IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M70 and M106 of 2011

BETWEEN

[redacted]
PLAINTIFF M106 OF 2011

Plaintiffs

ORIGINAL

and

10 **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Defendant

THE COMMONWEALTH OF AUSTRALIA
Second Defendant

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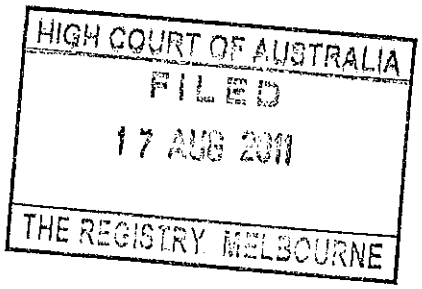
PLAINTIFFS' OUTLINE OF SUBMISSIONS



I. **CERTIFICATION:** These submissions are suitable for publication on the internet.

II. **CONCISE STATEMENT OF ISSUES**

1. This matter raises the following questions:

1.1. Is the declaration made by the Minister pursuant to s 198A(3) of the *Migration Act 1958* (Cth) (the **Act**) on 25 July 2011 (the **Declaration**) a legislative instrument within the meaning of the *Legislative Instruments Act 2006* (Cth) (the **LI Act**) and, if so, is it in force (it not having been registered pursuant to the LI Act)?

1.2. What is the proper construction of sub-ss 198A(3)(i) to (iv)?

1.2.1. What is the content of the matters specified in sub-ss 198A(3)(i) to (iv) (the **198A(3) criteria**)?

1.2.2. Are the 198A(3) criteria jurisdictional facts (in the objective sense)?

1.2.3. Alternatively, does s 198A(3) require the Minister to form a state of satisfaction about the 198A(3) criteria before the jurisdiction to make a declaration is properly engaged?

1.2.4. Alternatively, are the 198A(3) criteria mandatory considerations that the Minister must consider before making a declaration pursuant to s 198A(3)?

1.3. On any of the above bases, did the Minister's exercise of jurisdiction under s 198A(3) miscarry when he made the Declaration?

1.3.1. If the s 198A(3) criteria are jurisdictional facts, has the jurisdiction to make the declaration arisen?

1.3.2. If s 198A(3) requires the Minister to have formed a state of satisfaction, is that state of satisfaction subject to judicial review and did he lawfully form the requisite state of satisfaction?

1.4. Has the discretion conferred by s 198A(1) to take a person to a declared country been properly exercised in relation to the Plaintiff?

1.5. If, by reason of the answer to any one or more of the questions above, there is no power to take the Plaintiffs to Malaysia pursuant to s 198A of the Act, can the Plaintiffs be removed to Malaysia pursuant to s 198(2)?

1.6. In respect of Plaintiff M106, what is the content of the duty imposed by s 6 of the *Immigration (Guardianship of Children) Act* 1946 (Cth) (the **Guardianship Act**)? To what extent does the Act derogate from that duty? Has there been a breach of guardianship by reason of the Minister's direction not to consider exercising ss 46A and 195A and in threatening to take Plaintiff M106 to Malaysia under s 198A?

III. **SECTION 78B NOTICES**

2. Notices under s 78B of the *Judiciary Act 1903* (Cth) are not necessary.

IV. **STATEMENT OF RELEVANT FACTS**

3. The material facts are set out in detail in the Agreed Statement of Facts and the Minister's affidavit sworn 14 August 2011.

V. THE PLAINTIFF'S ARGUMENT

4. In summary the Plaintiffs submit:

4.1. Section 198(2) is not a source of power to remove offshore entry persons who claim to be persons to whom Australia owes protection obligations in circumstances where those claims have not been assessed.

4.2. The only source of power to take persons in that category out of Australia is s 198A(2). That construction is the only available construction consistent with the purpose of the Act to ensure Australia's international obligations under the Refugees Convention are met.[1]

4.3. Thus, the plaintiffs can only be taken out of Australia to Malaysia pursuant to an exercise of power under s 198A(1), which in turn depends upon:

4.3.1. There being a valid declaration under s 198A(3) "in force"; and

4.3.2. The discretion in s 198A(1) having been lawfully exercised.

4.4. The Declaration made by the First Defendant is either not in force or was not validly made because:

4.4.1. It is a legislative instrument and has not been registered.

4.4.2. Properly construed, the four criteria exist when a country has legal obligations (both domestic and international) to secure the protection described in sub-paragraphs (i)-(iii) and to meet the standards set out in sub-paragraph (iv), together with a judicial system which is capable of ensuring those obligations are enforced.

4.4.3. Whether or not it is a legislative instrument, the criteria in s 198A(3) are jurisdictional facts for the Court objectively to determine, and they do not exist in relation to Malaysia.

4.4.4. Malaysia does not have the requisite legal obligations in either international or domestic law.

4.5. If the criteria in s 198A(3) are facts about which the Minister must be satisfied before his power is enlivened, or if they are mandatory (or even permissible) considerations he must take into account, the Declaration made by the First Defendant was still not validly made, for two reasons.

4.5.1. First, properly construed the four criteria exist when a country has legal obligations (both domestic and international) to secure the protection described in sub-paragraphs (i)-(iii) and to meet the standards set out in sub-paragraph (iv), together with a judicial system which is capable of ensuring those obligations are enforced.

4.5.2. Second, the First Defendant asked himself the wrong question in deciding whether to make the Declaration. He asked how Malaysia would treat the 800 asylum seekers who would be transferred to Malaysia under the Political Arrangement. The question in s 198A(3) was how all asylum seekers and refugees within Malaysia's borders are treated, and what would happen to these 800 was irrelevant (although relevant under s 198A(1) at an individual level: see below).

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1 *Plaintiff M61/2010 v Commonwealth* (2010) 272 ALR 14.

4.6. The discretionary power in s 198A(1)[2] miscarried in relation to the First Plaintiff because:

4.6.1. It was unlawfully fettered by the Direction given by the First Defendant on 25 July 2011 to, inter alia, all officers exercising the s 198A(1) power.

4.6.2. The decision maker failed to consider the individual circumstances of the First Plaintiff, in that she did not, but was required to, consider the operation of Malaysian law on the Plaintiff, given that he had entered and exited Malaysia illegally on his way to Australia.

4.7. The Minister is the guardian of Plaintiff M106, a child whose claims to fear persecution have not been assessed. Taking him to Malaysia is not in his best interests. The failure of the Minister to consider exercising his powers under ss 46A and 195A and instead take him to Malaysia constitutes a breach of duty.

APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

5. The applicable provisions are set out in the Annexure to these submissions.

SECTION 198(2) NOT AVAILABLE

6. In this case there are two principal features of the legislative scheme upon which the Plaintiffs rely:

6.1. The purpose of the Act in relation to refugees; and

6.2. The presence, side by side since 2001, of ss 189(1) and 189(3), and ss 198(2) and s 198A, in the legislative scheme.

7. As to the first feature, this Court has made it clear that a purpose of the Act is to comply with Australia's international obligations under the Refugees Convention:[3]

> read as a whole, the Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol. ... [W]hat is presently significant is that the Migration Act proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.

8. As to the second feature, ss 189(3) and 198A were introduced with a suite of legislation in 2001 (including s 46A), the effect of which this Court has described thus: [4]

> [T]he changes to the Migration Act that were worked by inserting s 46A and, in consequence, inserting s 198A, are to be seen as reflecting a legislative intention to adhere to that understanding of Australia's

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2 The proposition that the provision confers a discretion is conceded by the Commonwealth.

3 *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14 at [27].

4 Ibid at [34].

obligations under the Refugees Convention and the Refugees Protocol that informed other provisions made by the Act.

9. Thus, the obligation in s 198(2) to remove an unlawful non-citizen "as soon as reasonably practicable" should be read as accommodating the taking of steps for the purpose of informing the Minister of matters relevant to the possible exercise of power under s 46A and s 195A.[5]

10. Those provisions are the mirror provisions to s 198A, in terms of fulfilling the purpose of the Act to which reference is made at [7] above. However, it is not possible to read the phrase " as soon as reasonably practicable" in s 198(2) in a way which "accommodates" s 198A. That is because, unlike s 46A and s 195A, s 198A is not about an exercise of power leading to the grant of a visa under the Act, nor is it about removal after the exhaustion of the Act's processes. It contemplates an entirely different way of Australia meeting its international obligations: by taking offshore entry persons (and only those persons)[6] elsewhere for the express purpose of assessing their claims in a third country. It provides a different purpose for detention, use of force and removal, and a different mechanism for the meeting of Australia's international obligations.

11. In that sense, within the legislative scheme, s 198A is not dependent upon, or connected to, s 198(2) at all. Nor is it connected to s 196 and this Court's decision in *Al Kateb* that s 196 of the Act requires that once a person is lawfully detained,[7] the period of detention is fixed by reference to the occurrence of any of the three events specified in that provision – of which removal under s 198 is one.

12. The Minister has made it clear he will not be considering the exercise of his powers under ss 46A and 195A in relation to both Plaintiffs (because of their date of arrival) and he expects them to be taken to Malaysia to have their refugee claims processed.[8]

13. Thus, the precise basis for the detention of the Plaintiffs in Plaintiff M61 is not present in this case. There must be another basis for their lawful detention, and for what is done with them – against their will - after they have been detained.

14. The obvious basis – and the one which is express in the scheme – is to read ss 189(3) and ss 198A as an independent stream to s 196 and 198(2). There are a number of textual indications supporting this approach:

    14.1. The conferral by s 189(3) of a discretion to detain, in contrast to s 189(1). That implies a discretion to bring immigration detention to an end in a different manner.

    14.2. The absence from s 196 of any reference to s 198A.

    14.3. The use of the verb "take" in s 198A rather than "remove" indicates that a different process is at work – not a process which follows the conclusion of the assessment of a person's claims, and their exhaustion of their opportunities under the Act, but one which begins the assessment of a person's claims. The trigger for their removal is not related to s 198(2) at all, it is related to the availability (by operation of s 198A(3), and s 198A(1)) of another country which can assess the Plaintiffs' claims to protection in a similar manner, and to the same standard, as Australia can.

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[5] *Plaintiff M61* at [35]

[6] For reasons of executive policy, centering on deterrence of a particular mode of arrival into Australia

[7] *Al Kateb v Godwin* (2004) 219 CLR 562 at 574, [10] per Gleeson CJ, 605 [113] per Gummow J

[8] ASF [38], Attachment 35.

14.4. A person 'dealt with' under s 198A is not in immigration detention (see s 198A (4)), but still subject to the control of the Commonwealth, including the use of force.

14.5. Section 198A, unlike s 198(2), purports to have an extra-territorial reach and is directed towards matters occurring outside Australia.

