

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
B E T W E E N:**

No. M68 of 2015

PLAINTIFF M68/ 2015
Plaintiff

AND

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**MINISTER FOR IMMIGRATION AND
BORDER PROTECTION**
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

**TRANSFIELD SERVICES (AUSTRALIA)
PTY LTD (ACN 093 114 553)**
Third Defendant

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**ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL
FOR WESTERN AUSTRALIA (INTERVENING)**

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Defendants.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

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**PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND
LEGISLATION**

4. See Part VI of the plaintiff's submissions.



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PART V: SUBMISSIONS

5. In these submissions, the Attorney General for Western Australia addresses whether any power exercised by the Commonwealth or the Minister¹ in respect of the past circumstances of the plaintiff in Nauru and her apprehended circumstances if returned to Nauru, is 'contrary to Chapter III of the *Constitution*'.
6. No submission is put as to the plaintiff's standing in respect of any matter². The second, third, fourth and fifth questions in the Special Case relate solely to the plaintiff's past circumstances in Nauru as outlined at [66] – [72] of the Special Case (SCB at 18 – 19). All such facts occurred in Nauru. On this basis the Attorney General for Western Australia makes no submission as to whether the Commonwealth was authorised to so act by reason of s.61 of the *Constitution*³, or whether s.198AHA of the *Migration Act 1958* (Cth) is a law with respect to naturalization and aliens (*Constitution* s.51(xix)), immigration and emigration (*Constitution* s.51(xxvii)), external affairs (*Constitution* s.51(xxix)) or the relations of the Commonwealth with the islands of the Pacific (*Constitution* s.51(xxx)).
7. In respect of the second, third, fourth and fifth questions in the Special Case, as they relate to s.32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) read with r 16 and items 417.021, 417.027, 417.029 and 417.042 of Schedule 1AA to the *Financial Framework (Supplementary Powers) Regulations 1997* (Cth) – again, on the basis that the facts all occurred on Nauru, no submission is made as to whether these are laws with respect to the heads of power in ss.51(xix), (xxvii), (xxix) or (xxx) of the *Constitution*. In *Williams No 2*⁴, French CJ, Hayne, Kiefel, Bell and Keane JJ⁵ decided that the question of whether s.32B of the *Financial Framework (Supplementary Powers) Act* and r 16 of the *Financial Framework (Supplementary Powers) Regulations* are invalid as a delegation of legislative power, in the sense stated by Dixon J and Evatt J in *Dignan*⁶, need not be considered. In *Williams No 2* it was "enough" to consider whether the impugned laws were supported by a head of legislative power in respect of the challenged chaplaincy services agreement and payments⁷. As a broader 'Dignan contention' is not put by the plaintiff, the Attorney General for Western Australia does not address it⁸.
8. The facts relevant to the sixth question in the Special Case all relate solely to the plaintiff's future circumstances in Nauru should she be returned there. As such, the Attorney General for Western Australia makes no submission as to whether the Commonwealth would be authorised to so act by reason of s.61 of the *Constitution*,

¹ For ease, in these submissions, matters will be addressed on the basis that the Commonwealth is the relevant party, and a reference to the Commonwealth refers to the relevant defendant.

² See Special Case at [95], stated question for the Court 1 (SCB at 25 – 27).

³ See Special Case at [95], stated question for the Court 2(a) (SCB at 27).

⁴ *Williams v Commonwealth of Australia* [2014] HCA 23; (2014) 252 CLR 416.

⁵ Applying authorities such as *Lambert v Weichelt* (1954) 28 ALJ 282 at 283 (Dixon CJ); *Wurridjal v The Commonwealth* [2009] HCA 2; (2009) 237 CLR 309 at 437 [355] (Crennan J); *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51; (2009) 240 CLR 140 at 199 [141] (Hayne, Kiefel and Bell JJ).

⁶ *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan* [1931] HCA 34; (1931) 46 CLR 73 at 100–102 (Dixon J); 114–118 (Evatt J).

⁷ *Williams v Commonwealth of Australia* [2014] HCA 23; (2014) 252 CLR 416 at 457 [36].

