs power and the Pacific Islands power, at the core of each is the power to regulate relations between Australia and another country.[29] Whether these powers support the full breadth of action contemplated by s 198AHA, they clearly support the actions at issue in these proceedings. The restraints imposed upon the plaintiff were and are imposed consistently with and as required by Nauruan law. A law authorising the Commonwealth executive to take action to facilitate the implementation of the law of the sovereign state within which that action is taken is a law affecting relations with that country. And the treatment of persons associated with one country in the territory of another is "[o]ne of the most important and delicate of all international relationships".[30]

38. In so far as s 198AHA supports actions undertaken in Nauru or in respect of Transferees on Nauru, it is also supported by that aspect of the external affairs power which extends to "places, persons, matters or things physically external to Australia."[31] The Plaintiff is wrong to characterise the Commonwealth as "itself generat[ing] any physical externality by first rendering people overseas under s 198AD."[32] Transferees must first have arrived in Australia from overseas by boat, and any actions taken by the Commonwealth in Nauru follow performance of the statutory duty that this Court has already held was validly imposed by s 198AD.[33]

Chapter III and Chu Kheng Lim

39. While it has been said that the separation of judicial power advances "two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges",[34] analysis and application of the principles in *Lim* upon which the plaintiff relies cannot safely proceed from constitutional objectives framed at such a

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[28] Plaintiff's submission at [92]-[93].

[29] See *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 643 (Latham CJ), 658 (Starke J), 669 (Dixon J), 684 (Evatt and McTiernan JJ); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 188 (Gibbs CJ); *Victoria v Commonwealth* (1996) 187 CLR 416, 482; *New South Wales v Commonwealth* (1975) 135 CLR 337, 360 (Barwick CJ), 470-471 (Mason J).

[30] *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 193 [111] (Gummow J), quoting *Hines v Davidowitz*, 312 US 52, 64 (1941).

[31] *Victoria v Commonwealth* (1996) 187 CLR 416, 485; *XYZ v Commonwealth* (2006) 227 CLR 532, 539 [10] (Gleeson CJ), 546-547 [30]-[31] (Gummow, Hayne and Crennan JJ).

[32] Plaintiff's submissions at [90].

[33] *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 690.

[34] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11.

high level of generality. The "guarantee of liberty" does not have "an immediate normative operation in applying the Constitution".[35] The plaintiff's case depends on severing the principles established by *Lim* from their constitutional foundations, and giving those principles a freestanding operation that cannot be justified by reference to either the text or structure of the Constitution.

40. The plaintiff seeks to derive two principles from *Lim*.[36] The first principle, which is that an officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision,[37] is not controversial. That principle, which is concerned principally with the relationship between the legislature and the executive, reflects longstanding limits on executive detention without statutory authority. But where the Executive seeks to detain a person outside of its own territorial jurisdiction, the authority to detain may be conferred by the law of the place where detention occurs. Indeed, absent such a local conferral of power to detain the Executive would be exposed to claims for false imprisonment, as an Australian law authorising detention would not provide an answer to such a claim (the applicable law being the law of the place where the tort occurs).[38] Accordingly, to the extent that any detention in Nauru occurs pursuant to s 18C of the RPC Act, any involvement of Commonwealth officials or contractors in that detention does not conflict with the first principle from *Lim*.

41. The second principle relates to the limits of the detention that can be justified by legislative authority. We make eight points about that aspect of *Lim*.

42. **Point 1.** The plaintiff correctly acknowledges that the principle has its constitutional roots in the identification of the judicial power of the Commonwealth and the exhaustive vesting of that power in accordance with Chapter III.[39] However, her analysis tends to obscure the fact that, unless Parliament purports to authorise the Executive to exercise power of a kind that is exclusively judicial, *Lim* has no work to do. Here, the relevant exclusively judicial function is "the adjudgment and punishment of criminal guilt".[40] Whether a law purports to confer that function on the Executive is determined as a matter of "substance and not mere form", meaning it is beyond the power of Parliament "to invest the Executive with an arbitrary power

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[35] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 [72].

[36] Plaintiff's submissions at [36]-[38].

[37] *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1, 19 (***Lim***); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 528-529.

[38] See, eg, *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

[39] *Lim* (1992) 176 CLR 1, 26, 32-33 (Brennan, Deane and Dawson JJ), 66-67 (McHugh J); *Woolley* (2004) 225 CLR 1, 21-23 [48]-[51] (McHugh J), 76 [224] (Hayne J); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 498 [20] (Gleeson CJ); *Al-Kateb* (2004) 219 CLR 562, 647 [254] (Hayne J).

[40] *Lim* (1992) 176 CLR 1, 27. See also *Duncan v New South Wales* (2015) 89 ALJR 462, 471 [41].

to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt".[41] That was said in *Lim* to follow because, subject to various exceptions, "the involuntary detention of a citizen in custody by the State is penal or punitive in character and ... exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt".[42] Many Justices of this Court have acknowledged that the number of exceptions to that proposition creates doubt as to its correctness.[43] But even if the proposition is correct, the point of present importance is that the critical question is whether the executive is performing a function that is exclusively judicial. If it is not, then *Lim* is not relevant.