15. From the moment that the Plaintiffs are 'taken' from their beds in the detention centre on Christmas Island for the purpose of transferring them to Malaysia as a declared country, they are not in immigration detention. None of the three events in s 196 apply, and there is a need to reconcile the apparent absolute nature of s 196 with its failure to refer to the powers under s 198A(1).

16. The discretion in s 189(3) allows release from immigration detention (as s 198A (4) contemplates), and the exercise of a different coercive power in relation to offshore entry persons: namely, s 198A(1) and (2).

17. Reliance on s 198(2) as an available source of power to remove the Plaintiffs (and to avoid the requirements in s 198A) renders s 198A otiose. It is an inappropriate approach to construction.[9] It also ignores the fact that the powers are differently conditioned, which suggests they are not intended to both be available in the same circumstances, or in respect of the same people. And it ignores the entire legislative history of the introduction of these provisions.

THE DECLARATION IS A LEGISLATIVE INSTRUMENT AND IS NOT IN FORCE

18. The *Legislative Instruments Act 2003* (Cth) (**LI Act**) imposes certain procedural requirements in relation to legislative instruments. Section 5 defines what is a legislative instrument. The two mandatory characteristics are that it is of a legislative character, and that it is or was made in the exercise of a power delegated by the Parliament.

19. A declaration under s 198A(3) is legislative in character, both according to general principles[10] and within the terms of s 5(2) of the LI Act because it "determines the law or alters the content of the law, rather than applying the law in a particular case" and "has the ... effect of affecting an interest, imposing an obligation and/or creating a right", namely:

19.1. the interests of persons who will then be subject to being taken to a declared country pursuant to s 198A(1);

19.2. the obligations of such persons to go to the declared country, and comply with directions given to them; and

19.3. the rights of those taking such persons to use take steps to remove a person, including the use of reasonable force, pursuant to s 198A(2).

20. Further, the declaration was made in the exercise of a power delegated by the Parliament as required by s 5(1)(b) of the LI Act. Finally, the declaration is not excluded from being a legislative instrument by any of ss 6, 7 or 9 of the LI Act.

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9 *Commonwealth v Baume* (1905) 2 CLR 405 at 414 per Griffith CJ; *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 per Gummow J; *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382, [71].

10 See, eg, *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82; *RG Capital Radio* (2001) 113 FCR 185, 194-202. And see *SAT FM Pty Ltd v Australian Broadcasting Authority* (1997) 75 FCR 604, 607-9; *Roche Products Pty Limited v National Drugs and Poisons Schedule Committee* [2007] 163 FCR 458, 458-460 [26]-[41]; *Federal Airports Corp v Aerolineas Argentinas* (1997) 76 FCR 582, 590-593; *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, 633-4; *Austral Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 37 FCR 463, 471-472; Pearce and Argument, *Delegated Legislation in Australia* (3rd ed, 2005) at 1-2, 115-6.

Section 12(d) of the LI Act provides that a legislative instrument that does not specify a day or a day and time at which it takes effect takes effect from "the first moment of the day next following the day when it is registered".[11] Section 24 of the LI Act (in Division 2) provides that a legislative instrument made after the commencement of the LI Act "must be registered".

21. Section 31(1) of the LI Act provides that a legislative instrument that is required to be registered under Division 2 "is not enforceable by or against the Commonwealth, or against any other person or body, unless the instrument is registered".[12] The Declaration has not been registered. Thus it has not yet taken effect and is not enforceable by the Commonwealth. It is therefore not in force and cannot be used as the basis for the exercise of a discretion to take a person to Malaysia under s 198A(1).

THE PROPER CONSTRUCTION OF SECTION 198A(3)

22. The Plaintiff contends that the jurisdiction of the Minister by s 198(3) to make a declaration depends on the existence of the s 198A(3) criteria and that it is the function of a court, where its jurisdiction is invoked, to determine, for itself, whether those criteria do or do not exist.[13] That is, the Plaintiffs contend that the s 198A(3) criteria are jurisdictional facts in an objective sense, not simply matters of which the Minister must be satisfied.[14]

23. In the alternative, the Plaintiffs contend that s 198A(3) requires the Minister to be satisfied of the s 198A(3) criteria. The Plaintiffs resist any contention that s 198A(3) has no element of jurisdictional fact, whether it be objective or by reference to the Minister's state of satisfaction, so that all that the s 198A(3) criteria do is either specify mandatory or permissive considerations to be taken into account by the Minister before exercising the power conferred by s 198A(3). These latter constructions are not consistent with the language of the provision, nor with its context and purpose. They also render the substantive content of the criteria otiose, if they are simply factors to which the Minister can give little or no weight.

24. The first task is to ascertain what each of the criteria in sub-s (3) mean, in light of the matters referred to above. Their proper construction is critical to the decision whether they are jurisdictional facts.

25. Together, the alternative statutory methods in the Act by which Australia can respond to its international obligations, and comply with them, are clearly designed to allow for political and policy flexibility in relation to the entry of asylum seekers into Australia. In other words they are designed to allow for the kind of policy decisions reflected in the First Defendants' public statements about the Government's desire to deter 'people smugglers'. Allowing for the legislative

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11 Neither the declaration nor the Act specify a day, or day and time, at which the declaration is to take effect, thus ss 12(a)-(c) of the LI Act are not applicable to the declaration. Nor are s 12(2) and 12(3) relevant to operation of the declaration.

12 There is an exception where technical difficulties preclude registration and the instrument is gazetted instead; there is no suggestion of such circumstances in this case.

13 See *Corporation of the City of Enfield v Development Assessment Corporation* (2000) 199 CLR 135 at [50] (Gaudron J).

14 As Gleeson CJ, Gummow, Kirby and Hayne JJ observed in *Enfield* (2000) 199 CLR 135 at [28], the term "jurisdictional fact" "(which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion". In these submissions the Plaintiff uses the term "jurisdictional fact" to denote a fact that must exist, objectively, before an administrative jurisdiction to exercise a power is enlivened. A jurisdictional fact of this kind must be determined by a reviewing court for itself in order to ascertain whether a jurisdiction purported to be exercised was properly exercised. In contrast, where the jurisdictional fact is a person's state of satisfaction, while such satisfaction is subject to judicial review, such review does not involve the reviewing court determining the fact for itself; all that is permitted is the application of traditional principles of judicial review to the formation of the state of satisfaction.

scheme facilitating the achievement of such policies does not mean, however, giving to the statutory language a meaning which enables them to be sent anywhere, regardless of whether the country they will be sent to is in any way comparable to Australia in terms of what protection its laws oblige it to give to refugees.

26. The reference to the intention of the legislature must, of course, be understood as a reference to the objective meaning of the words used by Parliament ascertained by a court undertaking the process of statutory construction accepted by all branches of government; it is not "the attribution of a collective mental state to legislators".[15] This principle is particularly important in the light of the weight the Defendants apparently seek to place on facts not before the Parliament when it passed the "Pacific Strategy" sequence of amending legislation to the Act in 2001.[16]

The meaning of the matters specified in sub-ss 198A(3)(i) to (iv)

The language and grammar of s 198A(3)

27. The term "protection", is used in each of (i)-(iv) in relation to persons seeking asylum and persons recognised as refugees[17] and the meaning of that term is an important indication of the meaning of the provision as whole. "Protection", in this context, is a legal term of art to describe the rights to be accorded to a person who is or claims to be a refugee under the Refugees Convention.

28. At its heart in this context, protection means or includes protection from *refoulement*, ie removal to a country where the person fears persecution on a Convention ground.[18] In addition, however, it means or includes other rights set out in the Refugees Convention, which rights expand as the refugee's relationship with the asylum state deepens.[19] These rights include (in summary) that the person:[20]

28.1. not be penalized for seeking protection;

28.2. be provided with basic survival and dignity rights, including rights to property, work and access to a social safety net;

28.3. be provided with documentation;

28.4. be given access to national courts to enforce their rights;

28.5. not be discriminated against;

28.6. be guaranteed religious freedom.

29. The protection obligations that the Refugees Convention imposes apply to persons who are as a matter of fact refugees, that is to persons who satisfy the definition of "refugee" in Art 1 of the Refugees Convention; the obligations do not apply only to persons who have been determined through some administrative process to be a refugee. Thus these obligations must be respected "until and

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15 *Zheng v Cai* (2009) 239 CLR 446 at [28] (the Court).

16 The plaintiffs submit these facts are irrelevant to the construction of the provisions: they are not extrinsic material within s 15AB of the *Acts Interpretation Act 1901* (Cth), nor are they referred to in the extrinsic material.

17 Cf *Minister for Immigration and Ethnic Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [141]-[143] (Gummow J).

18 Refugees Convention, art 33.

19 James Hathaway, *The Rights of Refugees Under International Law* (2005) (**Hathaway**) at 156-7.

20 Hathaway at 94-5; and see Refugees Convention, arts 3, 4, 13, 16, 17, 21, 22, 23, 27, 28, 31, 32.

unless a negative determination of the refugee's claim to protection is rendered".[21]

30. The Act itself uses the term "protection" to describe only one class of visa — a "protection visa", the fundamental statutory criterion of which is that it may only be granted where the Minister is satisfied that the visa applicant is a person to whom Australia owes "protection obligations under the Refugees Convention".[22]

31. Thus, the "protection" of which sub-s 198A(3) speaks should be construed as the protection that the Refugees Convention requires signatories to afford: namely, *non-refoulement* and the matters set out above.

32. The second critical construction question common to each of the paragraphs is what the use of the present tense in the verbs in those paragraphs signifies. The Plaintiffs submit that use signifies the assessment of protection is to be of the situation in the proposed declared country at the time of the proposed declaration — ie a contemporaneous assessment of what the situation actually is and not, significantly for the Defendants' arguments, what it might be in the future. Thus, assurances — and in particular political assurances — about changes in the future have no place in the s 198A(3) assessment.

33. The use of the present tense does not mean that the focus of the s 198A(3) criteria is on the practical steps a country takes in relation to dealing with asylum-seekers and refugees (ie the circumstances "on the ground"). The use of the legal term "protection" reveals that the focus of the s 198A(3) criteria is a legal one. The present tense simply indicates that the question to be asked about a country that is to be the subject of a declaration is addressed to its present legal position in relation to the protections of which s 198A(3) speaks.

34. The third feature common to three out of the four criteria is the use of the verb "provides". The use of this verb suggests not only the existence of laws which authorise or require protection to be afforded, but also the existence of an effective judicial system capable of enforcing those laws.[23]

35. Turning to each of the s 198A(3) criteria in turn.

36. The criterion in (i) is that the country "provides access for asylum-seekers to effective procedures" for assessing their need for protection.

    36.1. This criterion is directed to ensuring that asylum seekers may have their "need for protection" assessed. "Need for protection" should be understood, for the reasons explained above, as meaning whether the person needs protection as a refugee.

    36.2. The term "effective"" means "serving to effect the purpose; producing the intended or expected result".[24]

    36.3. Thus criterion (i) has two elements: first, that a country have procedures in place to assess whether a person is a refugee and thus needs protection; and second, that such procedures, serve to effect the outcome, namely the assessment of the person's status.