⁸ This is not to concede that the question might not arise in a future case.

or whether s.198AHA of the *Migration Act* or s.32B of the *Financial Framework (Supplementary Powers) Act*, read with r 16 and items 417.021, 417.027, 417.029 and 417.042 of Schedule 1AA to the *Financial Framework (Supplementary Powers) Regulations* are laws with respect to the heads of power in ss.51(xix), (xxvii), (xxix) or (xxx) of the *Constitution*.

The Chapter III issue

9. The plaintiff's contentions require identification of the restrictions that are the circumstance of the Chapter III arguments.

The circumstances of detention that are not impugned

- 10 10. The core of it all is the pleaded Constraints Upon Liberty⁹. All such constraints relate to restrictions in Nauru. So, the detention of the plaintiff on 19 October 2013 when she was transferred to a Commonwealth vessel on the high seas¹⁰ is not impugned; nor the detention on the Commonwealth vessel while transferring her to Christmas Island¹¹. Similarly, her detention by the Commonwealth on Christmas Island pursuant to s.189(3) of the *Migration Act*¹² is not impugned¹³. Seemingly, the detention of the plaintiff while being transported from Christmas Island to Nauru is not impugned, on Chapter III grounds¹⁴.

The two impugned circumstances of detention

- 20 11. There appear to be two circumstances of detention that have excited the Chapter III contentions. The *first* is the pleaded Constraints Upon Liberty¹⁵, all of which occurred on Nauru¹⁶. In respect of these constraints, the plaintiff asserts that they are attributable to the Commonwealth, in the sense that the Commonwealth has "effective control of the imposition or enforcement of the Constraints Upon Liberty"¹⁷. The notion of 'effective control' by the Commonwealth of the 'imposition or enforcement' of the Constraints Upon Liberty requires a number of findings and characterisation of certain facts¹⁸. To the extent that any Constraints Upon Liberty or that anything that happens to the plaintiff in Nauru is attributable to the Commonwealth, this attribution is by reason of things done pursuant to "international arrangements" between Australia and Nauru¹⁹ and the contractual
30 arrangements described at [13] to [25] of the Special Case (SCB at 4 – 6).

⁹ Amended Statement of Claim at [15] (SCB at 881).

¹⁰ Special Case at [48(c)] (SCB at 15).

¹¹ Special Case at [48(d)] (SCB at 15).

¹² Her detention on Christmas Island was pursuant to s.189(3) and not another provision of s.189 because the Territory of Christmas Island is an "excised offshore place"; s.5(1) of the *Migration Act*.

¹³ Special Case at [48(i)] (SCB at 16).

¹⁴ Special Case at [49] and [50] (SCB at 16). The power being exercised by the Commonwealth was that pursuant to s.198AD(2) of the *Migration Act*.

¹⁵ Amended Statement of Claim at [15] (SCB at 881).

¹⁶ That this detention is challenged on this ground emerges from [35] of the Amended Statement of Claim (SCB at 898).

¹⁷ Amended Statement of Claim at [36] (SCB at 898 – 899).

¹⁸ This arises from the Amended Statement of Claim at [36] and the First and Second Defendants' Defence at [36], incorporating [32] (SCB at 898 – 899; 928 – 932).

¹⁹ See [7] – [10] in the Special Case (SCB at 2).

12. It is likely important to note that the Constraints Upon Liberty also occur by reason of the municipal law of Nauru, as administered by the government of Nauru, in the territory of Nauru. The Commonwealth could not 'effectively control' anything on Nauru other than pursuant to Nauruan law.

10 13. The impugned *second* circumstance of detention is understood to be the current constraints on the plaintiff in Australia by the Commonwealth for the apprehended return of the plaintiff to Nauru by the Commonwealth, where she will again be subjected to the Constraints Upon Liberty. As it is understood, the plaintiff's contention is not directed at the present constraints on the plaintiff in Australia, but that these constraints exist for the purpose of, and to facilitate, her return to Nauru, where she will again be subjected to the Constraints Upon Liberty²⁰. Determining the Commonwealth's purpose in respect of this detention is less clear²¹, but it is plain that the plaintiff's current circumstances, in Australia, are calculated to ensure that the plaintiff will be readily available to be returned to Nauru.