43. **Point 2.** *Lim* concerns the limits on the conferral on the executive of "authority to detain (or to direct the detention of) an alien in custody".[44] It holds that the conferral on the executive of such authority is valid if it occurs for the purpose of considering and granting permission to remain in Australia, or to deport or remove if permission is not granted, because detention for those purposes is "neither punitive in nature nor part of the judicial power of the Commonwealth".[45] But executive action that does not involve an assertion of "authority to detain" need not be analysed against the purposes identified in *Lim*,[46] because such action is not of a kind capable of being characterised as an exclusively judicial function. For that reason, the plaintiff's allegations concerning Commonwealth involvement in "organising" or "facilitating" detention in Nauru have no legal significance, for plainly the organisation or facilitation of detention (as opposed to its authorisation) is not an exclusively judicial function.

44. **Point 3.** Notwithstanding some occasionally expressed reservations,[47] the touchstone for determining whether the *Lim* principle is infringed is whether or not detention by the Executive serves a punitive or non-punitive purpose.[48] Purpose is to be determined through the application of the ordinary rules of statutory

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[41] *Lim* (1992) 176 CLR 1, 27.

[42] *Lim* (1992) 176 CLR 1, 27.

[43] See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1, 84 (Toohey J), 110 (Gaudron J); *Al-Kateb* (2004) 219 CLR 562, 646 [251], 648 [258] (Hayne J); *Woolley* (2004) 225 CLR 1, 24-25 [57]-[59] (McHugh J).

[44] *Lim* (1992) 176 CLR 1, 32.

[45] *Lim* (1992) 176 CLR 1, 32.

[46] As is implicitly acknowledged in the Plaintiff's submissions at [37], [38] and [80].

[47] *Al-Kateb* (2004) 219 CLR 562, 611-612 [135]-[137] (Gummow J); *Woolley* (2004) 225 CLR 1, 77 [227] (Hayne J); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 542 [171] (Hayne J); *Lim* (1992) 176 CLR 1, 32, 33.

[48] *Al-Kateb* (2004) 219 CLR 562, 584 [45] (McHugh J), 651 [267] (Hayne J), 660 [294] (Callinan J); *Woolley* (2004) 225 CLR 1 at 26 [60] (McHugh J), 61 [167] (Gummow J), 85 [261]-[263] (Callinan J). See also *Duncan v New South Wales* (2015) 89 ALJR 462, 471 [41], 472-473 [47]-[49].

construction.[49] Whether a purpose is punitive "must depend on all the circumstances of the case."[50] The "bare fact of detention"[51] is not enough.

45. **Point 4.** Whether detention is for a punitive or non-punitive purpose does not depend on whether it fits into some known "exception". The list of "exceptions" is not closed.[52] In this as in other areas, novelty presents rather than answers the constitutional question as to whether detention has a punitive purpose.[53]

46. **Point 5.** The plaintiff is wrong[54] to submit that the reference to the beneficiaries of the principles in *Lim* as "citizens" is apt to mislead, for *Lim* makes it clear that the effect of being an alien is "significantly to diminish the protection which Ch III of the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process".[55] It does so because the detention of aliens is more readily to be characterised as having a non-punitive purpose. As Kiefel and Keane JJ observed in *Plaintiff M76/2013 v Minister for Immigration and Citizenship*,[56] in a proposition that is equally true of Nauru:[57]

> the character of a law which affects the right of a citizen under the common law to be at liberty is radically different from that of a law which affects an alien who seeks to enter the Australian community without its permission.

47. **Point 6.** While it has been said that the principles in *Lim* apply to actions taken by the Executive beyond Australia's borders, those principles cannot be blind to the consequences of acting extraterritorially. Where foreign law authorises action by Commonwealth actors (or contractors) within that state, those actions may be taken within that state at least to the extent that this is consistent with Australian domestic law (and even more clearly when conduct is authorised by a provision of Australian law such as s 198AHA).[58]

48. **Point 7.** The requirement in *Lim* that a law authorising detention be "reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered"[59] has been explained in subsequent cases as being limited to a consideration of the duration or

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[49] *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50].

[50] *Woolley* (2004) 225 CLR 1, 24 [58] (McHugh J).

[51] *Al-Kateb* (2004) 219 CLR 562, 651 [267] (Hayne J).

[52] *Vasiljkovic v Commonwealth* (2006) 227 CLR 614, 648 [108] (Gummow and Hayne JJ); *Woolley* (2004) 225 CLR 1, 12 [17] (Gleeson CJ), 24 [57], 26 [60] (McHugh J), 85 [264] (Callinan J); *Lim* (1992) 176 CLR 1, 55 (Gaudron J); *Al-Kateb* (2004) 219 CLR 562, 648 [257]-[258] (Hayne J).