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21 Hathaway at 278; and see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992) at 9.

22 The Act, s 36(2)(a).

23 There is no assertion in this case that Malaysia does not have an effective judicial system. The Plaintiffs' contention here is that it does not have the underpinning laws and legal obligations, both at a domestic and international level.

24 *Macquarie Dictionary* (5th edn, 2009).

36.4. The Plaintiffs contend that procedures to assess a protection claim must be grounded in legal obligation in order to be effective, so that the person is able to enforce his or her right to have his or her claim properly assessed. Such legal obligation must be present at least in the country's domestic law; and arguably also in the country's international legal obligations. However, in the area which is the subject mater of s 198A(3), the existence of domestic law will usually follow the existence of an international legal obligation.

37. The criterion in (ii) is that the country "provides protection" for asylum seekers while their claims are being determined. Again, protection is to be understood as legal protection, as set out above. As such, it must be grounded in legal obligation towards the asylum-seeker or it will not in fact be protection in the sense in which that term is used in s 198A(3) and bearing in mind that a purpose of s 198A(3) is to ensure that Australia is not in breach of its obligations under the Refugees Convention and, in particular, its *non-refoulement* obligation. If "protection" under criterion (ii) is not legally enforceable, there is a real risk that a person will not receive that protection and thus the purpose of the power conferred by s 198A(3) will miscarry.

38. The criterion in (iii) is that the country "provides protection to" refugees pending their removal from the country. For the reasons given in paragraph [37], such protection (understood as explained above) must be grounded in legal obligation so that the protection referred to is real and enforceable.

39. The criterion in (iv) is that the country "meets relevant human rights standards" in providing protection. Thus criterion (iv) directs attention to those human rights standards relevant to persons to whom protection (understood as explained above) is being provided. The phrase "human rights standards" should be understood as a reference to generally accepted human rights obligations under international law[25] — ie human rights treaties that have gained near universal acceptance. These treaties are (the **HR Treaties**): the Refugees Convention; the International Covenant on Civil and Political Rights (**ICCPR**), the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), the Convention Against Torture and All forms of Inhuman and Degrading Treatment (**CAT**), the Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**); and (in relation to minors) the Convention on the Rights of the Child (**CROC**).

40. Fundamental to the question whether a country "meets" such human rights standards is whether (a) the country is a party to the HR Treaties; and/or (b) whether its domestic law gives effect to the human rights standards specified in the HR Treaties.

Context and purpose

41. As explained by this Court in *Plaintiff M61*, quoted above, in construing the s 198A(3) criteria reference must be made to the context and purpose of the Act as a whole and of s 198A specifically. The introduction of s 198A as part of the suite of legislation dealing with what was called the "Pacific Strategy" makes it clear that s 198A was seen as an offshore alternative to ss 46A and 195A: namely as a means of ensuring Australia complied with its international obligations without having to allow persons seeking asylum to access the regular onshore visa system available by reason of ss 45,46,47 and 65 of the Act.

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[25] See, eg, *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473at [45] (McHugh and Kirby JJ); *Forge v Australian Securities and Investments Commission* (2006) 229 CLR 223 at [28] (Gleeson CJ), [209]-[214] (Gleeson CJ).

42. This context and purpose means that it is fundamental to the operation of the scheme of which s 198A forms part that, if Australia will not consider extending its own protection "onshore" to some asylum seekers, it will nonetheless ensure that its obligations under the Convention are met "offshore" by any country to which asylum-seekers are taken. This is not a legislative scheme drafted or designed to facilitate the breaching by Australia of protection obligations to refugees.

43. The focus, therefore, of s 198A(3) is on the legal protections and standards imposed by international law; it is these protections and standards that Australia is required to meet; and it is these protections and standards that s 198A(3) is designed to ensure, so that Australia will not breach its international legal obligations in relation to offshore entry persons.

44. It is for this reason that the s 198A(3) criteria are, as a matter of language, directed to the legal position in the country in question in relation to **all** persons seeking asylum in that country (in this case, Malaysia), not simply to a subset of such persons (in this case, the 800 persons who might be transferred to Malaysia pursuant to the Arrangement (the **800 Transferees**)). There is nothing in the terms of s 198A(3) that confines the assessment of the protections offered by a third country to asylum-seekers and refugees to what will treatment will be given to those who might be actually be transferred.

"On the ground" situation relevant to the discretion in s 198A(3)

45. The Plaintiffs accept that the question of what occurs "on the ground" in a particular country that has legal obligations and protections in place (and so in relation to which the power to make a Declaration is enlivened) will be a permissible consideration for the Minister to take into account when he or she decides whether to exercise his or her discretion and make a declaration under s 198A(3). The fact that such factual matters are relevant to the exercise of the discretion does not mean that legal obligations are not a pre-condition to the exercise of the power.[26]

Jurisdictional facts

46. Whether a particular fact specified in a legislative regime conferring power upon an administrative decision-maker[27] is a jurisdictional fact, or whether it is a matter for the decision-maker to determine, is a question of statutory construction.[28] As such, the usual principles of statutory construction are to be applied. The authorities in this and other courts reveal that a range of factors will be relevant to the exercise of statutory construction:[29]

    46.1. the language of the statute, understood in light of the subject matter, scope and purpose of the Act (and subject to the principle articulated in *Project Blue Sky*, quoted above);

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26 See the distinction between "can I?" and "should I?" drawn by Handley JA in *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [141]-[142].

27 The courts have developed a different approach to jurisdictional facts in relation to courts (see, eg, *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369); but that jurisprudence has no direct relevance to this case.

28 *Woolworths* (2004) 61 NSWLR 707 at [6]; *Timbarra Protection Coalition Inc v Ross Minig NL* (1999) 46 NSWLR 55 at [37] (putting to one side the question of constitutional facts, which are not in issue in this proceedings).

29 See, eg, *Enfield* (2000) 199 CLR 135 at 148-151 (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Australian Heritage Commission v Mt Isa Mines Limited* (1997) 187 CLR 297 at 304-306; *Sutherland Shire Council v Finch* (1970) 123 CLR 657; *Cabal v Attorney-General (Cth)* (2001) 65 ALD 645 at 662-4; 199 CLR 135 at 148-151; *Foster v Minister for Customs and Justice* (1999) 164 ALR 357 at 367-369; *Timbarra* at 64-66, 68-9, 71-3; *Anvill Hill v Minister for the Environment* (2008) 166 FCR 54 at 58-62; *Woolworths* (2004) 61 NSWLR 707 at 715-721.

46.2. the nature of the task committed to the decision-maker and whether it is one unsuited to a decision by a court on judicial review;

46.3. whether the task involves the assessment of complex facts and the formation of opinions on a potentially wide range of matters;

46.4. whether and to what extent inconvenience would arise if the facts were regarded as jurisdictional facts;

46.5. whether fundamental rights are at stake.

The s 198A(3) criteria are jurisdictional facts

47. In this case the Plaintiffs contend that the factors identified above point to the s 198A(3) criteria being jurisdictional facts.[30]

The statutory language

48. First, the language of s 198A(3) is not expressed in terms of satisfaction or similar language. It treats the s 198A(3) criteria as objective in nature. While this is not determinative, it is a strong indicator that the matters there set out are jurisdictional facts, rather than simply matters of which the Minister must be satisfied or on which he must form an opinion.[31] This is particularly so where, as in the Act, other parts of the Act use the terminology of satisfaction.[32]

49. Further, the making of a declaration under s 198A(3) is a precondition to, and quite distinct from, the exercise of discretion whether to take a person to a declared country pursuant to s 198A(1). A s 198A(3) declaration instigates a discretionary statutory decision-making process in relation to individuals; this makes the decision under s 198A(3) "more likely to turn on an objective fact, than ... a factual reference arising in or in relation to the conduct of the decision-making process itself".[33]

50. The use of the word "declare", read with the nature of the criteria then specified, is an indicator of that the Parliament intended the criteria to be met as a matter of objective fact. In contrast to the word "deem", which clearly conveys the ability to create a fiction, the word "declare" suggests a revealing of what is the true situation. To adapt the words of this Court in *BHP Petroleum Pty Ltd v Balfour*,[34] "*the effect of acceptance of the respondents' argument would be to vest in* [the Minister] *an arbitrary power of determination, qualified only by the need to identify* [a particular country]. *The qualification would not be a significant one since, on the argument,* [such a country need not satisfy the s 198A(3) criteria]. *In the present case, for instance, it could mean* [Afghanistan, or Libya]. *The question arises whether a legislative intent to impose such an arbitrary basis for the selection of* [a country to which a person can be taken] *can be discerned in the legislation. Careful analysis of the relevant legislative provisions leads* [to the conclusion] *that it cannot*".[35]

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30 Neither the Explanatory Memorandum for the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001 (Cth) nor the second reading speech for that Bill shed any light on Parliament's intention in relation to whether the s 198A(3) criteria are to be construed as jurisdictional facts.

31 See, eg, *Finch* (1970) 123 CLR 657 at 666 (Gibbs CJ, the other justices agreeing).

32 *Cabal* (2001) 65 ALD 645 at [73].

33 *Timbarra* (1999) 46 NSWLR 55 at [50] (Spiegleman CJ).

34 (1987) 180 CLR 474 at 479-80.

35 A similar view was expressed by Brennan J in *Church of Scientology v Woodward* (1982) 154 CLR 25 at 71-2.

51. Unless the criteria are construed as jurisdictional facts, then the declaration is subject only to limited judicial review, despite the consequence of the declaration being continued deprivation of liberty, forced transfer to a country to which a person does not agree to go and with which he or she has no connection, and the use of force if need be to effect the transfer. Yet this is an Act which, if it seeks to ensure that judicial review is limited or curtailed, does so unambiguously.[36] Other Acts use conclusive evidence provisions to limit judicial review.[37] There is no such clear expression in s 198A and one ought not be read in: see Mason J observed in *Church of Scientology v Woodward*.[38]

The purpose of s 198A, in light of the purpose of Act as a whole

52. Second, the purpose of s 198A is to permit the taking of a person to a declared country; but s 198A needs to be understood in light of the purpose of this legislative scheme, as discussed by this Court in *Plaintiff M61* (quoted above). The purpose is not simply to enable to taking of a person to another country, nor to enable removal per se, but to fulfil Australia's obligations under the Refugees Convention by authorising the taking of a person to a country where their claim for protection under the Refugees Convention will be assessed and determined and they will be given protection both during that process, and afterwards if they are found to be refugees. That purpose is not advanced by interpreting s 198A(3) as enabling a declaration to made in relation to a country that does not in fact fulfil the s 198A(3) criteria. That is, the purpose of s 198A — which is of considerable importance in determining the issue before the Court[39] — suggests that the s 198A(3) criteria are jurisdictional facts.

