HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

PLAINTIFF M96A/2016 & ANOR PLAINTIFFS

AND

COMMONWEALTH OF AUSTRALIA & ANOR DEFENDANTS

Plaintiff M96A/2016 v Commonwealth of Australia
[2017] HCA 16
3 May 2017
M96/2016

ORDER

1. The demurrer be allowed.

2. The proceeding be dismissed.

3. The plaintiffs pay the defendants' costs.

Representation

C J Horan QC with F I Gordon for the plaintiffs (instructed by Victoria Legal Aid)

S P Donaghue QC, Solicitor-General of the Commonwealth with P D Herzfeld for the defendants (instructed by Australian Government Solicitor)

CATCHWORDS

Plaintiff M96A/2016 v Commonwealth of Australia

Migration – Unlawful non-citizens – Power to detain – Where plaintiffs unauthorised maritime arrivals – Where plaintiffs brought to Australia from regional processing country for temporary purpose of medical treatment – Where plaintiffs detained under ss 189 and 196 of *Migration Act* 1958 (Cth) until removal from Australia – Whether ss 189 and 196 validly authorise detention while in Australia for temporary purpose – Whether plaintiffs detained for lawful purpose – Whether duration of detention capable of objective determination.

Words and phrases – "detention of non-citizen", "duration of detention", "opinion, satisfaction or belief of officer", "purpose of detention", "temporary purpose", "transitory person", "unauthorised maritime arrival", "unlawful non-citizen".

Constitution, s 51(xix).
Migration Act 1958 (Cth), ss 189, 196, 198, 198AD, 198AH, 198B.

1 KIEFEL CJ, BELL, KEANE, NETTLE, GORDON AND EDELMAN JJ. The issue on this demurrer is the validity of ss 189 and 196 of the *Migration Act* 1958 (Cth) ("the Act") to the extent that those provisions purport to authorise the detention of a non-citizen who is brought to Australia for a temporary purpose from a place such as a regional processing country. Those sections are part of a suite of provisions in the Act, including provisions inserted in 2002[1] and 2012[2], which is relied upon by the defendants as a source of authority to detain the plaintiffs for the period that they are temporarily in Australia for medical treatment, having been brought to Australia from the Republic of Nauru.

2 The plaintiffs' case is confined in a number of respects. They do not challenge the lawfulness of their detention when they arrived in Australia at Christmas Island. They do not challenge the lawfulness of their removal from Australia to Nauru or the regional processing arrangements[3]. They do not challenge the lawfulness of the power in the Act by which they were brought back to Australia for the temporary purpose of medical treatment. Nor do they challenge the provisions of the Act which empower officials to remove them from Australia when they no longer need to be in Australia for that temporary purpose. The plaintiffs' challenge is limited to their claim that there is no basis for their detention whilst they are temporarily in Australia. They say that if a non-citizen is brought to Australia for a temporary purpose under the Act, then the non-citizen cannot be detained in Australia because the purported power to do so under ss 189 and 196 of the Act is an invalid exercise by the Executive of the judicial power of the Commonwealth. That submission must be rejected.

The pleaded claim

3 The pleaded claim of the plaintiffs is as follows. The plaintiffs, a mother and her daughter, are Iranian citizens. On 7 August 2013, they arrived in Australia at Christmas Island. In February 2014, the plaintiffs were taken to Nauru, where they were detained with the other members of their family. They

---

1 *Migration Legislation Amendment (Transitional Movement) Act* 2002 (Cth).

2 *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012 (Cth).

3 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28; [2014] HCA 22; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42; [2016] HCA 1.

claimed to be owed protection obligations under the Convention relating to the Status of Refugees[4].

4 On 1 November 2014, the plaintiffs were brought to Australia from Nauru. Both were brought to Australia for the purposes of medical treatment. The second plaintiff was also brought to Australia to accompany her daughter. They were not told that they would be held in a detention facility in Australia, or for how long they would remain in Australia. The plaintiffs were initially detained in Darwin, and then transferred to the Melbourne Immigration Transit Accommodation in Victoria on 10 November 2014.