[53] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 94 [138].

[54] Plaintiff's submissions at [41].

[55] *Lim* (1992) 176 CLR 1, 29.

[56] (2013) 251 CLR 322, 385 [206]. See also *Al-Kateb* (2004) 219 CLR 562, 637 [219] (Hayne J); *Woolley* (2004) 225 CLR 1, 12-13 [16]-[18], 14 [24] (Gleeson CJ); *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 499 [21] (Gleeson CJ).

[57] *Ruhani v Director of Police [No 2]* (2005) 222 CLR 580, 587-588 [25]-[26].

[58] *Williams v Commonwealth [No 2]* (2014) 252 CLR 416; *R v Hughes* (2000) 202 CLR 535 at 553 [31].

[59] (1992) 176 CLR 1, 33.

period of detention.[60] Judicial oversight of the purpose and duration of detention, not the necessity for it, effects an appropriate allocation of responsibilities as between the three branches of government.

49. **Point 8.** The animating principle behind *Lim* is not the need for "effective judicial control of detention",[61] because the very point of *Lim* was to reserve some functions exclusively to the judiciary. Accordingly, even if the Australian judiciary has reduced capacity to control extraterritorial detention, that would not demonstrate that the Executive was exercising the judicial power of the Commonwealth so as to contravene *Lim.* But in any case, it is by no means clear why judicial control is impaired.[62] There can be no suggestion of difficulty in serving the Commonwealth. If the Commonwealth is authorising or imposing detention in a place outside Australia and that detention is unlawful in that place, relief would issue in this Court under s 75(iii) or s 75(v).

50. Of course, if the Commonwealth is not authorising or imposing detention overseas, then Australian courts may not be able to control that detention. However, the proposition that detention by the executive of a foreign country, within that country, is subject to the supervisory jurisdiction of the courts of that country, and not to that of Australian courts, is both unremarkable and unobjectionable. Further, even in cases where the Commonwealth or its contractors are not themselves taking action of a kind that engages the jurisdiction of Australian courts, that is not to say that they are beyond scrutiny. Such scrutiny can occur, for example, through the Senate Estimates Committee, the Australian National Audit office, ombudsman review and reports of international organisations.[63]

The Chapter III challenge to s 198AHA and the Financial Framework Provisions

51. The plaintiff's Chapter III attack on the validity of s 198AHA and the Financial Framework Provisions should be rejected for three reasons.

52. ***First***, the detention of Transferees in Nauru is not "authorised" by s 198AHA or the Financial Framework Provisions in the sense in which that concept is used in *Lim*. There is nothing about s 198AHA or the Financial Framework Provisions that "bespeaks an exercise of the judicial power" of the Commonwealth.[64] It does not

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[60] See *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 369-370 [139]-[140] (Crennan, Bell and Gageler JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207, 249 [216]-[218] (Crennan J), 272 [374], 273 [381] (Gageler J). See also *Woolley* (2004) 225 CLR 1, 37 [88] (McHugh J).

[61] Cf Plaintiff's submissions at [45]-[46].

[62] Cf Plaintiff's submissions at [46]-[47].

[63] As to the relevance of accountability mechanisms not involving the courts, see *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 353 [40]; *ADCO Constructions Pty Ltd v Goudappel* (2014) 88 ALJR 624, 638 [61].

[64] *Al-Kateb* (2004) 219 CLR 562, 647 [254] (Hayne J); *Woolley* (2004) 225 CLR 1, 31 [72] (McHugh J), 76 [224] (Hayne J). See also *Duncan v New South Wales* (2015) 89 ALJR 462, 471 [41].

affect the lawfulness of detention. All that s 198AHA relevantly does is to provide whatever domestic statutory authority is needed to permit the Commonwealth to contract for the provision of services to people who are detained in Nauru, and then to supervise those contractual arrangements.

53. ***Secondly***, the notion of "authorising" detention directs attention to the source of the authority to detain. In *Lim*, it was assumed that the source of authority would be Commonwealth legislation because the detention in question was occurring in Australia. But where detention occurs in a foreign country, and is authorised by its laws, different considerations are engaged. For the reasons summarised in paragraphs 8 to 20 above, it is the law of Nauru that "authorises" the detention of Transferees. Nauru is a sovereign nation,[65] and it decides the content of its own laws. Respect for its sovereignty demands that Nauru not be treated in any way as a delegate of Australia.[66] That both denies the factual premise for the plaintiff's case, and also belies the suggestion that the Executive is here exercising the judicial power of the Commonwealth.

54. The plaintiff's tendency to refer without differentiation to acts or conduct that facilitated, organised, caused, imposed, procured, or resulted in (or some subset of that list) the detention of the plaintiff at RPC3 is apt to obscure the issue for determination. The proposition that the Commonwealth "facilitated" or "organised" the detention of persons who reside at RPC3 differs fundamentally (both as a factual proposition, and in its legal implications) from the proposition that the Commonwealth "caused" or "imposed" that detention. To roll those propositions together hinders both the identification of the relevant legal principle, and the identification of the facts that are relevant to the application of that legal principle.