The nature of the task committed to the decision-maker

53. Third, the nature of the task committed to the decision maker is to make a declaration about the legal protections offered by a country to a person claiming refugee status, and the capacity of that country's legal system to enforce those obligations. There is nothing about this task to which a court is unsuited. Making a finding as to the law in another country is a task that is familiar to the courts in a variety of contexts, whenever foreign law is in issue.[40] In this regard, foreign law is simply a matter of fact to be proved. These matters stand in stark contrast to the regime considered in *Mt Isa Mines*, where the statutory task required consideration of whether a place had "aesthetic, historic, scientific or social significance or other special value for future generations" so as to be appropriate to register as part of the national estate.

54. The nature of the task in this matter is more straightforward than that performed by a court in the extradition context in circumstances where it is necessary to consider whether a person who is proposed to be extradited will be subjected to prosecution on account of his or her political beliefs, or receive a fair trial. In those circumstances, not only must a court make findings about foreign law, it must engage in an evaluation of the legal system and its practical operation. Such a function is routinely performed by courts in the extradition context.[41] Furthermore, as Drummond J observed in *Foster*, "the justification for restraint by

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36 See, eg, ss 474, 494AA. And see *Cabal* (2001) 65 ALD 645 at [81].

37 See, eg, *Income Tax Assessment Act 1936* (Cth), s 177.

38 (1982) 154 CLR 25 at 55-6.

39 *Timbarra* (1999) 46 NSWLR 55 at [73], [81] (Spiegleman CJ).

40 See, eg, *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; *Ruhani v Director of Police* (2005) 222 CLR 489 at [65]-[66] (McHugh J), [113]-[115] (Gummow and Hayne JJ); *Hooper v Hooper* (1955) 91 CLR 529 at 536-537.

41 See, eg, *Republic of Croatia v Snedden* [2010] HCA 14.

an Australian court in pronouncing on the acts of a foreign sovereign is absent if the Australian Parliament invests the court with authority to do just that".[42]

55. The Plaintiffs do not contend that it is necessary or appropriate for a court determining whether the jurisdiction to make a declaration under s 198A(3) has arisen to investigate and make a decision upon whether the country proposed to be declared properly gives effect to its legal obligations "on the ground", which might be non-justiciable[43] (though in *Foster* Drummond J observed that "the law is not all one way").[44] As stated above, those matters, while undoubtedly relevant to the exercise of the discretion whether to make a declaration, are not jurisdictional facts required to enliven the discretion.

Complex facts and the formation of opinions on a wide range of matters

56. The task does not involve the assessment of complex facts and the formation of opinions on a potentially wide range of matters. Rather, it involves a confined inquiry into the international legal obligations on a country and the state of the country's domestic laws. Again, this case stands in stark contrast to the regime considered in *Mt Isa Mines*. It also stands in contrast to the regime considered by the Full Federal Court in *Eremin v Minister for Immigration, Local Government and Ethnic Affairs*,[45] where Lockhart, Gummow and Foster JJ held that a regulation that used terms such as "substantial", "significant" and "major" in relation to the state of affairs in other countries (eg "substantial political upheaval" or "major natural disaster") involved issues very much of degree rather than of "indisputable fact". In any event, as Gibbs J observed in *Sutherland Shire Council v Finch*, the fact that questions of degree may arise does not mean that the matter would more appropriately be decided administratively than by judicial decision.[46]

Inconvenience

57. No inconvenience (in the sense discussed in the authorities) would arise if the s 198A(3) criteria are regarded as jurisdictional facts. In cases where inconvenience has been given as a reason for concluding that a fact is not a jurisdictional fact, the decision in question is one that will be made on numerous occasions in relation to different individuals, and often as part of a lengthy process of administrative decision-making.[47] In those circumstances, it has been held that the inconvenience of repeated judicial fact finding and the fragmentation and delay in the larger administrative process that would result is a reason to conclude that they were not intended to be jurisdictional facts. Here, however, the position is quite different. For any declaration there will be but one occasion for judicial review of a particular s 198A(3) declaration on a jurisdictional facts basis, subject to any appeal; and there can only ever be a finite number of declarations ever made. Thus inconvenience is not a factor that suggests that the s 198A(3) criteria are not jurisdictional facts.

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42 *Foster* (1999) 164 ALR 357 at [40], citing *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-41.

43 Gummow and Crennan J described the term "non-justiciable" as a "slippery term of indeterminate reference" in *Thomas v Mowbray* (2007) 233 CLR 307 at [105].

44 *Foster* (1999) 164 ALR 357 at [39]; and see discussion at [38]-[41].

45 (1990) 21 ALD 69 at 77. A further contrast is that *Eremin* concerned circumstances where the Minister had not made a declaration, rather than a challenge to a declaration that had been made.

46 (1970) 123 CLR 657 at 666. And see the cases identified by Spigelman CJ in *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [60].

47 See, eg, *Anvil Hill Project Watch Association Inc v Minister for Environment and Water Resources* (2008) 166 FCR 54 at [33].

Fundamental rights are at stake

58. Finally, important fundamental rights are at stake in any decision to make a s 198A(3) declaration, as such a declaration triggers:

58.1. a power to take a person who claims refugee status to another country, where it is possible their rights will not be protected; and

58.2. powers to use force to take a person to another country.

59. Where fundamental rights are at stake, these are to be balanced against any inconvenience or other factors that suggest that the facts in question are not jurisdictional facts; and the fundamental rights or values "will ordinarily prevail".[48] This approach is supported by the principle of legality articulated in *Coco v R*[49] and subsequent cases;[50] and see the observations of Lord Hobhouse in *R v Secretary of State; ex parte Adan*,[51] which concerned an analogous provision, s 2[52] of the *Asylum and Immigration Act 1966* (UK).[53]

If the s 198A(3) criteria are jurisdictional facts, the Minister had no jurisdiction to make the Declaration

60. If, as the Plaintiffs contend, the s 198A(3) criteria are jurisdictional facts then it is for this court to decide whether those facts exist. On the basis of the matters in the Agreed Statement of Facts, the Court ought to conclude that none of the s 198A(3) criteria is made out and, as a consequence, the Minister had no jurisdiction to make the Declaration.

Section 198A(3)(i): "provides access, for persons seeking asylum to effective procedures for assessing their need for protection"

61. Malaysia is not a party to the Refugees Convention (ASF at [41]). Nor does Malaysian law provides for access to legal procedures for assessing the needs of asylum seekers and refugees for protection (ASF at [45]-[46]). Thus s 198A(3)(i) is not made out as a matter of fact. (The fact that Malaysia generally, and without legal obligation to do so, permits UNHCR to undertake assessments of asylum-seekers in Malaysia, is not relevant to the inquiry required by s 198A(3) in relation to the jurisdictional facts as explained in paragraphs [27]-[45], above.)

Section 198A(3)(ii): "provides protection for persons seeking asylum, pending determination of their refugee status"

62. Malaysia is not a party to the Refugees Convention (ASF at [41]). Nor does Malaysian law provide for protection of asylum seekers (ASF at [45]-[46]). To the contrary, Malaysian law criminalises irregular entry and exit from Malaysia and renders it a criminal offence to be a prohibited immigrant in Malaysia (ASF at [48]-[51]). Thus s 198A(3)(i) is not made out.

Section 198A(3)(iii): "provides protection to persons who are given refugee status,

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48 *Cabal* (2001) 65 ALD 645 at [79].

49 (1994) 179 CLR 427 at 435-6 (Mason CJ, Brennan, Gaudron and McHugh JJ).

50 See, eg, *Lacey v Attorney-General (Qld)* (2011) 275 ALR 646 at [17] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Coleman v Power* (2004) 220 CLR 1 at [185] (Gummow and Hayne JJ); *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309 at [21] (Gleeson CJ); *K-Generation* (2008) 237 CLR 501 at [47] (French CJ); and see Gleeson, *The Rule of Law and the Constitution: The Boyer Lectures* (2000) 2, 5.

51 [2001] 1 All ER 593; [2001] 2 AC 477.

52 Section 2 of that Act provided for an asylum-seeker to be removed from the UK if the Secretary of State had "certified that, in his opinion, the conditions mentioned in subsection (2) below are fulfilled". Sub-section (2) included a condition that the government of the country to which the person was to be sent "would not send him to another country or territory otherwise in accordance with the Convention".

53 [2001] 1 All ER 593 at 614.

pending their voluntary repatriation to their country of origin or resettlement in another country"

63. Malaysia is not a party to the Refugees Convention (ASF at [41]). Nor does Malaysian law provide for protection of refugees (ASF at [45]-[46]).

Section 198A(3)(iv): "meets relevant human rights standards in providing that protection"

64. Malaysia is not a party to the majority of human rights treaties relevant to persons claiming protection as refugees, namely the ICCPR, ICESCR, CAT and CERD (ASF at [41]). The fact that Malaysia is a party to CEDAW, CROC and the Convention on the Rights of Persons with Disabilities (ASF at [42]) is not sufficient to establish s 198A(3)(iv) as a matter of jurisdictional fact. Further, Malaysian law does not meet relevant human rights standards because, although some basic human rights are protected by the Malaysian Constitution (ASF [43]), many constitutional rights protections apply only to Malaysian citizens (ASF [44]) and, *ipso facto*, not to persons seeking asylum or recognised as refugees.

The Arrangement and the Operational Guidelines are irrelevant to the s 198A(3)(iv) criteria

65. The Arrangement is expressly stated to be non-binding and to record the parties "intentions and political commitments". The Operational Guidelines have no different status. For this reason, they are irrelevant to a determination of whether Malaysia satisfies the s 198A(3) criteria in relation to international and domestic legal protections.

66. Further, the Arrangement and the Operational Guidelines apply only in relation to the 800 persons who might be taken to Malaysia pursuant to the Arrangement; but s 198A(3) is in terms directed to the position of all asylum-seekers present within the country's borders. Thus the Arrangement and/or the Operational Guidelines cannot demonstrate that the s 198A(3) criteria are, as a matter of fact, made out.

Alternatively, the jurisdictional fact is the Minister's satisfaction of the s 198A(3) criteria

67. In the alternative, if the s 198A(3) criteria are not jurisdictional facts to be objectively determined by the Court, section 198A(3) as a whole should be construed as requiring the Minister to be satisfied of the four criteria before he is entitled to exercise his discretion to make a declaration under s 198A(3).

68. To conclude otherwise once again would vest in the Minister "an arbitrary power of determination", qualified only by the need to identify a particular country and an obligation not to act in bad faith and would not reflect international obligations. This conclusion would be inconsistent with the courts' general reluctance to construe legislation so as to confer upon the executive broad and almost unreviewable powers, particularly where such powers impact on fundamental common law rights such as liberty, most recently manifested in *Plaintiff M61*.