5 On 16 December 2016, the plaintiffs were released from detention at the Melbourne Immigration Transit Accommodation, after the Minister made a residence determination, under s 197AB of the Act, permitting them to reside at a specified place subject to conditions. A residence determination can be made in relation to a person who is detained, or required or permitted to be detained, under s 189 of the Act. No submissions were made about the effect of a residence determination generally, or its effect on the detention of the plaintiffs. The plaintiffs accepted in oral argument that they did not challenge the residence determination other than to challenge its precondition, being the validity of s 189 of the Act.

6 It is unnecessary[5] on this demurrer to descend into the particulars containing the evidence of the medical conditions, or the medical treatment, of each plaintiff whilst they are in Australia. It suffices to consider the demurrer on the pleaded basis that the plaintiffs (i) have needed to be in Australia since they arrived for the purposes for which they were brought; (ii) have not had any right to make an application for a visa while they have been in Australia; and (iii) have not, at any time, been the subject of any ministerial consideration as to whether they should be permitted to make a valid application for a visa.

7 The plaintiffs challenged their detention in Australia on two grounds. First, they submitted that ss 189 and 196 of the Act cannot support their detention whilst in Australia because detention pursuant to those sections is not necessary,

---

4 Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

5 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142; [1962] HCA 10; *Levy v Victoria* (1997) 189 CLR 579 at 597, 649; [1997] HCA 31.

nor reasonably capable of being seen as necessary, for any legitimate non-punitive purpose for which the Executive may be validly authorised to detain a non-citizen. Secondly, they submitted that the duration of their detention in Australia has not been capable of objective determination by a court at any material time. It is necessary to set out the scheme of the Act in relation to persons in the position of the plaintiffs before addressing each of these submissions.

The operation of the Act upon the plaintiffs

8 It is unnecessary in this case to conduct an exhaustive examination of the provisions of the Act. The operation of many of the provisions of the Act has been considered in other cases in this Court[6]. The provisions of the Act which are of particular relevance to this case are those which are concerned with the plaintiffs as "transitory persons".

9 When the plaintiffs arrived at Christmas Island, they were classified as "unauthorised maritime arrivals", as defined in s 5AA of the Act. This was because they entered Australia by sea at an "excised offshore place" (within the meaning in s 5(1), which includes Christmas Island), they were "unlawful non-citizens" (within the meaning in s 14, read with s 13), and they were not "excluded maritime arrivals" (within the meaning in s 5AA(3)).

10 Divisions 7 and 8 of Pt 2 of the Act comprise, respectively, ss 188 to 197AG and ss 197C to 199. It is the provisions of those two Divisions which have governed the manner of treatment of the plaintiffs. The two Divisions are respectively entitled "Detention of unlawful non-citizens" and "Removal of unlawful non-citizens etc".

11 When the plaintiffs arrived at Christmas Island, they were detained under s 189(3) of the Act. That sub-section provides, subject to exceptions which are not presently relevant, that an officer (as defined) must detain a person who is in an excised offshore place if the officer knows or reasonably suspects that the person is an unlawful non-citizen. Section 198AD(2) of the Act then provides that an officer must, as soon as reasonably practicable, take an unauthorised

---

6 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319; [2010] HCA 41; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219; [2014] HCA 34.

maritime arrival to whom the section applies from Australia to a regional processing country. Since the plaintiffs were classified as "unauthorised maritime arrivals" they were taken to Nauru, which is a regional processing country.

12 Section 198B of the Act provides that an officer may, for a temporary purpose, bring a transitory person to Australia from a country or place outside Australia. The plaintiffs fell within the definition of "transitory person" in s 5(1) because they were people who had been taken to a regional processing country under s 198AD. Examples of the "exceptional situations" where a temporary purpose might lead to a transitory person being brought to Australia were given in the Revised Explanatory Memorandum to the legislation which introduced s 198B of the Act[7]. Those examples were[8]: medical treatment for a condition which cannot be adequately treated in the place where the person has been taken; trials at which the person is to provide evidence in the prosecution of people smugglers; or transit through Australia to a country of origin or to a third country. In this case the temporary purpose was medical treatment.

