IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M96 OF 2016

BETWEEN:

PLAINTIFF M96A/2016
First Plaintiff

AND

PLAINTIFF M96B/2016
Second Plaintiff

AND

THE OFFICER IN CHARGE, MELBOURNE IMMIGRATION TRANSIT ACCOMMODATION
First Defendant

AND

COMMONWEALTH OF AUSTRALIA
Second Defendant

PLAINTIFFS' SUBMISSIONS IN REPLY

Filed on behalf of:	The Plaintiffs
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Part I PUBLICATION OF SUBMISSIONS

1. These reply submissions are in a form suitable for publication on the Internet.

Part II REPLY TO DEFENDANTS' ARGUMENT

The legislative scheme

2. The power under s 198B to bring a transitory person to Australia for a temporary purpose is not confined to 'a temporary purpose which cannot be achieved in the regional processing country'.[1] Nor is it limited to purposes which are connected with the processing of the person's claims to protection in the regional processing country (**RPC**) – to take one example, a transitory person can be brought to Australia under s 198B even after that person's protection claims have been assessed and determined in the RPC. Or a transitory person can be brought to Australia for a purpose which is unconnected with the processing of his or her protection claims, such as giving evidence in criminal proceedings.

3. An exercise of the power to bring a transitory person to Australia cannot be viewed as a temporary 'reversal' of the Commonwealth's actions in taking an unauthorised maritime arrival (**UMA**) to an RPC under s 198AD.[2] The Commonwealth's power to detain the plaintiffs for the purpose of removing them from Australia and taking them to Nauru ceased when they were handed over to the custody of Nauru.[3]

4. Further, when a transitory person who was a UMA is brought to Australia under s 198B,[4] he or she is subject to a different regime under Subdiv B of Div 8 from that which was applicable prior to being taken to the RPC. In particular, s 198AD is suspended so that there is no obligation to take the person to an RPC until he or she no longer needs to be in Australia for the relevant temporary purpose. The satisfaction of that requirement is a pre-condition to the existence of any duty to take the person to an RPC, and is distinct from the requirement of reasonable practicability which qualifies that obligation if and when it arises.

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[1] *Cf.* Defendants' Submissions, [9(b)]. Indeed, on its face, s 198B(1) can apply to a transitory person who is brought to Australia from any country or place outside Australia, and not only from a RPC.

[2] *Cf.* Defendants' Submissions, [10].

[3] See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 67 [31] (French CJ, Kiefel and Nettle JJ), 162 [389], 163 [393] (Gordon J).

[4] The definition of 'transitory person', and consequently the operation of s 198B, also covers classes of person who were not UMAs (*eg*, persons who did not enter Australia by sea). While those persons may be brought to Australia under s 198B, they stand outside the regional processing regime in Subdiv B of Div 8 and are subject to the general removal power under s 198 as opposed to the specific obligation to take to a RPC under s 198AD. It is to those persons that s 198(1A) continues to be relevant. Contrary to the suggestion at [25] of the Defendants' Submissions, s 198(1A) is unnecessary and has no operation in relation to a UMA who is governed by the regional processing provisions in Subdiv B.

5. The defendants' submission that the general removal power under s 198 applies during the period any transitory person needs to be in Australia should be rejected. A UMA is governed by the specific regime for regional processing contained in Subdiv B of Div 8. In such circumstances, s 198AD provides the sole source of power to take or remove the person from Australia (*ie* to an RPC), to the exclusion of the general power to remove an unlawful non-citizen under s 198.[5]

6. It would be anomalous if s 198(1) were applicable to a transitory person brought to Australia from an RPC, so as to enable the person to request removal from Australia. First, the power conferred by s 198B is not conditioned on the request, consent or acquiescence of the transitory person: s 198B(2) expressly contemplates that the person can be brought to Australia forcibly and involuntarily. Second, it is illogical to suggest that a person who still 'needs to be in Australia' should be able to request removal. Third, because a request for removal under s 198 is not specific to a particular country,[6] the person would become liable to be removed to any country including where he or she had a well-founded fear of persecution (see s 197C). Practically, applying s 198(1) to transitory persons would require the withdrawal or abandonment of any protection claims (even those accepted in the RPC).[7] Fourth, the definition of a transitory person does not envisage transfer to an RPC under s 198 (see, especially paragraph (aa) of the definition).