If s 198A(3) required the Minister to be satisfied of the s 198A(3) criteria, the formation of his state of satisfaction miscarried

69. If, as the Plaintiffs contend in the alternative, the s 198A(3) criteria are matters of which the Minister must be satisfied before his jurisdiction to make a Declaration is enlivened, his state of satisfaction is reviewable by this court on accepted grounds of judicial review.

70. On the basis of the matters in the Agreed Statement of Facts, the Court ought to conclude that the Minister's satisfaction miscarried because the Minister:

70.1. misconstrued s 198A(3); and

70.2. asked himself the wrong question.

The Minister misconstrued s 198A(3)

71. The Minister, in reaching his state of satisfaction, misconstrued s 198A(3) by considering that it required him to be satisfied that as a practical matter Malaysia could meet the s 198A(3) criteria "on the ground", irrespective of Malaysia's international legal obligations and domestic laws.

72. Rather, as explained above, the s 198A(3) criteria are directed to the legal obligations of the country in question. Matters going to the practical protections offered to asylum-seekers and refugees are relevant to the exercise of the discretion once it is enlivened (the "should I?" question)[54] but not to the question whether the jurisdiction to exercise the discretion is enlivened (the "can I?" question). Thus the Minister's state of satisfaction miscarried and the Declaration was made in excess of his jurisdiction.

The Minister asked himself the wrong question

73. If the Plaintiffs are wrong about the criteria in s 198A(3) needing objectively to exist, then they submit when all of the evidence is examined, the Court should find that the Minister's satisfaction about the preconditions in s 198A(3) was formed on the basis of what he believed would happen to the transferees alone. The Minister's decision makes no distinction between the "can I' and the "should I", probably because that is not the Defendants' construction of s 198A(3).

74. However, irrespective of whether there is one stage or two in s 198A(3), and accepting for the sake of this argument that the Plaintiffs' construction of s 198A(3) is wrong and its terms do extend to "on the ground" factual matters, the Plaintiffs nevertheless contend that the Minister did not ask himself the correct question, namely how are all asylum seekers in Malaysia are currently treated, what access do they have to protection and what is and is not provided to them? Nor, in relation to s 198A(3)(iv), did he ask himself what human rights standards generally exist in Malaysia for asylum seekers and refugees.

75. Rather, the Minister asked himself whether the s 198A(3) criteria were satisfied in relation to the 800 Transferees would be treated. This is demonstrated by the reliance the Minister placed on the Arrangement as the essential basis for forming a state of satisfaction, or deciding, that the s 198A(3) criteria were met and the Declaration should be made. The evidence as a whole[55] discloses that he asked himself how the Arrangement would affect the way the 800 Transferees would be treated if they were to be taken to Malaysia.

76. The Ministerial submission[56] provided to the Minister by the Department (the **Submission**) focussed on the Arrangement and what would happen to the 800 Transferees insofar as it:

76.1. advised the Minister that he could be satisfied that "*the protections afforded to Transferees under the [Arrangement] with Malaysia, and the associated Operational Guidelines, satisfy the matters outlined at paragraph six above*", those matters being a reproduction of s 198A(3); and

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54 And clearly also to the exercise of power in respect of each individual proposed for transfer under s 198A(1).

55 ASF at [35], [37] attachment 32 (the **Submission**) attachment 34.

56 ASF, attachment 32.

76.2. placed significant emphasis on the Political Arrangement as a matter that the Minister could regard as addressing the recognised lack of protections provided for in Malaysia's domestic law[57].

77. It is clear that the Minister relied on the submission[58] to decide whether to make the declaration, that submission having been provided to the Minister immediately prior to him making the Declaration. The chronology is significant: there was no declaration until after the Arrangement had been concluded. The Court can and should infer from the whole of the evidence that but for the Arrangement, no Declaration would have been made by the Minister[59] – and this demonstrates that the Minister was singularly focussed on how the 800 transferees under the Arrangement would be treated (although as noted the Arrangement is only a political document and is unenforceable), rather than how Malaysia treats all asylum seekers and refugees within its borders.

78. The mere inclusion of country information, without any evidence about how it was used or relied upon by the Minister, and whether he made any findings in relation to it in the process of making his decision to give the Declaration, is insufficient to form a basis for the conclusion that the Minister applied the proper test[60].

79. The Affidavit of the Minister, which is the only source of the Minister's reasons for making the Declaration other than the circling of a word on the submission to him on 25 July 2011, does nothing to cure the deficiencies identified above. While paragraphs 12 and 13 of the affidavit of the Minister discloses that he took into account *"whether Malaysia met the criteria set out in subsection 198A(3) of the Migration Act 1958 generally..."* it does not follow that, having taken that matter into account, he applied the correct test.

80. At its highest, the Minister's affidavit, sworn after litigation had commenced, confirms that the Minister had regard to material going to the situation in Malaysia generally. The assertion that he "understood" the need to consider whether Malaysia met the criteria in s 198A(3) of the Act generally does not prove that he did so in the manner required by the Act.

81. Further, the Plaintiffs contend that the Minister's failure to contemporaneously record any such understanding is significant, as is the Minister's failure to depose to *how* he applied the s 198A(3) criteria "generally".

The s 198A(3) criteria should not be regarded as mandatory or permissible considerations

82. On no view should the s 198A(3) criteria be regarded simply as matters to which the Minister must or may have regard.

82.1. Whether or not the s 198A(3) criteria are construed as confined to matters of legal obligation and the capacity to enforce them or read as extending to "on the ground" assessments, to construe the terms of s 198A(3) as imposing on the Minister nothing more than an obligation (or freedom) to take the criteria into account empowers the Minister to declare a country

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57 Refer to the Submission at para 2 on page 1, paragraphs 8 – 10 on page 3, paragraph 13 – 14 on page 4.

58 It is not in dispute that the Minister had regard to the Submission – refer to the Affidavit of the Minister, [11].

59 This is further emphasised by para 14 of the Submission on page 4, which describes the 'Background' to the decision to be made *only* in terms of the Arrangement with Malaysia.

60 *Re MIMIA; Ex parte Palme* (2003) 216 CLR 212 at 245 [114]: *...simply to treat the brief as incorporated by reference by way of the Minister's consideration of "all relevant matters" gives no clue as to the way the Minister resolved the tension critical to the decision...*' (Kirby J, dissenting). See also *Nezovic v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2003) 133 FCR 190 at [38] (French J).

which satisfies (whether on a broad or narrow view) none of the criteria in those four provisions.

82.2. Such an approach creates a second class of asylum seekers, contrary amongst other things to Australia's obligations under Art 7 of the Refugees Convention not to treat refugees any differently from other aliens.

83. Again to adapt the language of this Court in *Balfour*,[61] "*the task of the* [Minister] *is to determine the relevant fact, that is to fix upon a* [country] *which* ***fairly accords with the description*** [set out in the s 198A(3) criteria]. *That task is not performed if* the [Minister] *fixes upon a [country] which, though it does not fairly accord with the description* [set out in the s 198A(3) criteria], *yields what is thought to be an appropriate* [country to which people might be taken]. *To approach the task in that way is to misunderstand the question which* [s 198A(3)] *requires the* [Minister] *to answer*".

84. This construction of s 198A(3) fails to pay sufficient regard to the purpose of s 198A understood in light of the purpose of the Act as explained by this Court in *Plaintiff M61*. The matters set out in s 198A(3) ought not be regarded as mere verbiage or of "symbolic significance".[62] Rather, they are properly regarded as an indication of Parliamentary intention that a person claiming refugee status should not be sent to a third country where their protection claim and/or their human rights will not be respected to the same extent as Australia. In order for that intention to be given effect, it is necessary that the s 198A(3) criteria be regarded as jurisdictional facts or, at least, as matters about which the Minister must be satisfied and thus subject to the accepted standards of judicial supervision pursuant to s 75(v) of the Constitution.

THE OFFICER'S DISCRETION UNDER s 198A(1) WAS NOT PROPERLY EXERCISED

Failure to consider individual circumstances

85. The decision to take Mr [redacted] to Malaysia was made by an officer on 7 August 2011.[63] The relevant officer failed to consider the individual circumstances of Mr [redacted] by not considering the operation of Malaysian immigration law on him.[64] The decision of the officer under s 198A(1) in relation to Mr [redacted][65] was made after having regard to the Pre-Removal Assessment only.[66] Attached to that Assessment were nine documents including:

85.1. the Malaysian *Syariah Criminal Offences Act* 1997;

85.2. the 2004 "Freedom of the World" country report on Malaysia and

85.3. the 2008 US State Department Report on Malaysia.

86. The Pre-Removal Assessment noted, on two occasions, that Mr [redacted] had been in Malaysia for three days before his arrival in Australia on 4 August 2011.[67] The

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61 (1987) 180 CLR 474 at 480.

62 Cf Ministerial briefing note on "the use of removal powers under the Migration Act 1958 to transfer offshore entry persons to a transfer country", ASF Attachment 32.

63 ASF 17.

64 ASF 52

65 Attachment 15. No such decision has yet been made concerning Mr [redacted]

66 Attachment 8. ASF 17.

67 ASF 9 and 21. On 7 August 2011, the Minister said that "Malaysia [is] where between 80 to 90 per cent of boat arrivals in Australia begin their journey" (Attachment 36). On 6 August 2011, the Prime Minister

Pre-Removal Assessment did not consider whether or not that prior presence gave rise to any consequences in Malaysian law for Mr [redacted]. Most especially, the Pre-Removal Assessment fails to consider whether Mr [redacted] committed any offences under Malaysian law for which he would, or might, be liable to punishment if he were returned, and what the nature of any such punishment may be.

87. Generally, the nature of punishments existing in Malaysia was considered relevant by the Pre-Removal Assessment officer. The officer noted that whipping is a legally-sanctioned punishment in Malaysia. However the officer only examined that issue in the context of religious offences in Malaysian law. In that regard, the Pre-Removal Assessment officer "f[ou]*nd that there is not a real risk that Mr [redacted] will be detained or prosecuted because he is a practicing Shi'a Muslim if he were removed to Malaysia.*" The same analysis was required in relation to past conduct by Mr[redacted] in Malaysia. The same finding (i.e of no real risk) may not have been open to the officer if that had been considered.

88. The pertinent law for Mr[redacted] is and remains the one for people seeking refugee status, the Malaysian *Immigration Act* 1959 (the Malaysian Act).[68] In light of Mr [redacted] recent time in Malaysia, it was a key part of his individual circumstances that he had been to Malaysia before in the company of people smugglers, on his way to Australia. The officer was required to consider whether he had committed any offences under Malaysian law, the punishment for those offences as well as those offences the Mr [redacted] might have committed simply by being in Malaysia <u>as an asylum seeker</u>. Instead, the Pre-Removal Assessment repeatedly refers to the unenforceable, political Arrangement as the basis for asserting that "the Malaysian Government has made a clear commitment that the Transferees will be treated with dignity and respect, in accordance with human rights standards". To the limited extent that there is law to support the Arrangement in Malaysia, it does not relevantly protect Mr [redacted] from prosecution for those past offences.