13 The power to bring a transitory person to Australia for a temporary purpose under s 198B is an exception to the prohibition upon a non-citizen travelling to Australia "without a visa that is in effect": s 42(1), (2A)(ca). Unless the Minister determined otherwise, if the plaintiffs made an application for a visa while in Australia, that application would not be valid: s 46B(1)-(2).

14 Division 8 of Pt 2 of the Act creates a regime for removal of persons from Australia. Two of the central provisions in this regime which are relevant to transitory persons are ss 198AD and 198. Section 198AD(2) provides that an officer "must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country". Section 198(1) provides that an officer must remove an unlawful non-citizen as soon as reasonably practicable when that person "asks the Minister, in writing, to be so removed". These two provisions do not have concurrent operation because s 198AD applies to unauthorised maritime arrivals, and s 198(11) provides that s 198 does not apply to an unauthorised maritime arrival

---

7 *Migration Legislation Amendment (Transitional Movement) Act* 2002 (Cth).

8 Australia, Senate, Migration Legislation Amendment (Transitional Movement) Bill 2002, Revised Explanatory Memorandum at 2.

to whom s 198AD applies. In other words, the provisions of s 198 will only apply where s 198AD does not apply.

15 Section 198AD of the Act applies, with various qualifications, to unauthorised maritime arrivals who are detained under s 189. Section 198AH lists requirements that must be satisfied before s 198AD will apply to a transitory person. The requirements include that the transitory person (i) is an unauthorised maritime arrival who has been brought to Australia from a regional processing country under s 198B for a temporary purpose (s 198AH(1A)(a)); (ii) is detained under s 189 (s 198AH(1A)(b)); and (iii) no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved) (s 198AH(1A)(c)).

16 Section 198 will apply to a person who is an unlawful non-citizen within s 198 but not to an "unauthorised maritime arrival" within s 198AD. The category of unlawful non-citizens is broader than unauthorised maritime arrivals because, by ss 13 and 14 of the Act, an unlawful non-citizen is any non-citizen in the migration zone who does not hold a visa. However, as the plaintiffs were unauthorised maritime arrivals, the provisions of s 198 only apply to them where s 198AD does not apply. One circumstance where s 198AD will not apply is where a transitory person still needs to be in Australia for a temporary purpose. While that need to be in Australia is present, as it is for the plaintiffs on their pleaded case, s 198AD will not apply and the operation of s 198 is not excluded by s 198(11). Hence, while a person needs to be in Australia for a temporary purpose, the person can nevertheless request to be removed from Australia under s 198(1) of the Act. Contrary to the plaintiffs' submissions, there is nothing illogical about a construction which permits a person who is taken to Australia for a temporary purpose such as consensual medical treatment to request removal from Australia. As to the scope of s 198(1), and in circumstances where it does not affect the ultimate conclusion in this case, it is sufficient to proceed on the basis of the defendants' submission that s 198(1), properly construed by reference to its consensual character, would not permit removal of an unlawful non-citizen to a place contrary to his or her wishes.

17 Apart from where a transitory person needs to be in Australia, there are other circumstances in which s 198AD will not apply. In broad terms, these include where there is no regional processing country (s 198AF); where a regional processing country has advised an officer in writing that the country will not accept the unauthorised maritime arrival (s 198AG); or where the Minister determines that s 198AD does not apply (s 198AE).

18 In every circumstance where s 198AD does not apply and where an unlawful non-citizen is brought to Australia for a temporary purpose, s 198(1A) imposes an obligation upon an officer to "remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for [the temporary] purpose (whether or not the purpose has been achieved)". The combination of ss 198(1A) and 198AD(2) means that any transitory person who is brought to Australia for a temporary purpose must be removed as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved). As we explain below, the Act has the effect that the person will be kept in immigration detention whilst in Australia (s 189). That immigration detention must continue until the time of removal from Australia under s 198(1A) (s 196(1)(a)), or until the commencement of acts involving the process of removal from Australia to a regional processing country under s 198AD(3) (s 196(1)(aa)).

