PLAINTIFF M61/2010E.. ..... PLAINTIFF;

AND

THE COMMONWEALTH OF AUSTRALIA AND OTHERS.. ..... DEFENDANTS.

PLAINTIFF M69/2010.. ..... PLAINTIFF;

AND

THE COMMONWEALTH OF AUSTRALIA AND OTHERS.. ..... DEFENDANTS.

OFFSHORE PROCESSING CASE

[2010] HCA 41

HC of A
2010

Aug 24, 25;
Nov 11
2010

French CJ,
Gummow,
Hayne,
Heydon,
Crennan,
Kiefel and
Bell JJ

Immigration — Refugees — Application for refugee status — Offshore entry person precluded from making valid visa application — Power to allow visa application or to grant visa — Powers required to be exercised by Minister personally — No duty to consider exercise of powers — Refugee status assessment process — Independent merits review — Whether Minister decided to consider exercise of powers — Whether rights or interests directly affected — Whether determinations reviewable — Error of law — Failure to treat Australian legislation and case law as binding — Denial of procedural fairness — Failure to put country information for consideration and comment — Failure to address claimed basis for fear of persecution — Availability of mandamus, certiorari and declarations — Migration Act 1958 (Cth), ss 46A, 189(3), 195A, 196(1), 198(2), 198A.

Constitutional Law (Cth) — Powers of Commonwealth Parliament — Migration — Statutory power to allow offshore entry person to make valid visa application — Power required to be exercised by Minister personally — No duty to consider exercise of power — Whether enforceable limits on power — Whether a "law" — Commonwealth Constitution, s 75(v) — Migration Act 1958 (Cth), s 46A.

Section 46A(1) of the *Migration Act 1958* (Cth) provided that an application for a visa was not a valid application if it was made by an offshore entry person who was in Australia and was an unlawful non-citizen. An "offshore entry person" was defined by s 5(1) to mean a person who entered Australia at an excised offshore place and became an unlawful non-citizen because of that entry. The Territory of Christmas Island was an "excised offshore place". Section 46A(2) authorised the Minister, if the Minister thought that it was in the public interest to do so,

to determine that s 46A(1) did not apply to an application by an offshore entry person for a visa of a specified class. Section 46A(3) required the power under s 46A(2) to be exercised only by the Minister personally. Section 46A(7) provided that the Minister did not have a duty to consider whether to exercise the power under s 46A(2) in respect of any offshore entry person. Section 195A(2) authorised the Minister, if the Minister thought that it was in the public interest to do so, to grant a visa of a particular class to a person who was in detention under s 189. Section 195A(4) provided that the Minister did not have a duty to consider whether to exercise the power under s 195A(2), and s 195A(5) required the power under s 195A(2) to be exercised only by the Minister personally.

Section 189(3) empowered an officer to detain a person whom the officer knew or reasonably suspected to be an unlawful non-citizen in an excised offshore place. Section 196(1) provided that an unlawful non-citizen detained under s 189 must be kept in detention until he or she was removed from Australia under s 198 or s 199, deported under s 200, or granted a visa. Section 198(2) required an officer to remove as soon as reasonably practicable an unlawful non-citizen detained under s 189(3) who had not subsequently been immigration cleared and had not made a valid application for a "substantive visa" that could be granted while the applicant was in the migration zone.

Following an announcement made by the Minister, the Department of Immigration and Citizenship developed two procedural manuals describing the process for assessment of refugee status in respect of unlawful non-citizens who entered Australia at an excised offshore place, including unauthorised boat arrivals on Christmas Island. The purpose of the process was to advise the Minister whether Australia had protection obligations under the Convention relating to the Status of Refugees as amended by the Protocol relating to the Status of Refugees. If the Department concluded that an offshore entry person was owed protection obligations, the Department would prepare a submission seeking the Minister's agreement to exercise the power under s 46A to allow the person to make a valid visa application. Otherwise, the person had an opportunity to seek review of the decision by an independent reviewer, who then made a recommendation whether Australia had protection obligations to the person. If the reviewer concluded that Australia had protection obligations to the person, the Department would prepare a submission to the Minister for consideration of the exercise of power under s 46A or s 195A. If it were found initially or by the review that protection obligations were not owed, no submission was made.

Two citizens of Sri Lanka entered Australia at the Territory of Christmas Island without a valid visa and were detained under s 189(3) of the *Migration Act*. Each claimed to be a person to whom Australia had protection obligations. Officers of the Department made refugee status assessments that each claimant was not a person to whom Australia had protection obligations. Independent reviewers reached the same conclusions. The claimants applied for judicial review in respect of the assessment and review determinations.

Held, (1) that s 46A of the *Migration Act* was valid. Neither s 46A as a whole, nor sub-s (7) in particular, was of so little content as not to constitute an exercise of legislative power or to be a "law" as a rule of conduct or a declaration as to power, right or duty. Section 46A(7) did not prevent any exercise of jurisdiction under s 75(v) of the *Constitution*.

(2) That the Minister had decided to consider exercising the power under s 46A or s 195A in every case where an offshore entry person claimed to be a person to whom Australia owed protection obligations.

(3) That the continued detention of an offshore entry person during the conduct of the assessment and review processes was lawful because those processes were directed to whether powers under s 46A or s 195A could or should be exercised. The obligation created by s 198(2) to remove an unlawful non-citizen "as soon as reasonably practicable" accommodated the taking of steps for the purpose of informing the Minister of matters relevant to the possible exercise of power under s 46A or s 195A.

(4) That the decision to consider whether powers under s 46A or s 195A should be exercised directly affected the rights and interests of those who were the subject of the assessment or any review, because it prolonged their detention for so long as the assessment and any review took to complete.

(5) That consideration of the exercise of the power under s 46A or s 195A including steps taken to inform that consideration, must be procedurally fair and must proceed by reference to correct legal principles, correctly applied.

Held, further, in applying those principles to the present cases, (6) that, in each case, the reviewer had made an error of law by treating Australian legislation and case law as no more than an aid to the interpretation of the Refugees Convention, rather than as binding on those who made or reviewed the assessments.

(7) That, in each case, the reviewer had denied procedural fairness by failing to put to the claimant for his consideration and comment those aspects of country information which the reviewer considered might bear upon the claimant's claims. The reviewer also had denied procedural fairness to one of the claimants by failing to address one of the claimed bases for his fear of persecution.