Further matters relevant to the characterisation of the plaintiff's circumstances

14. The plaintiff's contentions rely upon certain other matters that she contends are relevant to the Chapter III arguments.

20 15. The plaintiff positively asserts, and the Commonwealth denies, that the Constraints Upon Liberty contravene the municipal law of Nauru²². If the plaintiff's assertion is correct, there appears to be no impediment, on the facts agreed, to the plaintiff bringing proceedings in Nauru in respect of any such unlawfulness. Attachments 21, 22 and 23 to the Special Case²³ are decisions of the Supreme Court of Nauru in proceedings commenced by detainees at Nauru seeking (*inter alia*) writs of *habeas corpus* for unlawful detention contrary to Art 5 of the Nauruan *Constitution*. Attachment 23 concerns proceedings in which the detainees also sought a direction for their release under the *Criminal Proceedings Act 1972* (Nr).

30 16. The plaintiff claims to be a refugee within the meaning of Article 1 of the Refugees Convention²⁴. Nauru is a party to the Refugees Convention²⁵. The plaintiff has applied to the relevant authority in Nauru to be recognised "by Nauru" as a refugee in terms of s.5 of the *Refugees Convention Act 2012* (Nr)²⁶.

²⁰ That upon return to Nauru the plaintiff will be subject to the Constraints Upon Liberty is admitted at the First and Second Defendants' Defence at [15(a)] (SCB at 919).

²¹ This is largely so because these submissions are filed at the same time as the submissions of the Commonwealth.

²² This would appear to be an effect of the plea at [42] and [43] of the Amended Statement of Claim and the First and Second Defendants' Defence at [42] and [43] (SCB at 901 – 902; 934).

²³ SCB at 564 – 604.

²⁴ Amended Statement of Claim at [2(c)] (SCB at 875). The Commonwealth admits this; First and Second Defendants' Defence at [2(c)] (SCB at 906).

²⁵ This is inferred from [51(b)] of the Special Case and from [15(c)] of the First and Second Defendants' Defence (SCB at 16; 920).

²⁶ Special Case at [51(b)] (SCB at 16).

17. The long title to the *Refugees Convention Act* relevantly states that it is an Act to give effect to the Refugees Convention²⁷. Section 5 of the *Refugees Convention Act* establishes a regime by which the plaintiff can apply to be recognised as a refugee²⁸. Section 6 requires the decision maker to determine whether an applicant is recognised as a refugee or is owed complimentary protection²⁹.
18. The Act also establishes a regime for merits review by the Refugee Status Review Tribunal of (relevantly) a decision of the administrative decision maker that a person is not to be recognised as a refugee or is not owed complimentary protection³⁰. The Act also provides for a right to appeal to the Supreme Court of Nauru on a point of law against any decision by the Tribunal that a person is not recognised as a refugee³¹. Finally, s.44(c) of the *Appeal Act 1972* (Nr) provides that an appeal lies to the High Court of Australia, with the leave of the High Court, against any judgment, decree or order of the Supreme Court in the exercise of this appellate jurisdiction.
19. On these facts there can be no basis for the Court to find that the plaintiff will not have her claim to being a refugee determined³².

The relevance of "judicial control of detention"

20. At [45] of her submissions the plaintiff asserts that the lawfulness of extra-judicial detention "depends on the availability of effective judicial control of the detention". No authority is cited for this proposition in the context of the detention of non-citizens. Even if it is the case, as the plaintiff contends³³, that the extra-territorial nature of extra-territorial detention impairs aspects of "judicial control", it is not precluded. Judicial power is routinely exercised by Australian courts over foreign defendants.
21. Further, if, as the plaintiff contends, her detention is attributable to the Commonwealth, in the sense that the Commonwealth has "effective control of the imposition or enforcement of the Constraints Upon Liberty"³⁴, then there is no reason to doubt that she can bring proceedings against the Commonwealth in this Court's original jurisdiction. If the plaintiff's detention is attributable to the

²⁷ Being the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951: s.3 of the *Refugees Convention Act*.