55. Where people are detained under the authority of a Nauruan law, the fact that the Commonwealth has some involvement in facilitating or assisting with the implementation of that detention does not attract any Chapter III limit. The facilitation or organisation of detention cannot be equated with the authorisation (or imposition, or procurement) of detention, because conduct of that kind simply takes the detention that is required by Nauruan law as a given, and seeks to ensure that it occurs in an appropriate manner. Influence over the manner of detention does not involve conduct of a kind that is exclusively judicial, for it is only an attempt to authorise detention (if it occurs for a punitive purpose) that may properly be so characterised.

56. ***Thirdly***, even if s 198AHA and the Financial Framework Provisions do authorise the detention of Transferees in Nauru, they do not contravene Chapter III because the purpose of that detention is not punitive. Any restraints on liberty were imposed by

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[65] See *Ruhani v Director of Police [No 2]* (2005) 222 CLR 580, 588 [26].
[66] *R v Cook* [1998] 2 SCR 597, 646 [91].

reason of Nauruan law to keep Transferees "separate from the community, in administrative detention, while their visa applications were being investigated and considered".[67] That Nauru is processing the applications, not Australia, makes it less rather than more likely that any action taken by the Commonwealth Executive (or its contractors) to assist Nauru is properly characterised as an exercise of the judicial power of the Commonwealth.

57. The plaintiff's suggestion that her detention is punitive because the regional processing regime is intended to deter maritime arrivals[68] is mistaken. The scheme of regional processing pursuant to which unauthorised maritime arrivals may be transferred to Nauru was upheld by this Court in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*.[69] Any detention authorised by s 198AHA and the Financial Framework Provisions is plainly in aid of that scheme. In any case, as McHugh J acknowledged in *Woolley*, "[d]eterrence that is an intended consequence of an otherwise protective law will not make the law punitive in nature unless the deterrent aspect itself is intended to be punitive".[70]

58. The plaintiff submits that "but for the regional processing provisions of the Act, those non-citizens would have been detained and processed in Australia" (at [87]). That submission highlights the bizarre consequences of her submissions. She accepts that the Commonwealth Executive can lawfully detain aliens in aid of processing in Australia without this involving any intrusion into the judicial power of the Commonwealth, and yet contends that for the Commonwealth to facilitate or fund detention in Nauru (being detention that is required by Nauruan law and administrative decisions in aid of such processing in Nauru that might result in temporary admission to the community of Nauru) is to exercise the judicial power of the Commonwealth.

59. If Questions 5 and 9 are reached, the Court should answer them "no".

Propriety of answering Questions 3, 7 and 11

60. For the following reasons, the Court should decline to answer Questions 3(a) and (b), 7(a) and (b) and 11(a) and (b) at least to the extent those questions require the Court to decide whether s 18C of the RPC Act is invalid by reason of art 5(1) of the Constitution of Nauru. While the plaintiff also seeks to impugn certain administrative conduct of foreign officials (relevantly, the direction to reside at RPC made pursuant to the conditions on the RPC visa, and rule 3.1.3 of the Centre Rules), no purpose would be served in considering those matters if the Court declines to rule on the

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[67] *Woolley* (2004) 225 CLR 1, 15 [28].
[68] Plaintiff's submissions at [93].
[69] (2014) 88 ALJR 690.
[70] *Woolley* (2004) 225 CLR 1, 26 [61].

validity of s 18C of the RPC Act, because if s 18C is valid then the plaintiff is validly detained by reason of Nauruan law.[71]

61. In addressing the plaintiff's attempt to challenge the validity of a foreign law under a foreign constitution, the label "act of state" provides no more than a starting point, for the "act of state" label can be applied to "situations which are quite distinct, and different in law".[72] It is necessary to adopt "a more particular level of inquiry". But that is not to deny the force of the famous dictum of Fuller CJ in *Underhill v Hernadez*, which has been approved by this Court, [73] the House of Lords[74] and the US Supreme Court, [75] that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory".[76]

62. That dictum was not disapproved in *Moti v R*,[77] although the Court did explain that it does not establish a "universally applicable rule that Australian courts may not be required ... to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law". [78] The Court recognised that "there will be occasions" when an Australian court must state "conclusions about the legality of the conduct of a foreign government or persons through whom such a government has acted".[79] Both *Moti* and *Habib v Commonwealth*[80] were occasions of that kind, where it was necessary to consider the conduct of a foreign official "along the way" as a necessary step in a conclusion about the operation of Australian law.[81] But the fact that there are "occasions" when this will be appropriate assumes rather than denies that there will also be occasions when considerations of international comity and judicial restraint, as reflected in *Underhill* and accepted for over 100 years, may require a court to decline to decide certain questions.