(8) That mandamus was not available because the Minister was not bound to consider whether to exercise the power under s 46A or s 195A. There was thus no utility in granting certiorari to quash the reviewer's recommendation. A declaration should be made in each case that the reviewer had made an error of law and had failed to observe the requirements of procedural fairness.

REFERENCES under *High Court Rules 2004*, r 25.03.3(b).

Two citizens of Sri Lanka (M61 and M69) entered Australia at Christmas Island without a visa on 2 October 2009. Christmas Island was an "excised offshore place", and each of M61 and M69 was an "offshore entry person" within s 5 of the *Migration Act 1958* (Cth). M61 and M69 were detained by officers of the Department of Immigration and Citizenship under s 189(3) of the Act. In January 2010, officers of the Department determined that neither M61 nor M69 met the definition of a refugee in Art 1A of the 1951 Convention

relating to the Status of Refugees and its 1967 Protocol. M61 and M69 requested independent merits review of the refugee status assessments. On 11 April 2010, Mr Steve Karas made a recommendation that M61 did not meet the definition of refugee as set out in Art 1A of the Convention as amended by the 1967 Protocol and that he should not be recognised as a refugee. On 20 April 2010, Ms Sue Zelinka found that M69 did not meet the definition of refugee as set out in Art 1A of the Convention as amended by the 1967 Protocol and that she did not recommend that he should be recognised as a refugee.

By an application in the High Court for an order to show cause, M61 applied for certiorari to quash the decisions or recommendations made by an officer of the Department (Mr Terry Lew) and by the independent reviewer (Mr Karas), and mandamus directing them to proceed to deal in accordance with law with his application for refugee status in Australia. The application sought mandamus to compel the Minister for Immigration and Citizenship to complete the statutory task under ss 46A(2) and 195A(2) of the *Migration Act* by considering whether it was in the public interest for the power to be exercised in respect of the claimant. The application sought prohibition or an interlocutory injunction to restrain the Commonwealth or the Minister or their officers or agents from taking any steps to remove the claimant from Australia until the determination of the application.

By an application in the High Court for an order to show cause, M69 applied for declarations that s 46A of the *Migration Act* was invalid, that the scheme set up by the Secretary of the Department or officers in the Department for dealing with the claim by M69 to be entitled to protection under the Refugees Convention was invalid, and that the questions whether M69 satisfied the definition in Art 1A and whether Australia owed protection obligations to M69 remained not determined. Alternatively, the application sought declarations that the decisions that M69 was not a refugee were vitiated by error, and certiorari to quash those decisions. The application sought mandamus directing the Minister, whether personally or by his officers or agents, to proceed to deal according to law with the application by M69 to be recognised as a refugee to whom Australia owed protection obligations, and directing the Secretary of the Department to do all things necessary to deal according to law with that application.

On 20 July 2010, Hayne J ordered pursuant to r 25.03.3(b) of the *High Court Rules 2004* that the further amended application in each matter be referred for further hearing to a Full Court.

D S Mortimer SC (with her *R M Niall* and *K E Foley*), for plaintiff M61. The refugee status assessment process forms part of the Minister's consideration of how to exercise his powers under ss 46A(2) and 195A(2) of the *Migration Act*. The establishment of the process is evidence that the Minister has decided that he will consider exercising those powers in relation to offshore entry persons. Alternatively,

determinations made under the refugee status assessment process are a necessary precondition to any consideration of the exercise of powers under s 46A or s 195A, because the *Migration Act* does not contemplate that a person to whom Australia owes protection obligations will be removed without any consideration being given to his or her status under the Refugees Convention. Sections 46A and 195A, as they apply to offshore entry persons, provide the only means by which refugee status can be considered and removal of refugees in breach of Australia's obligations under the Convention can be avoided. The statutory scheme contemplates the assessment of protection obligations in relation to offshore entry persons either by taking them offshore and assessing them pursuant to s 198A, or by assessing them onshore through s 46A(2). The refugee status assessment process should be characterised as a process authorised by and in aid of the *Migration Act*, and not merely as an executive function of information gathering. Otherwise, there would be no valid reason to postpone the plaintiff's removal, and his continued detention would not be for a purpose of the Act and would be unlawful (1). Any continuation of the plaintiff's detention must be for the purposes of assessing his eligibility for a visa. The only way he can access the visa scheme is through s 46A or s 195A. The determination under the refugee status assessment process ultimately governs eligibility for the grant of a visa. The criterion in the refugee status assessment process is that for a protection visa in s 36 of the *Migration Act*. To give the refugee status assessment process an operation which is harmonious with the removal obligation under s 198, the process must be viewed as directed towards deciding whether a person can be granted a visa. Alternatively, if neither s 46A nor s 195A has yet been engaged, the refugee status assessment process is undertaken in the execution of the *Migration Act*, supported by s 61 of the *Commonwealth Constitution*. The Commonwealth executive cannot create and administer a refugee status determination process outside the *Migration Act* because the Act expressly or by necessary implication excludes or displaces the operation of executive power to assess refugee status under the Convention for the purpose of determining whether or not the person should be permitted to enter or remain in Australia (2).

It is fundamental to the rule of law that refugee status determinations, with their capacity to affect liberty and status and Australia's non-refoulement obligations under the Refugees Convention, must be lawful and subject to judicial supervision (3). [GUMMOW J. What is the content of the notions of "law" and

(1) *Al-Kateb v Godwin* (2004) 219 CLR 562 at 581, 604; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 13, 19, 63.

(2) *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508; *Barton v The Commonwealth* (1974) 131 CLR 477; *Ruddock v Vadarlis* (2001) 110 FCR 491.

(3) *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [31].

"lawfully" where there does not seem to be an immediate engagement of the statute?] Procedural fairness and a proper application of the substantive law relating to the definition of refugee in Art 1A of the Convention. The concept of public interest in s 46A includes as a mandatory relevant consideration whether Australia owes protection obligations to an offshore entry person. The determination that informs the Minister's consideration of the public interest must be a determination that accurately applies the Australian law about Art 1A. Section 46A(2) is the principal means by which refugee status is to be taken into account. Section 46A(7) ceases to operate once consideration has been given to the exercise of the power under s 46A. Having embarked on a consideration whether to exercise the powers under s 46A or s 195A, the Minister is required to complete that task lawfully which includes observing procedural fairness and correctly applying the Convention as incorporated into the *Migration Act*.