The validity of ss 189 and 196 of the Act in relation to transitory persons

19 Section 189(1) creates an obligation upon an officer to detain a person who is in the migration zone if the officer knows or reasonably suspects that the person is an unlawful non-citizen. Section 196(1) provides that an unlawful non-citizen must be kept in immigration detention until the happening of one of four events: (i) removal from Australia under s 198 or s 199; (ii) an officer beginning the s 198AD(3) process for removal to a regional processing country; (iii) deportation under s 200; or (iv) the grant of a visa.

20 In the case of a transitory person, therefore, the detention must continue until: (i) removal under s 198 (the first event); (ii) the beginning of the process of removal to a regional processing country under s 198AD (the second event); or (iii) the making by the Minister of a determination under s 46B(2), allowing an application for a visa, which is then made and granted. In the case of each of the first or second event, under ss 198 and 198AD, it is a condition that removal must occur as soon as reasonably practicable after the person no longer needs to be in Australia for the temporary purpose.

21 As has been reiterated on a number of occasions in this Court[9], the majority in *Chu Kheng Lim v Minister for Immigration*[10] said that laws with respect to aliens within s 51(xix) of the Constitution, which authorise or require the Executive to detain non-citizens in custody, will not contravene Ch III of the Constitution if, and only if, "the detention which they require and authorize is 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"[11]. This requires two matters to be considered. First, it requires the purpose of the detention to be identified[12]. Secondly, it requires consideration of the time necessarily involved in the particular case to deport the non-citizen or to receive, investigate, consider, and determine an application for permission to remain in Australia[13]. The plaintiffs submitted that ss 189 and 196 of the Act were invalid for two reasons, corresponding to limits upon each of these considerations.

The purpose of detention of transitory persons brought to Australia under s 198B

22 As the plaintiffs accepted in oral submissions, the purpose of immigration detention is assessed objectively by reference to all of the circumstances. In *Plaintiff S4/2014 v Minister for Immigration and Border Protection*[14], this Court said that "detention under and for the purposes of the Act is limited by the purposes for which the detention is being effected". The Court added that the

---

9 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 11 [14], 13-14 [21]; [2004] HCA 49; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369 [138]; [2013] HCA 53; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [26].

10 (1992) 176 CLR 1; [1992] HCA 64.

11 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 33.

12 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 231 [26].

13 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369-370 [139].

14 (2014) 253 CLR 219 at 231 [26].

only lawful purposes of detention of non-citizens are: (i) removal from Australia; (ii) receiving, investigating, and determining an application for a visa permitting the alien to enter and remain in Australia; or (iii) determining whether to permit a valid application for a visa. It is sufficient to resolve this case on this basis, and unnecessary to address two further submissions made by the defendants. One of those submissions was that the list of permissible purposes of executive detention of non-citizens within Ch III of the Constitution is not closed and might extend beyond the three purposes identified above. The other was that the relevant distinction to be employed in order to determine whether a law authorising or requiring the Executive to detain non-citizens in custody is consistent with Ch III of the Constitution is a distinction between punitive and non-punitive purposes or, perhaps more accurately, between the purposes of punishment and other purposes.

23 The plaintiffs submitted that their detention in Australia was not for any of the three purposes identified above, each of which is connected with the executive power to permit non-citizens to enter and remain in Australia. They also submitted, correctly, that they have no right to make an application for a visa whilst they are in Australia. Hence, they submitted, they cannot be detained for purposes (ii) or (iii). They also submitted that while they need to be in Australia for the temporary purpose, their detention cannot be said to be for the purpose of removal from Australia (purpose (i)). Instead, they submitted, the purpose of their detention was the temporary purpose for which they were brought to Australia.

24 The plaintiffs' submission that their detention is for an impermissible purpose must be rejected. The temporary purpose for which a transitory person needs to be in Australia is not the same as the purpose for which that person is detained. It is unnecessary to determine whether the temporary purpose under the Act is a subjective purpose of the officers or whether it is a purpose which is objectively ascertained from the circumstances. In either case, that temporary purpose is different from the purpose of detention.