89. The Arrangement is not legally enforceable in Malaysia. It has been translated into the operation of the domestic law contained in the Malaysian Act in a limited way. The Malaysian Minister has ordered a conditional exemption for those transferred under the Arrangement (the Malaysian Exemption Order).[69] The exemption is limited in that it operates for a defined period,[70] which period started after the plaintiffs were in Malaysia; is an exemption from s 6 only of the Malaysian Act;[71] is "immediately void upon any person" that, among other things, is "registered as 'refugee' by" UNHCR[72] or "listed as prohibited immigrant under s 8(1)" of the Malaysian Act.[73]

90. The basis on which a person can be listed as a "prohibited immigrant" includes the situation where the person is "unable to show that... definite employment [is] awaiting him"[74] or is "likely to become a pauper".[75] The Malaysian Minister is empowered to order an exemption from being listed as a "prohibited immigrant".[76] There is no evidence that he has done so.

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said that "the *returns* to Malaysia aren't a question of volunteering, this will be done" [emphasis added] (Attachment 37).

68 ASF 45 and Attachment 39.

69 ASF 47 Attachment 40 *Immigration Act* 1959 s 55.

70 *Immigration (Exemption) (Asylum Seekers) Order* 2011 cl 1(2).

71 *Immigration (Exemption) (Asylum Seekers) Order* 2011 cl 3(1).

72 *Immigration (Exemption) (Asylum Seekers) Order* 2011 cl 4(a).

73 *Immigration (Exemption) (Asylum Seekers) Order* 2011 cl 4(e).

74 *Immigration Act* 1959 s 8(3)(a).

75 *Immigration Act* 1959 s 8(3)(a).

76 ASF 49 *Immigration Act* 1959 s 8(5).

91. If the officer had had regard to the effect of Mr [redacted]'s prior time in Malaysia as an asylum seeker, the officer would have discovered the following. Pursuant to the Malaysian Act, it is a criminal offence punishable by: whipping of up to six strokes, imprisonment up to five years and/or a fine up to an equivalent of approximately $3,000 to enter Malaysia as a non-citizen without an Entry Permit or Pass;[77] imprisonment up to five years and / or a fine up to an equivalent of approximately $3,000 to enter Malaysia except at an authorised point of entry and leave Malaysia except at an authorised landing place.[78]

92. Since Mr [redacted] was not permitted to be in Malaysia on the last occasion he was there[79] and given that he entered and left Malaysia with the assistance of "smugglers",[80] Malaysian law provides that he is punishable for these three offences.

93. The analysis set out above applies to Mr [redacted] The effect of these instruments[81] is that the Plaintiffs appear to have committed three offences punishable by up to six strokes of the whip,[82] 15 years imprisonment and / or approximately $9,000 in fines merely by being asylum seekers in Malaysia in the past. Had the officer considered the Malaysian Act, this would have been apparent.

94. Neither plaintiff will be protected by the Malaysian Exemption Order if and when it is the Malaysian Director-General's opinion that either plaintiff does not have definite employment waiting for him and / or either plaintiff is "likely to become a pauper". Neither plaintiff has the means of supporting himself in Malaysia.[83] Each of these constitutes a further offence punishable by imprisonment up to five years and / or a fine up to an equivalent of approximately $3,000.

95. The officer who decided that Mr [redacted] could be taken to Malaysia failed to have regard to the legal consequences of Mr [redacted]'s prior visit to Malaysia and the offences on which he may be prosecuted as a result. In this important respect the officer failed to consider his individual circumstances, and makes the resulting decision unlawful.

Fettering of discretion and/or undue influence

96. Any exercise of power under s 198A(1) in respect of the Plaintiffs is and will be unlawful. Section 198A(1) confers a discretionary power on an officer in relation to the taking of people including the Plaintiffs to a declared country.[84] The discretion conferred by s 198A(1) was exercised unlawfully in respect of Plaintiff M70 because the relevant officer's discretion had been fettered by the First Defendant, or the officer acted at the dictation of the First Defendant in deciding to take the plaintiff to Malaysia.[85] That fettering or dictation occurred by way of the Minister's letter of direction dated 25 July 2011 (ASF [38], Attachment 35 — the **Letter**).

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77 ASF 50 *Immigration Act* 1959 s 6.

78 ASF 51 *Immigration Act* 1959 ss 5 and 57.

79 ASF 9 and 21.

80 ASF 9 and 21.

81 The Malaysian Exemption Order does not cover those offences because it was not in operation at the time the offences were committed. Alternatively, on its terms,81 it does not cover offences under s 5 of the Malaysian Act and it would cease to cover offences under s 6 of the Malaysian Act if the plaintiffs either "registered as 'refugee'" with UNHCR or became listed as a "prohibited immigrant".

82 See also ASF 53.

83 ASF 9(l) and 22(i).

84 There is no disputed between the parties that the power conferred by s 198A(1) is discretionary in nature.

85 Although no decision has yet been made in relation to Plaintiff M106, the same argument is available to found injunctive relief in relation to him.

97. The Letter:

97.1. directed the Department and its officers were directed that "no processing of any asylum claims is to occur" for those who arrived after 25 July 2011, which included the Plaintiffs.[86]

97.2. stated that the Minister would not "consider exercising" his "powers under s46A or s195A".

97.3. stated the Minister's "expectation" that offshore entry persons arriving after 25 July 2011 "will be taken to Christmas Island and removed to Malaysia in accordance with the Arrangement, with any asylum claims being assessed in that country".

98. The Letter formed part of the "Removal Availability Assessment" (ASF [13], Attachment 8 – the **RAA**) for Plaintiff M70 and was attached to the RAA as Attachment C. The RAA with the attachments was a document on which the relevant officer relied in deciding to take the plaintiff to Malaysia. The statements in the Letter were reinforced by public statements by the Minister in relation to the taking of persons to Malaysia (ASF [39], Attachments 36, 37).

99. A Minister cannot, by direct correspondence or otherwise, dictate or fetter the exercise of a discretionary power by person a decision maker who is the repository of that power. The repository of a power must exercise that power and must do so with regard to the individual circumstances of the case before him or her. A "genuine belief" as to the existence or nature of a direction coupled with an "obedience to duty"[87] by the decision-maker vested with the power do not alter that requirement.

100. In the present circumstances, the Minister unlawfully fettered the exercise of the discretionary power conferred by s 198A(3)(1) by expressing, in a letter of direction, his "expectation" about how that power would be exercised.

101. Further, the Minister fettered his own powers under ss 46A and 195A of the Act.[88] It is an improper exercise of a discretionary power to exercise that power in accordance with a rule or policy, without regard to the merits of a particular case.[89] The Minister imposed upon himself an inflexible policy by making and recording his decision in the Letter that he would not consider the exercise of his powers under ss 46A and 195A, regardless of the individual circumstances of arrivals. Although the exercise of the power by the Minister under those sections is not compellable, that does not mean that declaratory relief will not issue when the Minister has made an error of law in relation to the exercise of those powers.[90]

102. The combination of the Minister's fetter on his own powers under s 46A and s 195A, together with the Letter directing the Secretary and officers that the Minister "expected" all people arriving after 25 July 2011 to be taken to Malaysia, resulted in an unlawful fetter on the officer exercising the 198A(1) power to decide that the Plaintiff should be taken to Malaysia. Any indications in some

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86 The minister has a power of direction conferred by s 499 of the Act; in addition, s 13(5) of the *Public Service Act* 1999 deals with compliance with lawful directions.

87 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 192 (Kitto J).

88 Application para 53

89 *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 (Gummow J), most recently cited by this Court in *Minister for Immigration and Citizenship v SZJSS and Others* (2010) 273 ALR 122 at [26].

90 *Plaintiff M61* at [101] and [103].

documents before the decision-maker that a discretion existed[91] were overridden by the dictation or fettering effected by the Minister's actions.

ADDITIONAL SUBMISSIONS ON BEHALF OF PLAINTIFF M106/2011

Nature of the Minister's duties as the guardian of Plaintiff M106

103. Section 6 of the Guardianship Act constitutes the Minister as guardian of every "non-citizen child", to the exclusion of her or his father or mother and every other guardian of the child. It follows from the imperative and emphatic wording of that provision (the Minister "shall" be the Guardian) that the Minister's position as guardian may not be displaced until such time as the child reaches the age of 18 years; leaves Australia permanently or "until the provisions of [the] Act cease to apply to and in relation to the child".[92]

104. The primary duty of the Minister is the protection of the person of the child, extending to every aspect of the child's life including the physical, mental, moral, educational and general welfare of the child[93]. That protection is achieved by conferring and imposing upon the Minister the "same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have".

105. The imposition of the duty of guardian is both an authority to act and a constraint on the powers and duties that the Minister otherwise enjoys. In the absence of some express statutory mandate, it constrains the Minister to act to advance or protect the welfare of the child.[94] That criterion is a matter to be determined objectively and not by reference to the Minister's good faith opinion.[95] At least as regards serious matters, that constraint may require the Minister to undertake "due inquiry about, and adequate consideration of, what truly represents the welfare of the child".[96]

106. The Minister's guardianship carries with it other positive obligations to meet the basic human needs of a child, including food, housing, health, education and (where required) legal advice and assistance.[97] So understood, it is apparent that the Guardianship Act is directed (at least in part) to providing protection for children who are "particularly alone, isolated and often in frightening circumstances" and who have little or no connection with Australia prior to entry.[98]

107. The discharge of those various obligations are subject to the supervision of this Court under s75(v) of the Constitution.[99] That jurisdiction (while perhaps bearing

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91 ASF [14], eg Attachments 10, 11.

92 Curiously, at least on the face of the Guardianship Act, the Minister's guardianship would continue even if the child's parents later arrived in Australia or if the child obtained citizenship (for s4AAA (1)(b), (2) and (3) all look to the time of entry into Australia as the time a child's status as a "non-citizen child" is to be determined). Of course, the Minister may, in such circumstances, exercise his powers of exemption in such a case (see s11). As in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 79 ALJR 94 (***WACB***), the question of whether the Guardianship Act is valid insofar as it purports to continue to apply to a child who acquires citizenship after entry does not arise in this matter.

93 *Secretary Department of Health and Community Services v JWB and SMB* (Marion's Case) (1992) 175 CLR 218 at 278 (Brennan J).

94 *Re Woolley; Ex Parte Applicants 276/2003* (2004) 225 CLR 1 at 159 per Gummow J ("Parental rights now are seen as deriving from parental duty, so that they exist for the protection of the person and the property of the child..."); *Marion's Case* at 237-8 per Brennan J; at 316 per McHugh J and at 293 per Deane J.

95 *Marion's Case* at 316 per McHugh J.