7. This supports the conclusion that the regime for taking a transitory person from Australia to an RPC is contained exclusively in Subdiv B of Div 8. Accordingly, the plaintiffs cannot bring their detention to an end by requesting their removal to Nauru under s 198(1). They can only be taken back to Nauru if and when the executive decides they no longer need to be in Australia for the temporary purpose.

Constitutional principles

8. The defendants' submissions as to the 'true principle' in *Lim* were advanced without success in *Plaintiff M68*.[8] The submission that the distinguishing feature is whether detention is imposed as punishment for a breach of the law is incorrect both as a matter of principle and authority.[9]

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[5] *Cf. Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 178 [54]-[55] (French CJ), 191-192 [95]-[99] (Gummow, Hayne, Crennan, Bell JJ), 231-232 [237]-[239] (Kiefel J).

[6] *Plaintiff M70* (2011) 244 CLR 144 at 189 [89] (Gummow, Hayne, Crennan, Bell JJ), 230 [233] (Kiefel J).

[7] Such a practical consequence is recognised in the Ministerial determination under s 198AE referred to in [26] (fn 8) of the Defendants' Submissions.

[8] See *Plaintiff M68* (2016) 257 CLR 42 at 85-86 [96]-[98] (Bell J).

[9] *Cf.* Defendants' Submissions, [32].

9. The approach adopted by Gaudron J in *Lim* was different from the joint reasons that 'reflect the principles for which the case stands as authority'.[10] Under those principles, a law authorising detention of non-citizens by the executive will be valid only if the detention is incidental to the purposes of removal from or entry to Australia.[11] Otherwise, detention will necessarily have a punitive character and will infringe Chapter III.[12] That default characterisation is important because of, amongst other things, the difficulties in distinguishing between punitive and non-punitive purposes.[13]

10. Accordingly, other than in exceptional cases, involuntary detention in custody by the executive is punitive and is permissible only as an incident of or a consequential step in the adjudgment and punishment of criminal guilt.[14] While the categories of exceptional cases are not closed, those which have so far been recognised were all 'well established at the time of the adoption of the *Constitution*'.[15] In so far as a non-citizen can be subject to 'non-punitive processes' as a result of that status,[16] detention for such purposes is not at large. One could not simply confer a power on the executive to detain any non-citizen present in Australia, whether in order to 'segregate' them from the Australian community or otherwise. Any such 'segregation' must be incidental to a permissible purpose (*eg* pending admission or removal), and is not an end in itself.

Validity of the impugned provisions

11. As is acknowledged by the defendants,[17] the plaintiffs' detention takes its character from the powers of which it is an incident. In the present case, this is the power under ss 198B and 198AH to bring them to Australia for so long as they need to be

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[10] *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [138] (Crennan, Bell and Gageler JJ); see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 32.

[11] *Plaintiff M76* (2013) 251 CLR 322 at 369 [138] (Crennan, Bell and Gageler JJ); see also *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [26]; *Plaintiff M68* (2016) 257 CLR 42 at 69-70 [40] (French CJ, Kiefel and Nettle JJ), 164 [395], fn 422 (Gordon J).

[12] *Plaintiff M68* (2016) 257 CLR 42 at 86 [98] (Bell J), 165 [400] (Gordon J); *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569 ('*NAAJA*') at 592 [37] (French CJ, Kiefel and Bell JJ), 611 [98] (Gageler J); *Al-Kateb v Godwin* (2004) 219 CLR 562 at 604-605 [110] (Gummow J).

[13] *NAAJA* (2015) 256 CLR 569 at 611 [98] (Gageler J); *Rich v Australian Securities and Investments Commission* 220 CLR 129 at 145 [32] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

[14] *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614 at 648 [108]-[109] (Gummow and Hayne JJ), 669-670 [193] (Kirby J). *Cf. Kruger v The Commonwealth* (1997) 190 CLR 1 at 110 (Gaudron J), cited in [30] of the Defendants' Submissions, but which does not represent the doctrine of this Court.

[15] *Vasiljkovic* (2006) 227 CLR 614 at 648 [109] (Gummow and Hayne JJ).

[16] *Cf.* Defendants' Submissions, [35].

[17] Defendants' Submissions, [34]. *See eg, Lim* (1992) 176 CLR 1 at 32 (Brennan, Deane and Dawson JJ); *Al-Kateb* (2004) 219 CLR 562 at 604 [110] (Gummow J).

here for the relevant temporary purpose. The purpose of their detention is the temporary purpose for which they need to be in Australia from time to time.[18] At least during that period, it is not detention for the purposes of the admission, exclusion or removal of aliens.