²⁸ Defined in s.3 of the *Refugees Convention Act* as a person who is a refugee under the Refugees Convention as modified by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967.

²⁹ Defined in s.3 of the *Refugees Convention Act* as protection for people who are not refugees as defined in the *Refugees Convention Act*, but who also cannot be returned or expelled to the frontiers of territories where this would breach Nauru's international obligations.

³⁰ *Refugees Convention Act* s.31.

³¹ *Refugees Convention Act* s.43.

³² In this respect, the Commonwealth legislative provisions and power impugned in this matter operate in a different factual context to that considered in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*; *Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144. The power impugned there enabled the Commonwealth to send an Australian non-citizen to a country that was not a party to the Refugee Convention and did not recognise the status of refugees in its municipal law; see 170 [30] (French CJ).

³³ Plaintiff's Submissions at [46].

³⁴ Amended Statement of Claim at [36] (SCB at 898 – 899).

Commonwealth, even though she is a non-citizen, there is no reason to doubt that the plaintiff can invoke the jurisdiction of the High Court under ss.75(iii) and (v) of the *Constitution* if and when any detention becomes unlawful³⁵.

22. The plaintiff's argument that extra-territorial detention limits "the role" of "Australian tort law" "in ensuring respect for the limits imposed by the Australian *Constitution*"³⁶ pre-supposes that this such 'ensuring' is a role of "Australian tort law". Further, the only "limit" is that which emerges from *Regie National des Usines Renault SA v Zhang*³⁷, applying the *lex loci delicti* as the applicable law. As decisions such as *Blunden v Commonwealth*³⁸ illustrate, the common law of Australia can adapt to develop relevant choice of law rules, if required.

The centrality of purpose for detention

23. As explained in *Plaintiff S4*³⁹, since *Chu Kheng Lim*, in determining whether executive detention of non-citizens is lawful, "it will always be necessary to identify the purpose for the detention" and lawfulness is determined (or "limited by") the purpose of detention. *Plaintiff S4*, drawing upon *Chu Kheng Lim*, identified three lawful purposes: removal from Australia; receiving, investigating and determining an application for a visa by an alien; or determining whether to permit a valid application for a visa⁴⁰. Obviously, formulations in judgments of such (lawful) purposes are not Talmudic nor the words of a statute; and the words used depend upon context, including the factual circumstances of the matters in which such judgments are given.

Purpose here

24. It is for the Commonwealth to articulate its purpose (if relevant) to its participation (if found) in the Constraints Upon Liberty in Nauru. There may be an issue in this, particularly as, to the extent that such constraints are attributable (in part) to the Commonwealth and (in part) to the government of Nauru, there may be different purposes⁴¹.

³⁵ *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53; (2013) 251 CLR 322 at 369-370 [139] (Crennan, Bell and Gageler JJ). See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs & Anor* [1992] HCA 64; (1992) 176 CLR 1 at 19-20 (Brennan, Deane and Dawson JJ).

³⁶ Plaintiff's Submissions at [46].

³⁷ *Regie National des Usines Renault SA v Zhang* [2002] HCA 10; (2002) 210 CLR 491.

³⁸ *Blunden v Commonwealth* [2003] HCA 73; (2003) 218 CLR 330.

³⁹ *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34; (2014) 253 CLR 219 at 231 [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

⁴⁰ *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34; (2014) 253 CLR 219 at 231 [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

⁴¹ This can be seen in Paragraph [15(c)] of the First and Second Defendants' Defence that pleads purpose in Nauru (SCB at 920). Paragraph [5] of the Plaintiff's Reply to the First and Second Defendants' Defence, incorporating [42] of the Amended Statement of Claim, puts this purpose in issue (SCB at 968; 901 – 902). Particular (ii) of [42] of the Amended Statement of Claim in effect asserts that the Constraints Upon Liberty are not imposed in Nauru by the government of Nauru "for the purpose of effecting the plaintiff's expulsion, extradition or other lawful removal from Nauru" (SCB at 901).