The Minister and the officer who made the status determination are both officers of the Commonwealth for the purposes of s 75(v) of the *Constitution*. Mandamus and certiorari are also sought against the independent reviewer, who was engaged by the Commonwealth and is either an officer of the Commonwealth or exercises executive power for and on behalf of the Minister or the Commonwealth. The determinations affected the rights of the plaintiff, including rights to remain in Australia, to be freed from immigration detention and to obtain a visa. There was a denial of procedural fairness, in that the independent reviewer failed to give the plaintiff an opportunity to respond to country information that was credible, relevant and significant and had the capacity to be used adversely to him. The reviewer misapplied the Refugees Convention by treating the plaintiff's credibility as an overarching first step through which all of his claims were to be considered. He failed to address a clearly articulated and specific claim that the plaintiff was a member of a social group comprising Tamil business owners or Tamils who are perceived to be wealthy (4).

S G E McLeish SC (with him *L G De Ferrari* and *P D Herzfeld*), for plaintiff M69. Section 46A of the *Migration Act* is invalid because s 46A(7) attempts to stultify the constitutional jurisdiction in s 75(v) of the *Constitution*. Section 46A(7) effectively confers on the Minister an unfettered and unreviewable statutory power to decide whether or not to permit an offshore entry person to make a valid visa application. But for s 46A(7), the Minister would have a duty to consider whether or

(4) *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24], [26]; 197 ALR 389 at 394; *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 at 494-495 [55]-[58].

not to exercise the power (5), and would be required to exercise it if satisfied that it is "in the public interest". Section 46A(7) purports to alter the operation of s 46A. Because the Minister has no duty to consider whether to exercise the power in s 46A(2), the Court cannot compel the Minister to consider exercising the power. Without mandamus, there would be no utility in quashing any decision by the Minister not to consider exercising the power (6). A court could not compel consideration of a request for the exercise of power under s 46A(2) even if a decision not to exercise the power were made by reference to considerations wholly extraneous to the public interest or in breach of the rules of procedural fairness. Section 46A(7) cannot be severed from the rest of s 46A without changing the operation of the section contrary to the intention of Parliament (7). The presence of s 46A(7) results in the conferral of a power free from any judicially enforceable limitation. The rule of law requires that limits on power can be enforced by the courts and s 46A(7) prevents that from happening. Section 46A lacks the hallmark of the exercise of legislative power, namely the determination of the content of a "law" as a rule of conduct or a declaration as to power, right or duty (8). The word "laws" in ss 51 and 52 of the *Constitution* does not include legislation that confers a power which is ostensibly subject to limits, but where the limits are incapable of enforcement. It is contrary to s 75(v) of the *Constitution* and the constitutional structure for the Parliament to confer executive powers in a way that would create "islands of power" immune from supervision and restraint (9). Section 46A in substance confers power on the Minister to determine conclusively the limits of his own jurisdiction and therefore purports to confer part of the judicial power of the Commonwealth and is invalid.

Alternatively, the refugee status assessment decisions are made for the purpose of informing the exercise of the Minister's powers under s 46A, and therefore involve the executive power of the Commonwealth under s 61 of the *Constitution*. The decisions are directed to the execution and maintenance of s 46A. The making of a recommendation that a person be recognised as a refugee is a precondition under the scheme for the matter being put before the Minister and is in practice determinative of the exercise of power under s 46A(2). If there is a positive assessment, the Minister invariably lifts the statutory bar under s 46A and a protection visa is almost certain to be granted. Unless there is a positive assessment, the Minister will not consider whether to

(5) *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 499.
(6) *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 461 [48].
(7) *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 371; cf *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 132 [389].
(8) *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512-513 [102].
(9) *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99].

lift the bar and the person will be liable to removal. The making of the refugee status assessment determines a person's status under the Refugees Convention in the eyes of the Commonwealth and affects ability to apply for a protection visa. It is more than an executive inquiry supported by the capacity to inquire in common with a natural person.

In making decisions under the status assessment process, officers of the Commonwealth acted beyond Commonwealth executive power. First, the power conferred by s 61 must be exercised in accordance with the requirements of natural justice (10). The exercise of prerogative powers is subject to judicial review on the ground of procedural fairness (11). Unless excluded, the requirement to afford natural justice emerges from the common law in cases where the exercise of public power is capable of defeating the rights, interests or legitimate expectations of a particular person. As a matter of invariable practice, the antecedent decisions made under the offshore processing regime were preconditions to the exercise of power by the Minister. The decisions either determined rights and interests adversely to the plaintiff, or were a step in a process capable of having that effect. By not being given the opportunity to deal with country information that could be used adversely to him, or to identify those parts of the country information that supported his claims, the plaintiff was denied natural justice. Further, where an exercise of executive power involves determining a question of law, the question must be determined in accordance with law. By treating Australian case law on the definition of refugee and protection obligations as inapplicable or as affording optional guidance, both decision-makers misdirected themselves and did not make the assessments in accordance with law. In making the first decision, the second defendant failed to deal with a specific claim that the plaintiff feared persecution on the ground of imputed political opinion. In making the second decision, the third defendant failed to a deal with a sur place claim. Further, the second decision was vitiated by a reasonable apprehension of bias, as it was made following statements by the then Prime Minister and the Minister for Immigration and Citizenship that the plaintiff was not a legitimate asylum seeker and was being processed for return to Sri Lanka (12).

The decisions have a sufficient legal effect on rights to attract certiorari. Certiorari will lie where a recommendation bearing upon an ultimate decision is either required to be taken into account by the

(10) cf *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 [22].

(11) *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268; *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501.

(12) cf *Minister for Immigration, Local Government and Ethnic Affairs v Mok* (1994) 55 FCR 375 at 398.

decision-maker or operates as a precondition for making the decision (13). Non-statutory executive powers are as capable of affecting rights and interests as statutory executive powers. The duties carried out by an independent reviewer are of a sufficiently public character to be enforceable by mandamus (14). A person engaged by the executive as a contractor to make administrative decisions ought to be regarded as an officer of the Commonwealth for the purposes of s 75(v) of the *Constitution*. The Department conceived of the independent reviewers as occupying an office, described as a Panel to which the Minister made appointments. Alternatively, the decision made by the independent review was subsequently adopted by the Commonwealth, which treated the decision as authoritatively determining the plaintiff's refugee status. The plaintiff also seeks mandamus against the Secretary of the Department to do all things necessary to ensure that the duties are fulfilled. Alternatively, he seeks a declaration that his application for refugee status remains undetermined.