12. It cannot be said that a transitory person who needs to be in Australia for a temporary purpose is being detained for the purposes of (or 'pending') his or her ultimate removal at some future time.[19] Unlike in *Al Kateb*,[20] there is no extant obligation to remove the person as soon as reasonably practicable. Nor is there any analogy with the position of a person who is detained pending the completion of consideration whether to exercise a statutory power (such as s 46A) to permit him or her to make a valid visa application which may result in the grant of a visa.[21]

13. Other than the requirement that the purpose be 'temporary', in the sense of non-permanent (but still potentially lengthy or indeterminate), the defendants do not identify any other limit on the power conferred by s 198B(1), nor any criteria by reference to which such limits may be enforced.[22] Once brought to Australia, the duration of the detention of the transitory person turns on the subjective state of mind of an officer or officers, presumably different to the officer or officers who exercised the power to bring the person to Australia, concerning whether the person 'no longer needs to be in Australia' for the relevant purpose. The possibility of judicial supervision and enforcement of the limits of such detention is more theoretical than real.[23] In such circumstances, the duration of the plaintiffs' detention is within the discretion of the executive, and is not capable of objective determination by a court at any time and from time to time. This position is not the same as 'the case of an unlawful non-citizen generally',[24] where there is an existing duty to remove as soon as reasonably practicable which raises justiciable issues.

14. The so-called 'stark consequence' alluded to at paragraph 55 of the Defendants' Submissions is simply the orthodox position that is generally applicable to non-citizens outside Australia. There is nothing surprising about the proposition that, if

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[18] Contrary to [50]-[51] of the Defendants' Submissions, this does not conflate the purpose of the detention with the subjective purpose of the officer or officers who brought the plaintiffs to Australia.

[19] *Cf.* Defendants' Submissions, [48]-[49].

[20] *Al-Kateb* (2004) 219 CLR 562 at 638 [224] (Hayne J).

[21] *Cf.* Defendants' Submissions, [52]. See, *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319 at 341-342 [35], 351 [71]; *Plaintiff M76* (2013) 251 CLR 322 at 343 [30] (French CJ).

[22] *Cf.* Defendants' Submissions, [15]-[16].

[23] Even on the Defendants' Submissions at [23], it would be necessary to establish that it was not lawfully open to any officer to fail to be satisfied that the person no longer needed to be in Australia for the relevant purpose.

[24] *Cf.* Defendants' Submissions, [23].

the Commonwealth wishes to bring a non-citizen to Australia for a temporary purpose, it cannot place them in detention while that purpose subsists. The Commonwealth is not thereby constrained from permitting non-citizens to travel to and enter Australia.[25] The question is whether detention in custody for the duration of their stay can be lawfully imposed by the executive as a condition of such permission. In that regard, the protection of individual liberty is a central concern of the separation of powers under Chapter III of the Constitution.[26]

Part IV MISCELLANEOUS MATTERS

15. The particulars to paragraphs [10], [11], [17], [18] and [19] of the Amended Statement of Claim provide details of the material facts alleged, as opposed to the evidence by which those material facts are to be proved.[27] As such, those particulars form part of the 'constituent facts' of the cause of action by which the plaintiffs claim that their detention was and is invalid. They are not mere 'evidentiary statements' in the sense referred to in *South Australia v The Commonwealth*,[28] and should not be disregarded in determining the demurrer.

16. The plaintiffs note that, on or about 16 December 2016, the Minister for Immigration and Border Protection made a residence determination under s 197AB of the Act in relation to the plaintiffs. The effect of that determination is that, while the plaintiffs remain in immigration detention for the purposes of the Act (see s 197AC), they are no longer detained in custody at the MITA. Nevertheless, the questions raised by the demurrer remain live issues. The plaintiffs propose to seek leave to file a further amended statement of claim addressing the factual developments since the proceeding was commenced.

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[25] For example, if a person is required to give evidence in criminal proceedings, Div 4 of Part 2 of the Act provides for the grant of a criminal justice visa.

[26] *Plaintiff M68* (2016) 257 CLR 42 at 86 [97] (Bell J), referring to *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

[27] See *High Court Rules 2004*, r 27.04(b) and (d); *R v Associated Northern Collieries* (1910) 11 CLR 738 at 740-741 (Isaacs J).

[28] (1962) 108 CLR 130 at 142 (Dixon CJ).