25. In the absence of such articulation⁴², the plaintiff essentially reasons that there are three lawful purposes of executive detention (described in *Plaintiff S4*⁴³), and that the plaintiff's detention in Nauru, past and future, is not for one of these purposes.

The first *Plaintiff S4* purpose

26. The plaintiff appears to accept that executive detention for "the purpose of removal from Australia" is lawful⁴⁴ but that the Commonwealth's participation in the Constraints Upon Liberty in Nauru is not for this purpose – because that purpose was effected, or wholly effected, by transport to Nauru⁴⁵.

10 27. This reasoning should not be accepted. It is not an answer to the characterisation of the Commonwealth's participation in the Constraints Upon Liberty in Nauru as being for the purpose of removal from Australia, to contend that there are other ways in which the plaintiff could be removed from Australia.

28. In *Plaintiff S4*, citing all of the judgments in *Chu Kheng Lim*⁴⁶, the Court prescribed the necessary link with a valid purpose as; detention "limited to what was reasonably capable of being seen as necessary for" (in this matter) removal from Australia⁴⁷. It is not the detention itself which must meet this test, but rather that the period of detention be limited to the time necessarily taken in administrative processes directed to that purpose⁴⁸.

20 29. This formulation of "reasonably capable of being seen as necessary for" necessarily introduces political judgment as to means. It is difficult to conceive of how the Court could substitute its judgment that removal to and detention in Nauru was not necessary to enable the plaintiff to be removed from Australia.

30. A means of removing the plaintiff from Australia was to find a country that would take and accommodate her. Here, the terms of this taking and accommodation included the Constraints Upon Liberty. These physical constraints are no more onerous than constraints that have been (and are) lawfully imposed on non-citizens in Australia.

⁴² These submissions are filed at the same time as those of the Commonwealth.

⁴³ *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34; (2014) 253 CLR 219 at 231 [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

⁴⁴ Plaintiff's Submissions at [81].

⁴⁵ Plaintiff's Submissions at [81].

⁴⁶ See *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34; (2014) 253 CLR 219 at 231 [26], fn. 42 (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

⁴⁷ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs & Anor* [1992] HCA 64; (1992) 176 CLR 1 at 33 (Brennan, Deane and Dawson JJ, with whom Mason CJ relevantly agreed, at 10); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53; (2013) 251 CLR 322 at 369 [138] (Crennan, Bell and Gageler JJ); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34; (2014) 253 CLR 219 at 231 [26]; 233 [34].

⁴⁸ *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53; (2013) 251 CLR 322 at 369 [139] (Crennan, Bell and Gageler JJ); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34; (2014) 253 CLR 219 at 232 [28]-[29]; 233 [34]. See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs & Anor* [1992] HCA 64; (1992) 176 CLR 1 at 33-4 (Brennan, Deane and Dawson JJ, with whom Mason CJ relevantly agreed, at 10).

31. If, as the plaintiff contends, the Commonwealth has participated in the Constraints Upon Liberty, it cannot be doubted that a purpose of the Commonwealth in doing so was to facilitate the plaintiff's removal from Australia. Plainly, it is easier for the Commonwealth to remove the plaintiff from Australia, and send her to Nauru, if the Commonwealth assists the government of Nauru in the manner that it has.

32. The observation of Hayne J in *Plaintiff M76/2013*⁴⁹ is relevant:

10 A law which requires the detention of a person who has no permission to travel to and enter Australia and no permission to remain in Australia until that person is removed from Australia does not constitute any exercise of the judicial power of the Commonwealth, regardless of whether removal can be seen to be reasonably practicable in the foreseeable future. It is a law within the legislative powers of the Parliament and is valid. Whether it is thought to be a good law or a bad law, a fair law or an unfair law, or a law that is consistent with basic tenets of common humanity is a matter for the Parliament and "the people of the Commonwealth", not for the courts.

33. Similarly, the following observation by Kiefel and Keane JJ in *Plaintiff M76/2013*⁵⁰ relates:

20 That a less stringent regime might have been adopted by the Parliament does not deny the competence of the Parliament to establish the regime for which the Act provides.