63. In this case, unlike *Moti* and *Habib*, the plaintiff's challenge is not limited to the conduct of foreign officials. The plaintiff asks this Court to take a far more radical step, being to apply the constitutional law of another country to decide that a law passed by the legislature of that country is invalid. For the following four reasons, this Court should decline to take that step.

64. ***First***, the plaintiff has not identified a single case where a court of one state has applied the constitutional law of another state to conclude that a law of the second

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[71] Indeed, rule 3.1.3 is apparently intended simply to restate s 18C: see Centre Rule 11.2 (**SCB 815**).
[72] *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888, 930G.
[73] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 40-41.
[74] *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888, 933D.
[75] *Banco Nacional de Cuba v Sabbatino* (1964) 376 US 398, 416.
[76] *Underhill v Hernadez* (1897) 168 US 250 at 252 (Fuller CJ).
[77] (2011) 245 CLR 456.
[78] (2011) 245 CLR 456, 475 [50].
[79] (2011) 245 CLR 456, 475 [51]. Seel also at 476 [52], approving observations by F A Mann.
[80] (2010) 183 FCR 62.
[81] (2010) 183 FCR 62, 96-97 [115] (Jagot J) (Black CJ agreeing).

state is invalid. The absence of cases of that kind reflects the fact that, whatever the boundaries of the notions of comity and judicial restraint that underpin the act of state doctrine, an attack on the validity of foreign legislation would transgress those boundaries. As this Court said in *Spycatcher*:[82]

> [T]here are some claims in which the very subject-matter of the claims and the issues which they are likely to generate present a risk of embarrassment to the court and of prejudice to the relationship between its sovereign and the foreign sovereign.

65. To decide that legislation passed by the elected legislature of another country is invalid strikes at the heart of that country's sovereignty. It is, for example, difficult to conceive that this Court would entertain an argument that a terrorism or abortion law passed by the United States Congress was contrary to the Bill of Rights and therefore unconstitutional. That is so whether the validity of the US law was raised directly, or collaterally (for example, in the context of a double criminality argument in extradition proceedings). In either case, this Court would refuse to examine that question, for to do otherwise would plainly jeopardise international relations.

66. That was the approach taken in *Buck v Attorney-General*,[83] where the plaintiffs challenged the validity of the constitution of Sierra Leone in the courts of the United Kingdom. Lord Justice Harman held that United Kingdom courts "cannot ... make a declaration impugning the validity of the constitution of a foreign or independent state, at any rate where that is the object of the action",[84] and also that, even if the courts could do so, "I should still think that we should not make such a declaration which would amount to an unwarrantable interference in the affairs of an independent member of the British Commonwealth".[85] Lord Justice Diplock considered that if the court were to grant the relief sought it would be to "assert jurisdiction over the internal affairs of that state".[86] He held that to determine the validity of foreign law would "be a breach of the rules of comity", being rules "which each state adopts in relation to other states and expects other states to adopt in relation to itself".[87] Lord Justice Russell agreed, stating that "[t]he proper and only forum ... is to be found in the courts of that independent sovereign state".[88]

67. Unlike the plaintiffs in *Buck*, in this case the plaintiff does not ask this Court to declare that a foreign law is invalid. Nevertheless, it cannot be said that the validity of Nauruan law only comes into question "incidentally",[89] given that it is the subject of

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[82] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 44. See also *Moore v Mitchell* (1929) 30 F. (2d) 600, 604 (Learned Hand J).

[83] [1965] 1 Ch 745. At first instance, Wilberforce J regarded the comity argument as "most formidable" (at 754), but ultimately his Honour decided the case adversely to the plaintiffs on its merits: see 755, 760.

[84] [1965] 1 Ch 745, 768.

[85] [1965] 1 Ch 745, 768.

[86] [1965] 1 Ch 745, 770.

[87] [1965] 1 Ch 745, 770.

[88] [1965] 1 Ch 745, 774.

[89] [1965] 1 Ch 745, 770.

specific questions in the special case. In those circumstances, the same considerations of international comity that were significant in *Buck* apply here.[90] Consistently with that submission, in discussing *Buck* and similar decisions, F A Mann did not treat the principle as confined to cases seeking declaratory relief in relation to the foreign law, stating that in both the United States and England "a court is likely to be precluded from inquiring into the constitutional validity of legislation enacted by a foreign sovereign".[91]

68. ***Secondly***, the damage to international relations that would be caused if this Court agreed to rule on the constitutionality of Nauruan law is emphasised by the fact that, when Australia and Nauru negotiated an international agreement to allow appeals to be brought to this Court from Nauru, appeals on constitutional questions were specifically excluded.[92] That is reflected in the Commonwealth legislation that implements the agreement.[93] Nauru has therefore specifically sought to reserve exclusively to its own courts rulings under its constitution. For this Court to rule on such questions carries the obvious potential to prejudice international relations.

