PLAINTIFF M96A/2016 & ANOR v. COMMONWEALTH OF AUSTRALIA & ANOR (M96/2016)

Date demurrer referred to Full Court: 2 November 2016

The plaintiffs, a mother and daughter, are citizens of Iran. They arrived in Australia by boat at Christmas Island in August 2013. Being "unauthorised maritime arrivals" within the meaning of s 5AA of the *Migration Act 1958* (Cth) ('the Act'), they were detained under s 189(3) of that Act and were subsequently taken to Nauru in February 2014. On or about 1 November 2014, the plaintiffs were brought to Australia by Commonwealth officers for the purposes of medical treatment. They have received and continue to receive medical treatment in Australia. Pursuant to ss 46(1)(e)(iii) and 46B of the Act, the plaintiffs are not entitled to apply for a visa while they are in Australia.

On 16 December 2016 the plaintiffs were released from the Melbourne Immigration Transit Accommodation to a place specified in a Residence Determination made by the second defendant ('the Minister') under s 197AB of the Act. They currently reside at that place subject to the conditions of the Residence Determination.

The plaintiffs are seeking a declaration that their detention is unlawful and has been since 1 November 2014, on the basis that, insofar as they purport to authorise such detention, ss 189 and 196 of the Act are beyond power and invalid. They further assert that the Minister did not have power to make the Residence Determination as they were not lawfully detained under s 189 of the Act at the time the Determination was made.

The plaintiffs submit that their detention is not for any purpose connected with the executive power to permit non-citizens to enter and remain in Australia. This is because the plaintiffs have no right to make an application for a visa while they are in Australia, and have not at any time been the subject of any consideration whether to permit them to make a valid application for a visa. Nor is the plaintiffs' detention for the purpose of removing them from Australia. If the plaintiffs are not held in detention for the purposes of their admission to Australia or their expulsion or deportation from Australia, the purposes for which they are being detained by the defendants can only be connected with the purposes for which they were brought to Australia under s 198B. In the present case, these purposes are directly related to the physical and mental health of the plaintiffs. They submit that it cannot be said that administrative detention for such purposes satisfies the principle in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 (*Lim*). To keep the plaintiffs in detention is not conducive to the purpose of medical treatment, and is highly likely to be inimical to the fulfilment of that purpose. Detention in such circumstances is not for any of the three purposes identified by the plurality in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, and there is no warrant to extend the *Lim* principle to create a new category of permissible purposes for which the Executive may detain a non-citizen which would cover the present case.

Accordingly, the plaintiffs assert that to the extent that ss 189 and 196 of the Act purport to authorise the detention of a transitory person who has been brought to Australia for a temporary purpose under s 198B of the Act and who needs to be in Australia for that purpose, those provisions are beyond power and invalid.

The defendants have demurred to the plaintiff's claim on the grounds that none of the challenged provisions of the Act are invalid or beyond power and the detention of the plaintiffs has been authorised by the Act since 1 November 2014.

On 2 November 2016 Gordon J referred the demurrer for consideration by the Full Court.

Notices of Constitutional Matter have been served. At the time of writing no Attorney-General had filed a Notice of Intervention.