96 *Marion's Case* per Deane J at 293.

97 *X's Case* at [34] per North J and (citing that passage with approval) *Odhiambo* at [88].

98 See, referring to the Minister's Second Reading Speech to the *Statute Law (Miscellaneous Provisions) Bill (No 1)* 1985, North J in *X's Case* at [45]-[46]. See also *Ex Parte Henry* at 381 per Mason J and 385-6 per Jacobs J.

99 *X's Case* at [79].

some analogy to the *parens patriae* jurisdiction) would not extend to an order that a child be discharged from the Minister's guardianship.[100]

108. Further, the powers conferred by s6 of the Guardianship Act are (or are in the nature of) fiduciary powers.[101] It is well established in that regard that the relationship between a guardian (including a statutory guardian) and her or his ward, while not that of trustee and beneficiary, is a fiduciary relationship of particular characteristics.[102] It follows from that that the Minister's powers as guardian may be exercised only if their exercise is for the benefit of the child.[103]

109. That role has been a feature of Australia's immigration system for some time. Indeed, even prior to the enactment of the Guardianship Act, the Minister of State for the Interior had a comparable position under the *National Security (Overseas Children) Regulations 1940* (Cth).[104] When first introduced, the scheme was directed principally at ensuring adequate oversight of the welfare of children who had been, or would be, brought to Australia under voluntary migration schemes sponsored by social welfare organisations and church bodies.[105] The nature and significance of the powers which were conferred upon the Minister is apparent from the following passage in the second reading speech, in which it was said "*It is... incumbent on the Commonwealth to see that child migrants are properly accommodated and cared for until they reach 21 years of age.*"

110. Although the Guardianship Act was enacted in 1946 (and thus preceded Australia's ratification of international instruments such as the *Convention on the Rights of the Child*), there was at that time already international recognition of the rights of children. In particular, Australia had at that time voted in favour of the Declaration of Geneva on the Rights of the Child as a member of the League of Nations.[106] The declaration may be seen as a predecessor to the 1959 United Nations *Declaration on the Rights of the Child* (which expressly refers to the Geneva Declaration in the Preamble), which led, in turn, to the 1989 *Convention on the Rights of the Child.*[107] Indeed, as Gaudron J observed in *Minister for Immigration and Ethnic Affairs v Teoh*,[108] those later instruments did no more than give "expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilised countries". Understood in that context, the enactment of the Guardianship Act may be seen to have proceeded on the basis that Australia had

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100 *Minister for the Interior v Neyens* (1964) 113 CLR 411 at 422-4 per Barwick CJ.

101 *Clay v Clay* (2001) 202 CLR 410 at [40], [46]. See, also, dealing with the relationship between the government and foster children in a similar statutory context, *KLB v British Columbia* [2003] 2 SCR 403 at [38] per McLachlin CJ, delivering the judgment of herself, Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ.

102 *Clay v Clay* (2001) 202 CLR 410 at [40] per curiam and *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-1 per Dixon J.

103 See eg *In Re Paulings Settlement Trusts; Younghusband v Coutts & Co* [1964] Ch 303 at 333 per Wilmer LJ. See also (dealing with the presumption of influence between a parent and a child) *Lamotte v Lamotte* (1942) 42 SR (NSW) 99 at 102-3.

104 See clauses 2(1) and 3(1). Such guardianship was to be vested in State authorities upon the reception of the minor into a State: clause 3(2).

105 J Taylor "Guardianship of Child Asylum Seekers" 34 *Federal Law Review* 185 at 186. See also House of Representatives 1946, *Parliamentary Debates* (Hansard), 31 July 1946, at 3369, Mr Callwell and (referring to that passage) *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 29 at [87].

106 By that declaration (although not binding as a matter of international law), Australia and the other States parties "declare[d] and accept[ed] it as their duty" that, amongst other things: (a) The child must be given the means requisite for its normal development, both materially and spiritually; (b) The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored; and (c) The child must be the first to receive relief in times of distress.

107 See generally, G Van Bueren *International documents on children* (1998) Kluwer Law International at xv-xix.

108 (1995) 183 CLR 273 at 304-5.

some form of fundamental "duty" or "overriding responsibility" (reflected in a developing norm of international law) to protect the children to whom the Act applied.[109]

General principles of construction arising from the intersection between the Minister's guardianship powers and the Migration Act

111. The role of guardian is not a hat that may be removed when the Minister turns to the administration of the Migration Act. It is a status that imports a paramount duty and overriding responsibility. The nature of the duty does not diminish because the Minister is also called upon to exercise other statutory powers.

112. The Full Court of the Federal Court in *Odhiambo,*[110] identified a potential for conflict between the Minister's responsibilities as guardian under the Guardianship Act, and the Minister's roles under the Migration Act.[111] However, the extent of conflict should not be overplayed.

113. First, the status of guardian does not permit the Minister to act inconsistently with the law: the Minister would not be authorised to grant a visa under s 65 of the Act to a ward who did not satisfy the criteria for its grant. Second, the Guardianship Act does not permit a rewrite of the words of the Act: *WACB* provides an illustration of that proposition in relation to the construction of the phrase "*notified of the decision*".

114. Fundamentally, however, within those constraints, the status of the Minister as guardian conditions the exercise of discretionary powers and it is not simply to be put aside or subordinated to some other general power in the absence of clear legislative intention. To the extent that he is permitted to do so, in the sense of not legally precluded from so acting, the Minister is required to act in the best interests of and to advance the welfare of his wards. The requirement for such reconciliation flows, at least in part, from the fact that the two enactments are to be construed in a harmonious fashion as component parts of a single legislative scheme.

115. First, at a general level, the Migration Act and the Guardianship Act deal with overlapping subject matter. In broad terms, those areas of convergence may be described as the entry of non-citizen children to Australia, the circumstances and conditions which apply while they remain within Australia and the circumstances and conditions of their removal from Australia. Although the Guardianship Act does not mandate that the Minister should be the same as that charged with the administration of the Migration Act, the extrinsic material suggests that it was expected to be so.

116. Secondly, both enactments contain important protections for non-citizen children and recognition of their vulnerable status. Sections 4AA and subdivision B of Division of Part 2 of the Migration Act,[112] were intended to allow a more flexible approach to detention so as to permit consideration of matters such as the age of the person, the best interests of children and the needs of families with children.[113] The powers conferred by ss46A(2) and 195A(2) permit the Minister to give effect to the principle affirmed in s4AA(1), by allowing the Minister to grant a visa to a minor who is an offshore entry person or who is detained under s189.

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109 See in that regard *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 (***X's Case***) at [35]-[41] and [51] per North J.

110 At [90]-[92].

111 By the Administrative Arrangements Order dated 14 October 2010, the Minister was responsible for the administration of both enactments.

112 *Migration Amendment (Detention Arrangements) Act* 2005.

113 See paras [3], [4], [8] and [6].

117. Thirdly, both enactments reflect an intention on the part of the Commonwealth Parliament to adhere to established or developing international obligations. The manner in which the Guardianship Act reflects such an intention is explained above. As regards the Migration Act, it is clear that an object of the Act is to comply with Australia's international obligations under the Refugees Convention and the Refugees Protocol (see the passages from *Plaintiff M61* extracted above.[114] Similarly, the specific accommodation of the special vulnerabilities of children achieved by ss4AA, 46A and 195A and subdivision B of Division of Part 2 may be seen as a manifestation of an intention by the legislature to adhere to Australia's obligations under the *Convention on the Rights of the Child*: see particularly article 37(b) which, in language that closely resembles s4AA of the Migration Act, requires that the detention of children be "used only as a measure of last resort".[115]

118. The presumption upon which the Court operates is that the Parliament intended its legislation to operate rationally, efficiently and justly, together.[116] In approaching the exercise of discretionary powers by the Minister, one commences with the hypothesis that Parliament intended that the statutory schemes embodied in both the Act and the Guardianship Act would be construed so as to achieve their "rational integration" and not applied in a way that would see the Minister in breach of his duties.[117]

Exercise of the Minister's power in the current matter: the critical issue of the duality of the Minister's role

119. Section 198A(1) confers a discretionary power upon an officer, who may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection 198A(3). As regards a "non-citizen child" as defined in s4AAA of the Guardianship Act, the exercise of that power necessarily involves the termination of the statutory guardianship (see s6 of the Guardianship Act – "until the child ... leaves Australia permanently").

120. It may be accepted that the consent of the Minister is not required under s 6A if there is legal authority for the departure: see s6A(4) of the Guardianship Act. However s 6A(4) does not mean that the Minister is precluded from exercising other powers that would allow the child to remain in Australia or that he is not duty bound to do so. The Minister has statutory powers by which he could take steps to ensure that the removal of his ward only takes place if it is in their best interests, so as to comply with his obligations as guardian. At issue is not the giving or withholding of consent but exercising such powers as he may have to ensure the best interests of the child. In particular, he could "lift the bar" for the making of a visa application or grant a visa under s 195A(2).[118]

121. As regards the powers conferred by ss46A(2) and 195A(2), the following matters are clear. First, they are each powers which may only be exercised by the

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114 In particular, the Court in there said that the insertion of s 46A and, in consequence, inserting s 198A, could be seen as reflecting an intention to adhere to those obligations, which, in turn, informed the construction of other provisions made by the Act: at [35].

115 See also articles 3(1) and 22.

116 See *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 726 per Griffith CJ; *Commissioner of Stamp Duties v Permanent Trustee Co Ltd (Trustee for Anzareno Dal Bon and Silvanio Dal Bon)* (1987) 9 NSWLR 719, 723-724 per Kirby P; *Abdi v Release on Licence Board and Others* (1987) 10 NSWLR 294, 295 per Kirby P; *Shaw v Yarranova Pty Ltd and Another* (2006) 15 VR 289, 308 and 310 per Eames and Neaves JJA; *Maroondah City Council v Fletcher* (2009) 169 LGERA 407 at 429 per Warren CJ and Osborn AJA

117 *Commissioner of Stamp Duties* at 722.

118 As submitted above, this Court observed in *M61* that the inclusion of those powers in the Migration Act reflects an intention to adhere to Australia's international obligations. It further observed that the exercise of those powers may, in some circumstances, be the only means by which contravention of those obligations may be avoided: see at [40].

Minister personally: ss 46A(3) and 195A(5). Secondly, the exercise of those powers is constituted by two distinct steps, described in *M61* as follows:

> first, the decision to *consider* exercising the power to lift the bar or grant a visa and second, the decision whether to lift the bar or grant a visa (original emphasis).[119]

122. Thirdly, at least as regard a person who is not his ward, the Minister is not obliged to embark upon either of those steps by reason of ss46A(7) and 195A(4), each of which provides that the Minister does not have a duty to consider whether to exercise the relevant power. However s 46A(7) does not immunise a legal error in the taking of either of the two steps.