S J Gageler SC, Solicitor-General for the Commonwealth, (with him *S P Donaghue* and *D F O'Leary*), for the first and second defendants. Section 46A of the *Migration Act* is valid. The Act makes permission to enter or remain in Australia dependent on the holding of a visa and, with limited exceptions, a visa can only be granted where a non-citizen makes a valid application for a visa. Section 46A renders certain non-citizens incapable of making a valid application for a visa unless the Minister in the public interest chooses to exercise the statutory power under s 46A(2). Section 46A(7) does not expand the power conferred by s 46A(2), but makes clear a statutory intention that the Minister has no duty to consider whether to exercise that power. A law is sufficiently with respect to aliens within s 51(xix) of the *Constitution* where it imposes a prohibition on an alien entering or remaining in Australia; it does not cease to be a law with respect to aliens because it prescribes circumstances in which that prohibition is or may be relaxed, even if the criterion involves the exercise of a discretion or judgment by the executive. Before amendments made in 1989, s 6 of the *Migration Act* conferred on the Minister a discretion unconfined in its terms to determine who should be granted an entry permit into Australia (15). Nothing in *Plaintiff S157* supports the conclusion that a statutory power must in every case be accompanied by a duty to consider the exercise of that power (16). Section 46A(7)

(13) *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 162; *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864.
(14) *R v Panel on Takeovers and Mergers; Ex parte Datafin Plc* [1987] QB 815.
(15) *NAGV and NAGW of 2002 v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 173-174 [32]-[33].
(16) *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512 [102]; cf *Re Minister for Migration and Multicultural and Indigenous Affairs; Ex parte S134/2002* (2002) 211 CLR 441 at 461 [48], 474 [100].

does not empower the Minister to determine the jurisdictional limits of the power conferred by s 46A(2) and would not prevent a decision under s 46A(2) from being quashed if it was made for corrupt or entirely personal and whimsical considerations (17). However, an application for review of a decision under s 46A(2) would be futile because the grant of relief would lack utility in the absence of any duty to consider the exercise of the power.

The refugee status assessment process is an administrative process which allows for the Minister to be advised whether, as a matter of international law, Australia's obligations under the Refugees Convention are engaged in respect of a particular offshore entry person, so that he can be invited to consider if he so chooses the exercise of power under s 46A(2) or, potentially, s 195A. It is proper and understandable that the Secretary and the Department would seek as a matter of policy to apply the interpretation of the Refugees Convention as incorporated legislatively into Australian law, and it is appropriate that the interpretations of the Convention as declared by Australian courts should be a guide to the assessment of Australia's obligations under international law. It is appropriate that the common law principles of procedural fairness should be applied as a matter of policy. But there is no underlying right or obligation or constraint on power that is enforceable in the exercise of judicial power under s 75(iii) or (v) of the *Constitution*. The process is undertaken pursuant to the non-statutory executive power under s 61 of the *Constitution*, and not under s 46A or s 195A. It is the exercise of an executive power to conduct an inquiry and make a report to the Minister, as a result of which the Minister may or may not exercise a personal non-compellable power under s 46A or s 195A. [KIEFEL J. In relation to doing something positive about the person or about their detention and removal, at some point you have to engage the statutory power. Does it come down to the simple question of what is the Minister doing by the refugee status assessment process and how far removed is it from the actual exercise of statutory power?] The process is designed to inform the Minister in an appropriate case of the circumstances of a particular offshore entry person, so as to allow the Minister to consider or not consider in his discretion the exercise of power.

Judicial review of administrative action is tied to the enforcement of legal constraints on the exercise of legal powers (18). The exercise of the power to undertake the refugee status assessment process is not subject to procedural fairness requirements. The pre-condition for any obligation to observe the principles of natural justice in the taking of non-statutory action must be that the action has the potential to destroy, defeat or prejudice legal rights or interests (19). When the executive

(17) *Murphyores Inc Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 12.
(18) *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.
(19) *Annetts v McCann* (1990) 170 CLR 596 at 598; *Ainsworth v Criminal Justice*

exercises a capacity that it shares with ordinary people, its conduct lacks any potential to alter legal rights or obligations without consent (20). Where a person has the task of carrying out a non-coercive inquiry in the exercise of an executive capacity, the conduct of that inquiry and the confidential reporting of its outcome cannot without more deprive a person of a legal right or interest (21). The refugee status assessment does not directly determine or affect rights, nor is it a condition precedent to the exercise of a power which will in turn affect rights. The making of a report does not place rights in a "new jeopardy" or subject them to a "new hazard" (22). The plaintiff has no right to remain in Australia (23), nor to be freed from immigration detention (24), nor to apply for or obtain a visa (25). There is no right to refugee status in domestic law. Recommendations made under the refugee status assessment process do not alter the "status" of the plaintiffs under Australian law as unlawful non-citizens and offshore entry persons. The refugee status assessment process is not subject to any limitation or requirement that it must be based on a legally correct understanding of the Convention or must deal with all claims made by an applicant. An error in applying an unincorporated treaty cannot invalidate executive action (26). The obligations to detain under s 196 and to remove under s 198 are legally unaffected by the existence and outcome of the refugee status assessment process. The obligation to remove a person "as soon as reasonably practicable" is to remove within a period appropriate or suitable to the purposes of the legislative scheme (27). It is reasonable for an officer not to remove a person while there remains a possibility of the exercise of discretionary power under ss 46A and 195A.

Each plaintiff has been assessed by a Department officer and an independent reviewer to be a person to whom Australia does not have protection obligations under the Refugees Convention. If a person is

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Commission (1992) 175 CLR 564 at 576, 583, 585; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 56 [24]-[26], 61 [51], 88 [138].

(20) *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 408-409; *Griffith University v Tang* (2005) 221 CLR 99 at 128 [80].

(21) *Stewart v Ronalds* (2009) 232 FLR 331 at 349 [71], 361 [137]; 259 ALR 86 at 102, 114-115.

(22) cf *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353 at 370, 373; *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471 at 473, 474-475; 8 ALR 691 at 694-695, 699; *Simsek v Macphee* (1982) 148 CLR 636 at 638-639, 643, 645.

(23) *Migration Act*, s 198.

(24) *Migration Act*, ss 189(3), 196.