69. ***Thirdly***, in determining the content of foreign law (which is a question of fact),[94] "if it is clear ... that all courts in one State or jurisdiction have decided and will decide a particular question in one way, the courts of another State or jurisdiction have no right to decide that that question ought to be decided in a different way".[95] As discussed in paragraphs 73 to 78 below, the question raised by the plaintiff has been authoritatively answered by Nauru's highest court. Accordingly, this Court should not decide the question in a different way. So too, the text of foreign legislation is properly treated as establishing the content of foreign law, subject only to decisions of the courts of the country in question either interpreting that law, or holding it to be invalid. To adopt any other approach would be to accord less respect to laws passed by a foreign legislature than is accorded to Australian laws, it being well established that in the absence of compelling grounds "it is the duty of the Court to respect, indeed, to defer to, the enactment of the legislature until that enactment is adjudged

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[90] [1965] 1 Ch 745, 768, 770.

[91] "Conflict of Laws and Public Law", [1971] I *Recueil des Cours* 107, pp 147-148. See, also, *Luther v Sagor & Co* [1921] 3 KB 532 and *Princess Paley Olga v Weisz* [1929] 1 KB 718.

[92] Agreement between the Government of Australia and the Government of the Republic of Nauru relating to appeals to the High Court of Australia from the Supreme Court of Nauru that was signed on 6 September 1976, Art 2(a).

[93] *Nauru (High Court Appeals) Act 1976* (Cth) s 5(1). That limitation was recognised in *Ruhani v Director of Police [No 2]* (2005) 222 CLR 580, 586 [16].

[94] *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331, 370 [115], citing *Di Sora v Phillipps* (1863) 10 HL Cas 624; (1863) 11 ER 1168; *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209.

[95] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 923. See also M Davies, A S Bell and P L G Brereton, *Nygh's Conflict of Laws in Australia* (9th ed, 2013) at 405.

ultra vires".[96]

70. ***Finally,*** the existence and scope of judicial authority to rule on the validity of legislation is not uniform throughout the world. If the plaintiff's argument were accepted, this Court may find itself asked to determine questions about the validity of foreign legislation in circumstances where the contours of judicial power to answer those questions are different in the courts of the country concerned. That would plainly be inappropriate, and highlights the dangers in embarking down the plaintiff's suggested path.

71. For these reasons, this Court should decline to answer Questions 3(a) and (b), 7(a) and (b) and 11(a) and (b).

The validity of Nauruan law (Questions 3 and 7)

72. In the event that the Court decides to address the validity of the impugned Nauruan laws or administrative measures, it should find that they do not contravene art 5(1) of the Constitution of Nauru because:

72.1. in *AG v Secretary for Justice*,[97] the Supreme Court of Nauru held that relevantly indistinguishable arrangements did not contravene art 5 of the Constitution of Nauru, and that judgment authoritatively establishes the validity of the impugned measures as a matter of Nauruan law;

72.2. alternatively, even if *AG v Secretary for Justice* is distinguishable, this Court should conclude that the impugned laws and administrative actions do not contravene art 5.

AG v Secretary for Justice

73. Article 5(1) of the Constitution of Nauru relevantly provides that "[n]o person shall be deprived of his personal liberty, except as authorised by law" and "for the purpose of preventing his unlawful entry into Nauru, or for the purpose of effecting his expulsion, extradition or other lawful removal from Nauru".

74. In *AG v Secretary for Justice*,[98] the Supreme Court of Nauru held that the arrangements that were then in place at the Nauru RPC deprived Transferees of their liberty within the meaning of art 5(1) but that this occurred for the permissible purpose of effecting "expulsion, extradition or other lawful removal from Nauru" (art

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[96] *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 156, approved in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, 82 [66]; *Commonwealth v Tasmania* (1983) 158 CLR 1, 161-167 (Murphy J).

[97] [2013] NRSC 10 (**SCB 590**).

[98] [2013] NRSC 10 (**SCB 590**).

5(1)(h)). The same result had been reached in two earlier judgments of the Supreme Court of Nauru concerning earlier regional processing arrangements.[99]

75. The Supreme Court rejected a submission that art 5(1)(h) applied only where an actual decision had been made to remove a person from Nauru, holding that "[t]he purpose of effecting a lawful removal can exist whether or not a removal order has been made".[100] So long as "detention is for the very purpose of ultimately 'effecting … lawful removal from Nauru'", the detention will be valid.[101]

76. The Court held that the RPC visas issued under reg 9A of the *Immigration Regulations 2013* (Nauru) were "stated to be for the purpose of determining their claims for refugee status, and for purposes that will have to be addressed leading up to their removal from Nauru when their applications for refugee status have been finally determined."[102] The Court noted that "[i]t has never been the intention of Nauru in granting visas to the applicants that their stay in Nauru will be other than temporary."[103] "[A]t the end removal will occur either to another country for resettlement, [or] to the country of their nationality."[104]