The other *Plaintiff S4* purpose/s

34. In her submissions at [82] the plaintiff submits that the Commonwealth's participation in the Constraints Upon Liberty in Nauru is not for the purposes of receiving, investigating and determining an application for a visa by the plaintiff; or for determining whether to permit her to apply for a visa. Having regard to the reasoning at [43(e)] of the plaintiff's submissions, the plaintiff's contention is best understood to be that detention is only lawful where the purpose is to facilitate receiving, investigating and determining an application for a visa by the plaintiff to remain in Australia or to determine whether to permit her to apply for a visa to remain in Australia.

35. Although judgments can be found in which reference is made (say) to detention to "consider and grant permission to remain in Australia"⁵¹ such statements are to be understood as arising from the facts of particular cases; applicants were detained in Australia and sought to remain in Australia. The judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim* is not the words of a statute.

⁴⁹ *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53; (2013) 251 CLR 322 at 367 [130] (Hayne J).

⁵⁰ *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53; (2013) 251 CLR 322 at 385 [208] (Kiefel and Keane JJ).

⁵¹ For example, *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53; (2013) 251 CLR 322 at 370 [140] (Crennan, Bell, Gageler JJ).

36. The plaintiff's proposition can be tested by considering some of its implications. If correct, detention of an alien who travels to Australia by boat, with the intention of transiting through Australia to apply for a visa to settle in New Zealand, would infringe Chapter III. An Act of the Commonwealth Parliament that empowered the Commonwealth executive to pay money to Hungary to assist to facilitate refugee processing that involved constraints on liberty in Hungary of aliens intending to apply for a visa to settle in Germany, would infringe Chapter III (assuming that such financial support attributed such constraints to the Commonwealth). Detention of an alien who does not have an intention to remain in Australia would infringe Chapter III.
37. The plaintiff's reformulation of the prescriptions of valid purposes of an alien's detention – to limit them to determining an application by a non-citizen to remain in Australia – has no warrant. The prescription of Brennan, Deane and Dawson JJ in *Chu Kheng Lim*⁵², referring to detention "limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered"⁵³, is an allusion to the invariable circumstance of non-citizens coming to Australia and seeking to remain in Australia.
38. At their base, prescriptions of the circumstances of lawful detention of non-citizens or aliens by the Commonwealth recognise the purpose of restraining non-citizens from "entering the Australian community"⁵⁴, or entering the territory of Australia, until their lawful entitlement to do so has been determined according to Australian law.
39. In this matter, the plaintiff is a Bangladeshi who is unwilling to return to Bangladesh⁵⁵. She is an Australian non-citizen and can be detained by the Commonwealth to preclude her from entering the Australian community until any entitlement that she has to do so is determined. If she does not wish to enter Australia no doubt this could be made plain.
40. Of the questions stated for the Court to which submissions have been directed, they should be answered as follows:
- (5) The statutory provisions referred to in questions (4)(b) and (c) are not invalid by reason that they infringe the exclusive vesting of judicial power by Chapter III of the *Constitution* in courts.
 - (9) The statutory provisions referred to in questions (8)(b) and (c) are not invalid by reason that they infringe the exclusive vesting of judicial power by Chapter III of the *Constitution* in courts.

⁵² That "reflect[s] the principles for which the case stands as authority", see *Re Woolley; Ex parte Applicants M276/2003* [2004] HCA 49; (2004) 225 CLR 1 at 11 [14] (Gleeson CJ).

⁵³ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs & Anor* [1992] HCA 64; (1992) 176 CLR 1 at 33.

⁵⁴ *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 at 584 [45] (McHugh J).

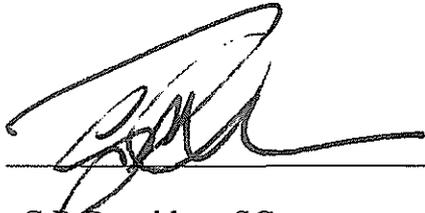
⁵⁵ Special Case at [48(a)]; [51(a)] (SCB at 15; 16).

PART VI: LENGTH OF ORAL ARGUMENT

41. It is estimated that the oral argument for the Attorney General for Western Australia will take no more than 20 minutes.

Dated: 18 September 2015

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