(25) *Migration Act*, s 46A(1).

(26) *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 [101]; *AB v Minister for Immigration and Citizenship* (2007) 96 ALD 53 at 63 [27]-[28].

(27) *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146; *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 506 at 515-518.

assessed not to be a refugee, the Minister is not involved and no question of the exercise or non-exercise of the power in s 46A(2) arises. Accordingly, the Department has made no submission to the Minister and the Minister has not personally considered whether to exercise the powers conferred by s 46A(2) or s 195A(2) (28). A request under the refugee status assessment process is not for an exercise of power under s 46A(2). The purpose of s 46A(1) is to prevent offshore entry persons from having a right under Australian law to make claims under the Convention. There is no basis for treating s 46A(2) or s 195A(2) as incorporating the Convention or making consideration of whether Australia owes protection obligations a mandatory relevant consideration (29). The Minister's judgment in relation to the public interest could not be impugned on the basis that the Convention was not correctly applied or that a claim under the Convention had not been considered (30). The refugee status assessment process involves an executive inquiry pursuant to the capacities that the executive has in common with any natural person (31). It is analogous with the position that existed prior to 1980 when an interdepartmental committee advised the Minister on the question whether a particular person was a refugee (32). The *Migration Act* does not exclude or displace the executive power to assess refugee status under the Convention. The area of operation of the status assessment process is not co-extensive with that of the *Migration Act*. The purpose of the process is not to determine whether a person should be permitted to enter or remain in Australia, but to ensure that persons identified as refugees are not returned to a country where they have a well-founded fear of persecution. The Act does not demonstrate an intention to exclude the capacity of the executive to assess whether Australia has obligations in respect of particular non-citizens under the Convention (33). An independent reviewer performs duties pursuant to a contract between the reviewer and Wizard People Pty Ltd, which has a contract with the Commonwealth. The assessments or recommendations inform the exercise of Commonwealth executive power, but do not themselves involve the exercise of executive power.

(28) cf *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 at 417-418.

(29) *AB v Minister for Immigration and Citizenship* (2007) 96 ALD 53 at 61-63 [20]-[27].

(30) *Nikac v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 20 FCR 65 at 77-78.

(31) *Clough v Leahy* (1904) 2 CLR 139 at 156-157; *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471 at 473; 8 ALR 691 at 695; *Davis v The Commonwealth* (1988) 166 CLR 79 at 108-109; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60 [126], 83 [214].

(32) *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 294, 300, 307.

(33) *Ruddock v Vadarlis* (2001) 110 FCR 491 at 545 [201]-[202]; *Migration Act*, s 7A.

In any event, the plaintiffs' grounds are not made out. The reviewer did not deny procedural fairness by failing to disclose country information to the plaintiffs. Disclosure of country information is ordinarily required only if the relevance of the information is not obvious, and if the information is critical to or determinative of the application (34). Even then, all that is required is disclosure of the gist of the information (35). The operation of rules of procedural fairness in relation to country information does not depend on characterising that information as adverse. The reviewers did not fail to address any claims advanced by the plaintiffs. The sur place claim by M69 was not raised until after the recommendation by the reviewer had been finalised and will be capable of being considered as part of the pre-removal clearance process. The statements of the Prime Minister and the Minister for Immigration did not give rise to a reasonable apprehension of bias of the independent reviewer. There was no evidence that the reviewer was aware of the statements, which did not purport to prejudge the outcome of the merits review. By indicating that Australian case law on the interpretation of the definition of "refugee" and protection obligations do not apply, the RSA Manual and the IMR Guidelines acknowledge that the process involves an assessment of claims against the Convention, while the Australian case law concerns the meaning of the *Migration Act*. The Manual and Guidelines do not deny that Australian case law provides important guidance as to the meaning of the Convention.

The relief sought by the plaintiffs is not available. Certiorari cannot issue to quash the RSA recommendations in the absence of any legal effect or legal requirement to consider the recommendations before exercising the power conferred by s 46A(2) (36). Further, certiorari would be of no utility unless mandamus were available (37). Mandamus will not issue except to command the fulfilment of a legal duty of a public nature (38). There is no duty of a public nature to exercise the function of making assessments under the RSA

(34) *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 974 [24], 991-992 [131]-[137], 1005-1006 [229]-[236], 1010-1011 [263]-[268], cf at 975 [30], 980 [64]; 190 ALR 601 at 609, 633-635, 654-655, 661-662; cf at 611, 618.

(35) *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 100 [29].

(36) *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159, 162-165, 178-180; *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471 at 475; 8 ALR 691 at 699; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580-581.

(37) *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 461 [48].

(38) *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 134 [140].

scheme (39). Section 46A(7) expressly denies the existence of any such statutory duty in relation to the power conferred by s 46A(2). Declaratory relief should not issue because a declaration would not have any legal consequences (40).

S P Donaghue, for the third and fourth defendants.

D S Mortimer SC, in reply. The purpose of detaining persons subject to the refugee status assessment process is not an executive purpose but the statutory purposes of enabling the Minister to decide how to exercise the power in s 46A or s 195A. The time for removal under s 198 has not been reached because the processes under the statute have not been completed. The new legal hazard that arises when a negative refugee status assessment determination is made is removal involving further interference with liberty. The Minister has embarked on a consideration of his powers under ss 46A and 195A and has asked officers and others that he has appointed to inquire, investigate and determine for him one of the considerations which is relevant to the exercise of his statutory powers (41).

S G E McLeish SC, in reply. Whether the obligation of procedural fairness has its source in the common law or the *Constitution*, the result is the same. The rights or interests that give rise to procedural fairness obligations are the plaintiff's interest in being allowed to make a visa application and his status as a refugee, each of which has immediate implications for his liberty. While s 46A(7) does not expand the power in s 46A(2), its effect is to prevent the limits on that power from being enforced.

Cur adv vult

11 November 2010

THE COURT delivered the following written judgment: —

1 The plaintiff in each of these matters entered Australian territory by entering the Territory of Christmas Island. The Territory of Christmas Island is what the *Migration Act 1958* (Cth) calls an "excised offshore place" (s 5(1)). Neither plaintiff is an Australian citizen. Neither held a valid visa to enter Australia. On arriving at Christmas Island, each was detained under s 189(3) of the *Migration Act* (42).

(39) cf *Ex-Christmas Islanders Association Inc v Attorney-General (Cth)* (2005) 149 FCR 170 at 191.

