

PLAINTIFF S156/2013 v THE MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR (S156/2013)

Date writ of summons filed: 20 August 2013

Date case stated and questions reserved for Full Court: 10 February 2014

These proceedings challenge the constitutional validity of provisions in the *Migration Act 1958* (Cth) (“the Act”) that permit the removal of a certain class of non-citizens from Australia to a “regional processing country”. The validity of certain administrative decisions made under those provisions is also challenged.

Section 198AD of the Act applies to persons who are subject to immigration detention as “unlawful non-citizens” who are also “unauthorised maritime arrivals” within the meaning of the Act. The section requires such persons to be taken to a “regional processing country”. If there are two or more such countries, s 198AD(5) requires the Minister for Immigration and Border Protection (“the Minister”) to give a written direction specifying the country to which a particular person or class of persons is to be taken.

Section 198AB of the Act permits the Minister to declare that a country is a “regional processing country”. The only condition for the making of such a declaration is that the Minister thinks it is in the national interest. That is after the Minister has had regard to whether the country has given any assurances, in respect of a person taken under s 198AD, that: (1) it will not expel the person to a country where his or her life or freedom would be threatened (on account of certain criteria); and (2) it will permit an assessment of whether the person is a refugee within the meaning of Article 1A of the Refugees Convention. Any such assurances need not be legally binding.

On 10 September 2012 the Minister designated Nauru a regional processing country under s 198AD(1) of the Act. On 9 October 2012 the Minister also designated Papua New Guinea (“PNG”) a regional processing country (“the Designation”).

The Plaintiff is a citizen of Iran. On 23 July 2013 he arrived on Christmas Island by boat, as both an “unlawful non-citizen” and an “unauthorised maritime arrival” within the meaning of the Act. The Plaintiff claimed refugee status on the basis of his fear of persecution in Iran as a member of a certain Sufi order. He was prevented however from applying for a protection visa by s 46A(1) of the Act.

On 29 July 2013 the Minister issued a direction under s 198AD(5) of the Act that persons such as the Plaintiff should be taken to either PNG or Nauru (“the Taking Direction”). On 2 August 2013 a decision was made by a relevant officer under the Act that the Plaintiff be taken from Australia to PNG (“the Taking Decision”). He was then taken to Manus Island in PNG.

On 20 August 2013 the Plaintiff commenced proceedings for orders to set aside the Designation and to compel the Minister and/or the Commonwealth to return him to Australia. By further amended statement of claim filed on 23 December

2013, the Plaintiff also seeks to set aside the Taking Direction and the Taking Decision.

On 10 February 2014 Chief Justice French stated a case and reserved for the consideration of the Full Court the following questions:

1. Is s 198AB of the *Migration Act 1958* (Cth) invalid on the ground that it is not supported by any head of power in s 51 of the Constitution?
2. Is s 198AD of the *Migration Act 1958* (Cth) invalid on the ground that it is not supported by any head of power in s 51 of the Constitution?
3. Is the Minister's designation that PNG is a regional processing country made on 9 October 2012 under s 198AB of the *Migration Act 1958* (Cth) invalid?
4. Is the Minister's direction made on 29 July 2013 under s 198AD(5) of the *Migration Act 1958* (Cth) invalid?
5. Are these proceedings otherwise able to be remitted for determination in the Federal Court of Australia or the Federal Circuit Court of Australia?
6. Who should pay the costs of and incidental to this Stated Case?

On 27 February 2014 the Plaintiff filed a Notice of a Constitutional Matter. At the time of writing, no Attorney-General had informed the Court of an intention to intervene in these proceedings.