77. The same is true under the existing visa arrangements. Regulation 9A of the *Immigration Regulations 2014* is exactly the same as reg 9A of the *Immigration Regulations 2013*, which was the subject of the decision in *AG v Secretary for Justice*. Further, contrary to the plaintiff's submissions at [98], the regime for temporary settlement visas also makes clear that its purpose is to permit the holder "to remain in Nauru pending the making of arrangements for his or her settlement in another country".[105] That is also made clear by clause 4.2.2 of the Administrative Arrangements (**SCB 80**), and is consistent with reg 9A(2) of the *Immigration Regulations 2014*, under which the duration of a temporary settlement visa is six months. In any event, once a Transferee receives a temporary settlement visa, that Transferee is not required (by a visa condition, or otherwise) to reside at the RPC, and is also entitled to work and to leave and re-enter Nauru.[106] Such a Transferee obviously is not deprived of his or her liberty, meaning there is no occasion to consider the operation of art 5(1)(h) with respect to such a Transferee.

78. Given that both RPC visas and temporary settlement visas are granted pending resettlement elsewhere or return to the person's country of origin, those visas serve

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[99] *Mahdi v Director of Police* [2003] NRSC 3 (**SCB 564**); *Amiri v Director of Police* [2004] NRSC 1 (**SCB 571**).

[100] [2013] NRSC 10 at [68]. See also at [63].

[101] [2013] NRSC 10 at [76].

[102] [2013] NRSC 10 at [71]. That the focus was on an RPC visa issued under reg 9 of the *Immigration Regulations 2013* is made clear at [7] and [9] (**SCB 591-592**).

[103] [2013] NRSC 10 at [72].

[104] [2013] NRSC 10 at [75].

[105] **SCB 793**. This is correctly recognised in the last sentence of the Plaintiff's submissions at [31].

[106] **SCB 793**.

the same purpose that was held to fall within art 5(1)(h) in *AG v Secretary for Justice*.[107] That judgment cannot be distinguished. As a judgment of the highest court in Nauru, it authoritatively answers the question (which in this Court is a question of fact) whether the impugned laws and measures are valid under Nauruan law. They are.

Deprivation of liberty

79. The above submission is sufficient to answer Questions 3(a) and (b), 7(a) and (b) and 11(a) and (b). But Questions 7(a) and (b), and 11(a) and (b), should also be answered adversely to the plaintiff on the additional basis that if she is returned to Nauru she would not be "deprived of her liberty", meaning that art 5(1) of the Constitution of Nauru would not apply irrespective of the operation of art 5(1)(h).

80. If the plaintiff is returned to Nauru, her residence at the RPC would be subject to arrangements quite unlike those held to amount to a deprivation of liberty in *AG v Secretary of Justice*.[108] That follows because the Court should infer that the plaintiff would be approved to participate in the "open centre arrangements" that have been operating at RPC3 since February 2015. That inference should be drawn because 284 of the 293 Transferees (or 97%) who reside at RPC3 have been so approved, and because there are no facts in the special case that suggest that there would be any impediment to the plaintiff receiving such approval.[109]

81. Once approved to participate in the open centre arrangements, the plaintiff would be permitted to leave the RPC five days a week between 9am and 9pm.[110] There is no cap on the number of Transferees who can participate in the arrangements on any given day.[111] She would not be required to be accompanied by an escort. Transferees "can come and go as they wish" on these days and a "shuttle bus service facilitates the[ir] movement around Nauru".[112] The plaintiff could therefore travel into the Nauruan community, go swimming, or socialise (with Nauruans or other Transferees) as she chose.[113]

82. The Supreme Court of Nauru considered the meaning of the phrase "deprived of his personal liberty" in art 5(1) in *AG v Secretary for Justice*. It held that:[114]

> [T]here can be many restrictions on liberty and movement which will not amount to a deprivation of liberty, i.e. detention. The difference between deprivation of and restriction on liberty is one of degree not substance, and the task for the court is to

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[107] [2013] NRSC 10 (**SCB 590**).
[108] [2013] NRSC 10 at [54].
[109] **SC [89]**.
[110] **SC [88]**.
[111] **SC [89]**.
[112] **SC [89]**.
[113] **SCB 833** (Open Centre – Voluntary Code of Conduct).
[114] [2013] NRSC 10 at [41].

> assess into which category a particular case falls. The task is to consider the particular "concrete" situation of the individual and, taking into account a whole range of criteria including the type, duration, effects and manner of implementation of the measures in question and to assess their impact on that person.

83. That reasoning is consistent with authorities on art 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which relevantly provides that "[n]o one shall be deprived of his liberty" save in specific limited circumstances.[115] In *Austin v Commissioner of Police of the Metropolis*, Lord Hope said that "it is not enough that what was done could be said in general or colloquial terms to have amounted to a deprivation of liberty", and that whether a restriction crosses the "threshold" into deprivation "must be measured by the degree or intensity of the restriction."[116] In *Guzzardi v Italy*, the European Court of Human Rights said that art 5(1) "is not concerned with mere restrictions on liberty of movement" albeit "the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance."[117]

84. *Guzzardi*[118] is said by the plaintiff to be "somewhat analogous", but it is not. In that case, the area within which the applicant could move "covered no more than a tiny fraction of an island to which access was difficult and about nine-tenths of which was occupied by a prison". There were "few opportunities for social contacts available to the applicant" because the permanent population of the island resided elsewhere. The applicant could not leave his dwelling between 10pm and 7am without giving prior notice to the authorities, he "[h]ad to report to the authorities twice a day" and trips elsewhere "were rare" and made under "strict supervision".