25 One circumstance which can illustrate the difference between the purpose of bringing a transitory person to Australia and the purpose of detention is where a transitory person is brought to Australia for medical treatment. The purpose of detention is not for medical treatment. Detention might even be antithetical to the medical treatment for which the person is brought to Australia.

26 Another way to highlight the difference between the temporary purpose of bringing the transitory person to Australia and the purpose of detention is to

recognise that the duration of the detention is not coterminous with the fulfilment of the purpose of bringing the person to Australia. A transitory person might be brought to Australia for medical treatment with equipment that is not available in the regional processing country. If that equipment later becomes available in the regional processing country then the person no longer needs to be in Australia for the temporary purpose. Section 198AH(1A)(c) then enlivens the operation of s 198AD. If no exception applies then s 198AD(2) requires an officer to take the person from Australia to the regional processing country as soon as reasonably practicable. The effect of s 196(1)(aa) is that the detention will come to an end when that process of removal begins under s 198AD(3) even if the purpose for which the person came to Australia (here, medical treatment) has not been fulfilled. Another instance where fulfilment of the purpose of coming to Australia might not coincide with the duration of the detention is if the person makes a request of the Minister, under s 198(1), to be removed from Australia. There is then a duty for that person to be removed irrespective of whether the purpose for which the person came to Australia has been fulfilled.

27 The purposes which the Act contemplates for the temporary detention in Australia of a transitory person are, therefore, different from the temporary purposes for which a person can be brought to Australia. The purposes of the temporary detention are the same purposes, and governed by some of the same provisions (ss 189 and 196), as all other instances involving unlawful non-citizens under s 189. In this case, where the plaintiffs have not made an application for a visa and cannot do so while they are in Australia, the purpose for which the plaintiffs are detained during their medical treatment is the purpose of subsequent removal from Australia. That removal can occur in a number of circumstances, including as soon as reasonably practicable after they no longer need to be in Australia for the medical treatment (s 198(1A) or s 198AD(2)), or as soon as reasonably practicable after asking the Minister, in writing, to be removed (s 198(1)).

28 Contrary to the submission of the plaintiffs, there is no contradiction between, on the one hand, a purpose of removal from Australia when preconditions are met (such as the desinence of a need to be in Australia) and, on the other hand, an immediate, but limited, privilege to remain in Australia. A comparison might be made with the detention in Australia of an unauthorised maritime arrival, who is precluded from applying for a visa by s 46A(1) of the Act, but whose detention is permitted subject to steps being taken to determine whether the person should nevertheless be permitted to apply for a visa by the

Minister exercising a power under s 46A(2)[15]. The purpose of potential removal is nevertheless one of the purposes of detention in this instance. While the Minister is considering the exercise of that power, the detention is for the purposes of determining whether to permit a valid application for a visa and, after the decision is made, either for removal or for the processing of the permitted application[16].

The duration of detention of transitory persons

29 The second basis upon which the plaintiffs submitted that ss 189 and 196 of the Act were invalid exercises by the Executive of the judicial power of the Commonwealth was that the sections permitted the detention of transitory persons for a time which was incapable of being objectively determined. The plaintiffs relied upon various passages from decisions in this Court in support of their submission[17], including *Plaintiff S4/2014 v Minister for Immigration and Border Protection*[18], where this Court said:

> "The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced[19] by the courts, and, ultimately, by this Court."

30 The plaintiffs submitted that the period of detention of transitory persons brought to Australia under s 198B is governed only by the question whether and when the person "no longer needs to be in Australia" for the relevant purpose and that this invalidated the detention. This was said to be for two reasons: first,

---

15 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 338 [25].

16 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 232 [27].

17 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219 at 232 [29]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 612 [99]; [2015] HCA 41; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 111 [184].

18 (2014) 253 CLR 219 at 232 [29].