(40) *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1 at 32-33.

(41) *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.

(42) Section 189(3) provides: "If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person."

2 Each plaintiff is a citizen of Sri Lanka. Each arrived at Christmas Island by boat. Each claims that he is a non-citizen in Australia to whom, in the words of s 36(2)(a) of the *Migration Act*, "Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol" (43). The *Migration Act* provides (s 46A(1)) that a person who, like each of the plaintiffs, became what the Act calls "an unlawful non-citizen" by entering Australian territory at an excised offshore place, cannot make a valid application for a visa. Accordingly, although the plaintiffs claim to be non-citizens to whom Australia has protection obligations, they cannot validly apply for that class of visa known as protection visas. They therefore cannot engage those provisions of the *Migration Act* which would oblige the Minister to consider an application and, if satisfied that the criteria for granting the visa are met, grant the visa (s 65).

3 While the plaintiffs were detained, officers of the Department of Immigration and Citizenship made, in each case, what departmental documents refer to as a "Refugee Status Assessment", or "RSA", and concluded that neither plaintiff was a person to whom Australia had protection obligations. Each plaintiff asked for the decision made by the relevant officer of the Department to be reviewed. What the Department calls an "Independent Merits Review", or "IMR", was undertaken by persons who were not officers of the Department, but had been engaged by a company with which the Department had contracted for the provision of such reviews. In each case, the reviewer concluded that the plaintiff was not a person to whom Australia had protection obligations.

4 The lawfulness of the plaintiffs' detention is not in issue in these proceedings. But the plaintiffs assigned a radically different basis for the conclusion that their detention was lawful from that given by the Commonwealth and the Minister. The plaintiffs submitted that their continuing detention, while inquiries were made about their claims to be refugees, was lawful because those steps were being taken under and for the purposes of the *Migration Act*. By contrast, the Commonwealth and the Minister submitted that the plaintiffs were detained while inquiries having no statutory foundation, whether in the *Migration Act* or otherwise, were conducted and that the detention was lawful because those inquiries might, but need not, lead to an exercise of powers under the *Migration Act*. The resolution of this issue is critical to the outcome of the litigation.

The proceedings

5 Each plaintiff instituted proceedings in the original jurisdiction of this Court, naming the Commonwealth, the Minister, and the person who conducted the review, as defendants. Plaintiff M61 joined as the

(43) The "Refugees Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951; the "Refugees Protocol" means the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

fourth defendant the departmental officer who made the original assessment; Plaintiff M69 joined the Secretary of the Department as the fourth defendant. Each plaintiff alleged, among other things, that he was not afforded procedural fairness during the original assessment or the subsequent review. Each plaintiff alleged that the persons who undertook the assessment and the relevant review made errors of law by not treating themselves as bound to apply relevant provisions of the *Migration Act* and what this Court and other Australian courts have held about the way in which the criterion of being a person to whom Australia owes protection obligations must be understood and applied.

6 The plaintiff in the second matter, Plaintiff M69, further alleged that the provision of the *Migration Act* which precludes him from making a valid application for a protection visa (s 46A(1)), and the rest of the section of which that provision forms a part, are invalid.

7 Each plaintiff claims relief by way of injunction, certiorari and mandamus. Plaintiff M69 also claims relief by way of declaration. One of the declarations claimed by Plaintiff M69 is a declaration that s 46A of the *Migration Act* is invalid but these reasons will show that the challenge to the validity of s 46A should fail.

8 In considering whether other relief claimed by the plaintiffs should be granted, attention must focus on what was done in the Independent Merits Review. What was done in the Refugee Status Assessment was overtaken by that review. These reasons will show that, in conducting a review, the reviewer was bound to afford procedural fairness to the person whose claim was being reviewed, and was bound to act according to law by applying relevant provisions of the *Migration Act* and decided cases. These reasons will further show that, although certiorari and mandamus should not issue, a declaration should be made in each case that the person who conducted the Independent Merits Review made the error of law that has been identified and that the plaintiff was not afforded procedural fairness in the conduct of that review. There being no present threat to remove either plaintiff without a further RSA being undertaken, in which the law would be correctly applied and procedural fairness afforded, it is not now necessary to consider granting an injunction.

9 The most important of the steps that lead to these conclusions can be summarised as follows:

(a) Because the Minister has decided to consider exercising power under either s 46A or s 195A of the *Migration Act* in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations, the RSA and IMR processes taken in respect of each plaintiff were steps taken under and for the purposes of the *Migration Act*.

(b) Because making the inquiries prolonged the plaintiffs' detention, the rights and interests of the plaintiffs to freedom from detention at the behest of the Australian Executive were directly affected, and those who made the inquiries were

bound to act according to law, affording procedural fairness to the plaintiffs whose liberty was thus constrained.

(c) The inquiries were not made according to law and were not procedurally fair.

(d) Because the Minister is not bound to consider exercising either of the relevant powers, mandamus will not issue to compel consideration, and certiorari would have no practical utility. But in the circumstances of each case, a declaration should be made to the effect described earlier.

10 Neither the issues which arise in these matters, nor the particular questions of statutory construction and application which fall for consideration, can be understood without close attention to the critical provisions of the *Migration Act*, ss 46A and 195A, placing those provisions in their relevant legislative and historical contexts.

Sections 46A and 195A

11 So far as relevant, s 46A provides:

"(1) An application for a visa is not a valid application if it is made by an offshore entry person who:

(a) is in Australia; and

(b) is an unlawful non-citizen.

(2) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an offshore entry person, determine that subsection (1) does not apply to an application by the person for a visa of a class specified in the determination.

(3) The power under subsection (2) may only be exercised by the Minister personally.

…

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (2) in respect of any offshore entry person whether the Minister is requested to do so by the offshore entry person or by any other person, or in any other circumstances."

12 So far as presently relevant, s 195A provides:

"*Persons to whom section applies*

(1) This section applies to a person who is in detention under section 189.

Minister may grant visa

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

(4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

(5) The power under subsection (2) may only be exercised by the Minister personally."