123. In the circumstances the Minister can only act consistently with his guardianship obligations by (at least) considering the exercise of those powers in favour of his ward. That follows from the requirement that the Minister, as Guardian, must give "adequate consideration" to what truly represents the welfare of the child.[120] Those duties and the overriding duty to act to advance or protect the welfare of the child naturally require attention to or consideration of all available measures which the Minister may have at her or his disposal to avoid harm or possible harm to the child.

124. Sections 46A(7) and 195A(4) do not alter the Minister's duties under the Guardianship Act but may limit the relief to which the Minister may be subject.[121] There is no textual foundation in the general words of ss 46A(7) and 195A(4) for the proposition that those provisions were intended to have that far reaching effect on that important set of protections for vulnerable children, particularly having regard to the principle of construction regarding fundamental rights identified in *Coco* and subsequent cases (see above).

125. Taking Plaintiff M106 to Malaysia is not in his best interests. The harm or possible harm which might be caused to Plaintiff M106 if he is removed to Malaysia is extensive and broad ranging: **first**, the statutory guardianship would be terminated; **secondly**, Malaysian law does not require that a guardian must be appointed in favour of persons seeking asylum who are unaccompanied minors;[122] **thirdly**, Malaysian courts do not generally exercise a jurisdiction equivalent to the *parens patriae* jurisdiction in respect of people seeking asylum who are unaccompanied minors;[123] **fourthly**, there are no arrangements in place for the appointment of a guardian for Plaintiff M106 upon his arrival in Malaysia;[124] **fifthly**, Plaintiff M106 is liable to a legally sanctioned whipping of up to six strokes in Malaysia because, when he entered Malaysia as an asylum seeker on his way to Australia without an entry permit or a pass,[125] he committed a crime punishable in this way;[126] **sixthly**, Plaintiff M106 does not have definite employment waiting for him in Malaysia, and claims he will not have the means of

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119 At [70].

120 See the submissions above referring to *Marion's Case* per Deane J at 293. See also, in that regard, the reasons of Kirby J in *Woolley* at [209], where his Honour said: On the face of things, the status of statutory guardian would appear to impose duties of individual decision-making giving explicit attention to the special needs of each particular child. Such a duty might be specially applicable to a Minister of the Commonwealth as "guardian", given the ancient functions of the Crown, as predecessor to the Minister, as parens patriae in respect of vulnerable children.

121 Cf the reasons of Crennan J in *M168/2010 v Commonwealth* [2011] HCA 25 at [37], although note that her Honour proceeded on the basis of a concession made by the plaintiff's counsel.

122 See para [55] of the ASF – equally, it does not prevent such a guardian being appointed.

123 ASF, para [56].

124 ASF, para [57]

125 ASF, para [21] (f) and (g).

126 ASF, para [50], [52], [53].

supporting himself in Malaysia;[127] and **seventhly**, Plaintiff M106 claims that he has a well founded fear of persecution in Malaysia because of his religion as a Shi'a Muslim and also claims that he fears he will be subjected to other harms and abuse in Malaysia.[128]

126. The Minister has failed to discharge those duties on the facts of the current matter. By letter dated 25 July 2011,[129] given before the Plaintiff M106 arrived in Australia, the Minister stated that he was "formally directing" the Secretary of the Department (and through him the officers of the Department) as to the matters set out in the paragraphs numbered 1 and 2 which immediately follow.[130] The matters described in the first paragraph involved a continuation of the arrangements addressed in *Plaintiff M61* – that is, the Minister had embarked upon a consideration of the exercise of his powers under ss 46A or 195A.[131] The second paragraph equally involved a decision as to the first step of the exercise of those powers. It is a decision (applicable generally to any person arriving in Australia after the stated date) that the Minister will not consider exercising those powers. As a result of that decision, Plaintiff M106 (and any other "non-citizen child" as defined in s4AAA of the Guardianship Act arriving in Australia after 25 July 2011) was liable only to be sent to Malaysia. The taking to Malaysia would necessarily take place without the Minister giving any consideration, as Plaintiff M106's guardian, to his specific position or needs as a child, the harm or possible harm identified above or the means by which those matters might be addressed.

127. The Minister's decision was therefore infected by legal error, in that the Minister overlooked the fact that, as regards each child to whom the Direction applied, there was a convergence between his role and responsibilities under the Migration Act and his duties and responsibilities as statutory guardian. That was an error of a jurisdictional nature, in that the Minister thereby disregarded or misapprehended the nature of his functions, responsibilities and powers under the statutory scheme.[132] Plaintiff M106 seeks a declaration that in refusing to consider the exercise of the powers conferred by s46A and 195A, the Minister made an error of law (see prayer 6.3 of Plaintiff M106's application.). Such relief is available for reasons similar to those given in *M61* at [103].[133]

128. If that is correct, it follows that any proposed exercise of the powers conferred by s198A(1) in respect of the plaintiff would be unlawful. In the first place, consideration of those powers has only arisen by reason of the making of the Direction. The repository of power under s198A(1) cannot act upon a direction which is not lawfully made. Moreover, the effect of the direction would be to require that decision maker to participate in a contravention of the first defendant's duties as guardian to the Plaintiff. The harmonious construction or rational integration of the statutory scheme requires that the power conferred by s198A(1) be constrained such that it may not be exercised in that fashion. Accordingly, this Court should grant the relief in prayer 3 (or alternatively prayer 4) of Plaintiff M106's application and the declaration in prayer 6.2.

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127 ASF para [21](i). Subject to the terms of the exemption referred to in ASF [47], he may therefore be exposed to punishment as a "prohibited immigrant": ASF [48] and [49].

128 The features of the Malaysian legal system referred to in ASF [44], [45] and [46] and the fact that Malaysia is not a party to the international instruments referred to in ASF [41] are also relevant matters requiring consideration by a guardian seeking to advance or protect the welfare of Plaintiff M106.

129 Attachment 35 to the ASF.

130 As submitted above, it is clear, from the use of the word "formal" that the Minister was there exercising his powers under s 499(1) of the Migration Act.

131 The subsequent consideration process will be subject to the constraints identified in *M61*.

132 See *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531at [72] and *Craig v South Australia* (1995) 184 CLR 163 at 177.

133 See, in addition to the authorities there referred to, *Project Blue Sky v ABA* (1998) 194 CLR 355 at 393.

Other constraints on the powers conferred by s198A(1)

129. In addition to the above, the requirement to construe the Guardianship Act and the Migration Act in a manner that assumes Parliament intended those enactments to operate harmoniously points to the conclusion that s198A(1) is subject to certain additional constraints.

130. In the first place, the repository of power is at least required, as a mandatory consideration, to have regard to the fact that the exercise of that power stands to destroy the careful protections Parliament has put in place by means of the Guardianship Act and (as is the case in the present matter) the absence of any such protections in the receiving state.

131. Further, Parliament's specific concern for the welfare of children, which is apparent from section 4AA of the Migration Act and the terms of Guardianship Act, suggests that the repository of power under s198A(1) is required to consider the best interests of the child as a primary consideration. As in other areas of the legal system, that principle may be seen to have suffused the exercise of the powers conferred by the Migration Act.[134] Again, in the circumstances of this case, that requires consideration of the fact that the exercise of the power will remove the protections conferred by the Guardianship Act and the absence of any such equivalent protections in the receiving state

132. By his letter of 25 July 2011, the Minister purported to 'formally direct [an] expectation' to the Secretary of the Department of Immigration and Citizenship that persons including the plaintiff 'would be taken to Christmas Island and then removed to Malaysia'. It further appears that officers of the Department considering the exercise of the powers conferred by s198A(1) are to operate under guidelines which state:

> The Pre-Removal Assessment Process for Transfers to a Third Country for Processing is distinct from the Minister's guardianship responsibilities under the [Guardianship Act].

133. That demonstrates that those exercising the powers under s198A(1) are to put from their minds any impact upon those "distinct" responsibilities. The pre-removal assessment report undertaken in respect of Plaintiff M106[135] was conducted in exactly that fashion. That report refers to Plaintiff M106 stating that "he did not want to be transferred to Malaysia due to being a minor without a guardian". No consideration was given to the effect upon Plaintiff M106 of the destruction of the existing statutory guardianship relationship. It is apparent from the agreed facts that no arrangements are in place for the appointment of a guardian for plaintiff M106 upon his arrival in Malaysia and that there is no requirement in Malaysian law for one to be appointed. He will be without the legal protection that the Guardianship Act affords.

134. Exercise of the power conferred by s198A(1) in those circumstances will not involve an active intellectual engagement with the mandatory considerations identified above.[136] Put another way, it will not involve a "proper, genuine and realistic consideration" of those matters.[137]

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134 *Woolley* at [159] per Gummow J. See also *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2011] UKSC 4 at paras [28] – [30], [44].

135 ASF, attachment 20.

136 See eg *Lafu v Minister for Immigration* (2009) 112 ALD 1 at [48], [49] (per curiam) and *Tickner v Chapman* (1995) 57 FCR 451 at 464.

137 *Khan v Minister for Immigration, Local Government and Ethnic Affairs* (1987) 14 ALD 291 at 292 per Gummow J and *Broussard v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 21 FCR 472 at 483 per Gummow J. See also *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [37] per Gummow J and at [171] per Callinan J and *Minister*

135. Further, Plaintiff M106 submits that the power conferred by s198A(1) is constrained such that it may not be lawfully exercised where its exercise would not advance or protect the welfare of the child. That is, it is subject to a similar constraint to that which applies to the Minister's powers under the Guardianship Act. That construction is indicated by the following matters:

(a) the powers and responsibilities conferred and imposed by the Guardianship Act are broad, exclusive and resilient – as submitted above, they apply to "every aspect of the child's life" and the Minister's position as guardian applies to the exclusion of the child's parents and any other guardian and may not even be displaced by an order of the Court;

(b) by that guardianship relationship, Parliament has sought to ensure that in relation to all matters affecting the child's welfare, active consideration is given to what will be in the child's best interests;

(c) the absence of a similar requirement as a pre-condition to the exercise of the power conferred by s198A(1) would give rise to an incongruity in that, notwithstanding those matters, Parliament would be taken to included in that design a fatal flaw or Achilles heel, which would stand to render those protections entirely nugatory.

136. An essential pre-condition for the exercise of that power is not satisfied. For those additional reasons, Plaintiff M106 seeks the relief in prayer 3 (or alternatively prayer 4) of his application and the declaration in prayer 6.2.

VII ORDERS SOUGHT

137. The orders sought are set out in the Applications.

Dated: 17 August 2011

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for Immigration and Citizenship v SZJSS (2010) 85 ALJR 306 at [23]-[34]. Unlike *SZJSS* the current matter does not merely involve disagreement with the assessment of factual matters – the basis for the process of assessment appears to involve the decision maker putting the issue of the destruction of the guardianship relationship to one side as a matter which is immaterial.