19 *Crowley's Case* (1818) 2 Swans 1 at 61 [36 ER 514 at 531].

because the period of time for detention is not readily capable of objective determination by a court at any time, and from time to time; and secondly, because the temporal limits are not connected with the limited permissible purposes of administrative detention such that the power to detain is not unconstrained.

31 The first of these two alleged reasons for invalidity misunderstands the requirement that the duration of any form of detention must be capable of being determined at any time, and from time to time. The requirement, reinforced by the reference in *Plaintiff S4/2014 v Minister for Immigration and Border Protection* to the remarks of the Lord Chancellor in *Crowley's Case* about the need for the writ of habeas corpus ad subjiciendum, is that there must be objectively determinable criteria for detention. In other words, Parliament cannot avoid judicial scrutiny of the legality of detention by criteria which are too vague to be capable of objective determination. This would include an attempt to make the length of detention at any time dependent upon the unconstrained, and unascertainable, opinion of the Executive[20].

32 The duration of the detention of transitory persons who are detained under s 189 of the Act is able to be objectively determined at any time, and from time to time. At any time it can be concluded that detention in Australia will conclude if any of the various preconditions explained above are met. One precondition is that detention in Australia will come to an end under s 198(1) as soon as reasonably practicable after the transitory person asks the Minister, in writing, to be removed from Australia. Another precondition is that the person no longer needs to be in Australia for the temporary purpose. This precondition arises from the operation of either s 198(1A), or s 198AD(2) read with s 198AH(1A)(c). As we have explained, it is unnecessary to determine whether the criterion by which this precondition is to be assessed is whether the need still objectively exists or whether an officer has formed a genuine opinion that the person no longer needs to be in Australia for the temporary purpose. The plaintiffs did not submit that there would be any difference to validity based upon which construction was correct.

33 The second reason why the plaintiffs alleged that the duration of detention led to invalidity was also based upon a misconception. The plaintiffs' submission

---

20 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258; [1951] HCA 5.

that the temporal limits of detention are not connected with the limited permissible purposes of administrative detention assumed that the purpose of administrative detention in Australia was for medical treatment. Alternatively, the submission assumed that if the purpose of administrative detention was for removal it would be unlawful for the duration of detention to be predicated not on the effectuation of removal itself, but on an apparently unrelated factum: the need to be in Australia for the medical treatment. As we have explained above, the detention was for the purpose of removal from Australia when preconditions are met, including where there is no longer a need for the transitory person to be in Australia for the temporary purpose. The detention does not become an exercise of judicial power merely because the precondition, and hence the period of detention, is determined by matters beyond the control of the Executive. This will frequently be the case where, for instance, questions arise as to whether it is reasonably practicable to remove a person from Australia[21].

Orders

34 The demurrer should be allowed and the proceeding must therefore be dismissed. The plaintiffs should pay the costs of the defendants.

---

21 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 637-640 [221]-[232]; [2004] HCA 37; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 367 [130], 384 [204]-[205].

35 GAGELER J. I agree that the demurrer must be allowed and, accordingly, that the proceeding must be dismissed with costs.

36 Section 198B of the Act, the validity of which is not in issue, limits the power to bring a transitory person to Australia to doing so for a purpose which can be identified and characterised at the time of exercise of the power as a temporary purpose. The purpose so identified and so characterised at the time of the exercise of the power to bring a transitory person to Australia thereafter governs the period within which the transitory person is able to remain in Australia before an officer becomes obliged to perform the duty imposed by s 198(1A), or in the case of a transitory person covered by s 198AH(1A) by s 198AD(2), to remove the person as soon as reasonably practicable.

37 Section 198(1A), and s 198AD(2) where it applies by operation of s 198AH(1), are unequivocal as to the circumstances in which that duty to remove is triggered. The duty is triggered once the transitory person "no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved)".