13 It will be observed that both s 46A and s 195A give a power that it is said "may only be exercised by the Minister personally" (ss 46A(3), 195A(5)). Both provide (ss 46A(7), 195A(4)) that the Minister does not have a duty to consider whether to exercise the power. The power given by s 46A is, in effect, to determine that an offshore entry person may make a valid application for a visa of a class specified. It is commonly referred to as a decision to "lift the bar" (scil on making a valid application for a visa). The power given by s 195A is, in effect, to grant a visa without there first having been a valid application for that visa. Both are powers that are exercisable "[i]f the Minister thinks that it is in the public interest to do so".

The issues

14 Each plaintiff's claim for relief, on account of the alleged denial of procedural fairness and error of law, necessarily directed attention to what power was exercised when the relevant departmental officer conducted a Refugee Status Assessment of each plaintiff, and when the independent contractor conducted the review of that assessment. There can be no consideration of what are the limits on the exercise of a power without first identifying the power that is exercised.

15 The Commonwealth and the Minister submitted that both the assessments and the reviews of the assessments were undertaken in exercise of non-statutory executive power under s 61 of the *Constitution*. It followed, so they submitted, that there was no obligation to afford procedural fairness in the conduct of those assessments and reviews, and that it mattered not whether those who undertook the inquiries had misunderstood or misapplied the law.

16 Plaintiff M61 alleged that the RSA and IMR processes, undertaken after the plaintiff had entered Australian territory, are properly seen as "either part of the Minister's exercise of powers in ss 46A and 195A or as informing their exercise because of the centrality of a refugee status determination to the execution of the Act". Although Plaintiff M69 adopted these submissions as an alternative way of putting his case, the principal argument advanced on behalf of Plaintiff M69 was that s 46A of the *Migration Act* is invalid because sub-s (7) gives "an effectively unfettered and unreviewable statutory power to decide whether or not to exercise the power in sub-s (2)". Plaintiff M69 further submitted that, if the inquiries made in the course of the RSA and IMR processes were made pursuant to executive power under s 61 of the *Constitution*, and not under any authority conferred by statute, those making the

inquiries were still obliged to act with procedural fairness and address the legally correct questions.

17 No party submitted that, on any branch of the arguments advanced, the privative provisions of s 474 of the *Migration Act* were engaged.

18 As noted earlier, evaluation of the competing submissions requires consideration of ss 46A and 195A in their proper statutory and historical contexts. The chief feature of statutory context to which regard must be had is those provisions of the *Migration Act* that provide for the detention and removal of unlawful non-citizens and, in particular, offshore entry persons.

Detention and removal

19 As noted at the outset of these reasons, each plaintiff was detained in the Territory of Christmas Island pursuant to the powers given by s 189(3) of the *Migration Act*. Section 196(1) fixes the duration of that detention. It provides that:

> "An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
>
> (a) removed from Australia under section 198 or 199; or
>
> (b) deported under section 200; or
>
> (c) granted a visa."

In the circumstances of these cases, where s 200 has no application, the relevant operation of s 196(1) is that each plaintiff must be kept in detention until he is either removed from Australia or granted a visa.

20 Division 8 of Pt 2 of the *Migration Act* (ss 198-199) regulates the removal from Australia of unlawful non-citizens. Immediately relevant to the circumstances of these cases are certain of the provisions of s 198(2). That sub-section, so far as presently relevant, provides that:

> "An officer must remove as soon as reasonably practicable an unlawful non-citizen:
>
> (a) who is covered by … paragraph 193(1)(b), (c) or (d); and
>
> (b) who has not subsequently been immigration cleared; and
>
> (c) who …
>
> (i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone."

Section 193(1)(c) refers to a person "detained under subsection 189(2), (3) or (4)". Each plaintiff, having been detained under s 189(3), is therefore an unlawful non-citizen "covered by … paragraph 193(1) … (c)". Since each plaintiff is an offshore entry person, neither has been, or could have been, immigration cleared (ss 166(1)(a)(ii), 172(1)(b)). Since each plaintiff is an offshore entry person in Australia, neither can make a valid application for a visa (s 46A(1)).

21 On an initial reading of s 198(2), it might be thought that the conditions which engaged the obligation to remove each plaintiff from Australia "as soon as reasonably practicable" were satisfied as soon as the plaintiffs entered the Territory of Christmas Island. If that were so, it would also follow that the continued detention of the plaintiffs, for so

long as was necessary to undertake the RSA or the IMR, was unlawful. (In neither case were processes for the plaintiff's removal from Australia set in train until after the completion of both the assessment and the review.) Detention is required and authorised by the *Migration Act* until removal or grant of a visa. But if attention were confined to the words of s 198(2), there being a duty to remove each plaintiff as soon as reasonably practicable, with there being no possibility of making a valid application for a visa, prolongation of detention for so long as was necessary for the Department to conduct inquiries about the refugee status of the plaintiffs might, at first sight, appear to have been unlawful.

22 As noted at the outset of these reasons, however, it is important to explore the foundations for accepting, as the plaintiffs did, that their detention while the RSA and IMR processes were undertaken was lawful. Exploration of those foundations shows what powers were being exercised when the RSA was conducted and a review of that assessment was undertaken.

23 To read s 198(2) as not permitting detention for so long as was necessary to undertake the RSA and IMR processes would impermissibly divorce it from its text and its context.

24 First, there is a textual reason for reading s 198(2) as permitting detention for those purposes.

25 Section 198(2)(c) expressly contemplates that an unlawful non-citizen who is covered by s 193(1)(c) could make a valid application for a substantive visa that can be granted when the applicant is in the migration zone. Yet, by operation of s 46A(1), no offshore entry person in Australia can make a valid application for a visa. Section 193(1)(c) deals with persons who are detained under s 189(2), (3) or (4). Sub-sections (2), (3) and (4) of s 189 contemplate detention of persons in various circumstances. Sub-section (2) of s 189 deals with persons in Australia, but outside the migration zone, suspected of seeking to enter the migration zone; sub-s (3) with unlawful non-citizens in an excised offshore place; sub-s (4) with persons in Australia, but outside the migration zone, suspected of seeking to enter an excised offshore place. Whichever of those powers of detention were to be engaged, the person detained, if brought into Australia, would be an offshore entry person precluded by s 46A(1) from making a valid application for a visa. The only power to permit the making of a valid application for a visa by an offshore entry person in Australia is the power in s 46A(2). The fact that s 198(2)(c) contemplates the making of a valid application for a substantive visa by a person who is covered by s 193(1)(c) suggests strongly that s 198(2) should be read as permitting detention while steps are taken to determine whether the person detained should be permitted to make such an application by the Minister exercising power under s 46A(2).