85. Residence at RPC3 under the open centre arrangements is not comparable to the restrictions in *Guzzardi*. Transferees are not "under continuous supervision and control" and are "free to leave" the Nauru RPC as and when they choose, without any escort, and without geographical restriction, for the majority of their waking hours.[119] They are not socially isolated, and travel around Nauru is facilitated. While there are undoubtedly restrictions on the freedom of movement of Transferees during the periods when the open centre arrangements are not operative, viewed as a whole those restrictions lack the intensity necessary to constitute a deprivation of liberty. They can be contrasted, for example, with the much more onerous

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[115] See, eg, *Guzzardi v Italy* (1980) 3 EHRR 333 at [92]; *HL v United Kingdom* (2004) 40 EHRR 761 at [89]; *Stanev v Bulgaria* (2012) 55 EHRR 696 at [115].

[116] [2009] 1 AC 564, 575 [18] (emphasis added).

[117] *Guzzardi v Italy* (1980) 3 EHRR 333 at [92]-[93] (emphasis added). This formulation has been settled ever since, and is regularly applied: see *Surrey County Council v P* [2014] AC 896, 911 [20], 917 [38].

[118] *Guzzardi v Italy* (1980) 3 EHRR 333, 363-364 [95].

[119] Cf *Surrey County Council v P* [2014] AC 896, 920 [49], 924 [63], although that case is of limited assistance because it was "not about the distinction between a restriction on freedom of movement and the deprivation of liberty" (at 920 [48]) as the individuals in question were not free to go *anywhere* without permission and close supervision.

restrictions that were only narrowly held to constitute a deprivation of liberty in *Secretary of State for the Home Department v JJ.*[120]

86. Contrary to the plaintiff's submissions,[121] the "open centre arrangements" are not inconsistent with Nauruan law. The plaintiff's reliance on s 7(2)(c) and (d) of the RPC Act to support that submission is misconceived, because those sections provide that the Centre Rules "may" contain particular rules, but in fact the Centre Rules that have been made do not do so.[122]

87. It is not inconsistent with the standard RPC visa condition that the person remain at the Nauru RPC except "in circumstances where the absence is organized by a service provider and the holder is under the care and control of a service provider or of another person" for Transferees to be permitted by the Operational Manager and service providers to leave the Nauru RPC unsupervised as part of the "open centre arrangements". "Care and control" does not connote the actual exercise of direct physical care and control over the body of person.[123] This is made clear by comparing visa condition (b) (that the holder must be "under the care and control of a service provider") with condition (c) (the holder must be "in the company of a service provider"). But even if there was such an inconsistency, that would not make participation in the open centre arrangements unlawful. At its highest, such inconsistency might expose a Transferee to discretionary visa cancellation under reg 19(1)(a) of the *Immigration Regulations 2014*, but it would not be open to the Court to infer that there was any prospect that such a step would be taken (assuming, indeed, that it could validly be taken) solely because a Transferee had participated in the open centre arrangements after receiving the approval of the Operational Manager (a Nauruan official) to do so.

88. As to the points raised at [99] of the plaintiff's submissions, there is nothing in the special case to support the statement that family members cannot visit Transferees, and the conditions on temporary settlement visas indicate otherwise.[124] The fact that it is theoretically possible that the "open centre arrangements" might be terminated is irrelevant. Those arrangements have been in operation since February 2015, and there is nothing in the special case to suggest that there is any likelihood that they will be terminated. In deciding whether the plaintiff would be deprived of her liberty if returned to Nauru, the task, as von Doussa J explained in *AG v Secretary of Justice,*[125] is "to consider the particular 'concrete' situation of the individual". The plaintiff, in effect, invites the Court to disregard the concrete

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[120] [2008] 1 AC 385.
[121] At [34]-[35].
[122] Plaintiff's submissions at [34], referring to [26]; cf the Centre Rules as made (**SCB 810**).
[123] See *Fountain v Alexander* (1982) 150 CLR 615.
[124] **SCB793**, condition (e).
[125] [2013] NRSC 10 at [41].

situation that presently exists in favour of speculation about what may happen in the future (which might equally involve still further relaxation of the restrictions on the plaintiff). Finally, as for the point that Centre Rules must be in writing pursuant to the RPC Act, there is no requirement that the "open centre arrangements" form part of Centre Rules. Even if there was, that would not change the plaintiff's "concrete situation".

VII: Estimate

89. Transfield Services estimates that it will require 1.5 to 2 hours for the presentation of oral argument.

10 Dated: 18 September 2015

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