38 The answer to the question which arises under s 198(1A), and under s 198AH(1A) where it applies, of whether the transitory person any longer needs to be in Australia for the temporary purpose for which the person was brought to Australia, does not depend, expressly or by implication, on the opinion, satisfaction or belief of any officer. I reject the argument of the defendants that answering of the question is committed by the terms of ss 198(1A) and 198AH(1A) to the evaluative judgment of an officer, subject perhaps to the "general principle of law … that a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself"[22]. The question of whether the duty to remove is triggered is in that respect separate from, and anterior to, the question of what is required of an officer to remove the person from Australia as soon as reasonably practicable in the performance of the duty once triggered[23].

39 Established drafting techniques are available to be used to make the holding of a particular state of mind by the repository a precondition to the

---

22 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189; [1965] HCA 27, citing *Sharp v Wakefield* [1891] AC 173 at 179.

23 See *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at 166 [67].

performance of a duty or to the exercise of a power[24]. Techniques of that kind are used throughout the Act. They are not universally observed. But their availability cannot be assumed to have been overlooked by the parliamentary drafters, especially those who framed s 198AH(1A) for insertion into the Act in the aftermath of *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[25]. Those available techniques have been eschewed in s 198(1A) and in s 198AH(1A) in favour of casting the precondition to the performance of the duty to remove in manifestly objective terms.

40 The objectivity apparent in the statutory expression in s 198(1A) of the criterion for the triggering of the duty imposed by s 198(1A), and in s 198AH(1A) for the triggering of the duty imposed by s 198AD(2), is reinforced by the manner in which ss 198 and 198AD are expressed to interrelate. Section 198AH(1) relevantly states that s 198AD "applies" to a transitory person if the person is "covered" by s 198AH(1A). Section 198(11) states that s 198, including s 198(1A), "does not apply" to a person to whom s 198AD "applies". A person is either covered by s 198AH(1A) or is not. Section 198AD either applies to a person or does not. Section 198(1A) applies to a person if s 198AD(2) does not.

41 Neither of the duties imposed by s 198(1A) or by s 198AD(2) is imposed on a particular officer. Whether one or other of those duties applies to a transitory person who has been brought to Australia under s 198B must be capable of discernment independently of the state of mind of a particular officer.

42 Whether a transitory person who has been brought to Australia under s 198B for a temporary purpose any longer needs to be in Australia for that temporary purpose, so as to trigger the obligation imposed on an officer by s 198(1A) or by s 198AD(2) to remove the person from Australia, is thus an objective question. That is to say, the question is one which in the event of dispute falls to be answered by a court.

43 When ss 198(1A) and 198AH(1A) are so construed, the duty to detain imposed on an officer by ss 189 and 196(1)(a) and (aa) in their application to a transitory person brought to Australia under s 198B can readily be seen to meet both of the two conditions of validity on the absence of which the plaintiffs rely to found their argument that their detention is punitive.

---

24 Cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1175 [54]; 198 ALR 59 at 71; [2003] HCA 30, citing *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385 at 403; [1919] HCA 41.

25 (2011) 244 CLR 144; [2011] HCA 32.

44 As to the first, the duration of the detention is limited to that reasonably necessary to effectuate a purpose which is identified in the Act. The purpose is removal under s 198(1A) or s 198AD(2) once the temporary purpose identified at the time of the person being brought to Australia under s 198B no longer exists.

45 As to the second, the duration of the detention is capable of objective determination by a court at any time and from time to time. From the moment of the commencement of the detention under s 189, duration of the detention is made by s 196(1)(a) and (aa) to depend on performance of the duty to remove imposed by s 198(1A) or by s 198AD(2). Whether or not the duty to remove has been triggered from time to time turns under s 198(1A) or s 198AH(1A) on the objective question of whether the temporary purpose identified at the time of the person being brought to Australia under s 198B any longer exists. That is the question which, in the event of dispute, arises for the determination of a court.

46 Whether the second condition of validity would have been met had ss 198(1A) and 198AH(1A) made the duty of an officer to remove dependent on the opinion, satisfaction or belief of that or some other officer is an issue which it is unnecessary to determine. The argument of the plaintiffs did not engage with the argument of the defendants on that issue. On what I consider to be the proper construction of ss 198(1A) and 198AH(1A), the issue does not arise.