26 There are also contextual reasons that point to the conclusion that detention while steps are taken to determine whether the detainee should be permitted to make a valid application for a visa is lawful.

27 First and foremost among those contextual reasons is that, read as a whole, the *Migration Act* contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol. In some respects, as was explained in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (44), the provisions of the *Migration Act* may, at times, have gone beyond what would be required to respond to those obligations. It is not necessary to explore those issues here. Rather, what is presently significant is that the *Migration Act* proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.

28 To understand how that assumption is reflected in the *Migration Act*, it is necessary to recognise some features of the history of the relevant provisions.

Historical context

29 In 2001, the Parliament enacted six Acts (45), one after the other, which affected the entry into, and remaining in, Australia by aliens. Those six Acts were all assented to, and for the most part came into operation, on the same day. The first of those Acts, the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) (the Border Protection Act), sought to validate certain actions taken between 27 August 2001 and the commencement of the Act. The actions in question were actions taken by the Commonwealth, by any Commonwealth officer, or by any other person acting on behalf of the Commonwealth, in relation to the MV *Tampa* and certain other vessels, and actions in relation to persons who were on board those vessels during the relevant period. The circumstances that gave rise to those actions are sufficiently described in *Ruddock v Vadarlis* (46). In addition, the Border Protection Act, and several of the other five Acts,

(44) (2005) 222 CLR 161 at 179-180 [54]-[59].

(45) *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Migration Legislation Amendment Act (No 1) 2001* (Cth); *Migration Legislation Amendment Act (No 5) 2001* (Cth); *Migration Legislation Amendment Act (No 6) 2001* (Cth).

(46) (2001) 110 FCR 491.

amended the *Migration Act* to change the way in which persons who arrived in, or sought to enter, Australian territory without a valid visa were to be dealt with.

30 Those changes had a number of features of immediate relevance to the present matters. First, certain Australian territory, including the Territory of Christmas Island, was excised from the migration zone (47), thus introducing the category of places called excised offshore places. A person who entered Australia at an excised offshore place, after the excision time, and who became an unlawful non-citizen because of that entry, was identified as an "offshore entry person". The *Migration Act* was amended (48), by inserting s 46A, to provide that an application for a visa is not a valid application if it is made by an offshore entry person who is in Australia and is an unlawful non-citizen.

31 One of the consequential provisions made for dealing with unauthorised arrivals in places excised from the migration zone was to provide, by the insertion of s 198A into the *Migration Act* (49), that offshore entry persons might be taken from Australia to a country declared under that section. The new s 198A(3) provided that the Minister might declare a country for the purposes of that section by declaring that, in effect, the country in question provides access for persons seeking asylum to effective procedures for assessing their need for protection; provides protection for persons seeking asylum pending determination of their refugee status; provides protection to persons who are given refugee status pending their voluntary repatriation to their country of origin or resettlement in another country; and meets relevant human rights standards in providing that protection. An offshore entry person being dealt with under that provision is taken (s 198A(4)) not to be in immigration detention. The Republic of Nauru and Papua New Guinea were declared countries and persons were removed from Australia to those places in exercise of the power given by s 198A.

32 The Department referred to the procedure contemplated by s 198A, of removing offshore entry persons from Australia to another country, as the "Pacific Strategy". Removal of offshore entry persons to those countries began in 2001 but ceased in 2008.

33 While the so-called Pacific Strategy was operating, claims by offshore entry persons taken to a declared country that they were owed protection obligations were assessed according to procedures specified by the Department. The document that recorded those procedures began by stating Australia's international obligations in the following terms:

(47) *Migration Amendment (Excision from Migration Zone) Act*.
(48) *Migration Amendment (Excision from Migration Zone) Act*, s 3, Sch 1, item 4.
(49) *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act*, s 3, Sch 1, item 6.

> "Australia's primary obligation under the Refugees Convention is not to refoule (return) a refugee, either directly or indirectly, to a country where they have a well-founded fear of persecution for a Convention ground. Australia's protection obligations extend to refugees who have entered Australia's territorial seas. *The Pacific strategy in no way detracts from these obligations.*"

(Emphasis added.)

Because persons dealt with under these procedures were not in Australia, but were in either Nauru or Papua New Guinea, s 46A of the *Migration Act* did not apply to prevent their making a valid application for a visa. But being outside Australia, and in a declared country, such persons could apply for only certain classes of visa and, in particular, could not apply for a Protection (Class XA) visa.

34 It is not necessary to examine further the operation of the arrangements that were made to effect the Pacific Strategy. What is presently important is that the changes to the *Migration Act* that were worked by inserting s 46A and, in consequence, inserting s 198A, are to be seen as reflecting a legislative intention to adhere to that understanding of Australia's obligations under the Refugees Convention and the Refugees Protocol that informed other provisions made by the Act. As the document recording procedures for administration of the so-called Pacific Strategy said:

> "The new legislation underpinning the Pacific strategy has two mechanisms that reflect Australia's obligations under Article 33 of the Refugees Convention and other Conventions. These mechanisms are:
>
> • *a framework to enable the Minister for Immigration and Multicultural and Indigenous Affairs to decide whether to allow an application for a visa to be made by unauthorised arrivals on excised offshore places* (offshore entry persons) (while in Australia), following consideration of protection obligations under the relevant United Nations Conventions; and
>
> • the ability to take unauthorised arrivals who have entered Australia at excised offshore places (such as Ashmore Reef and Christmas Island) to another country provided that the Minister for Immigration and Multicultural and Indigenous Affairs has declared under s 198A of the *Migration Act 1958* that the country [meets the requirements described earlier]."

(Emphasis added.)

35 In the light of these considerations of text and context, the obligation created by s 198(2)(a) to remove an unlawful non-citizen who is covered by s 193(1)(c) "as soon as reasonably practicable" should be read as accommodating the making of inquiries, in the words quoted earlier, "to enable the Minister … to decide whether to allow an application for a visa to be made by unauthorised arrivals on excised offshore places". That is, s 198(2) should be read as accommodating the taking of steps for the purpose of informing the Minister of matters

relevant to the possible exercise of power under either s 46A or s 195A. Assuming the relevant steps were taken promptly (and the contrary was not suggested in either of these matters) detention while the inquiries were made would be lawful.

36 To state the accommodation between s 198(2) and the possible exercise of power under s 46A or s 195A in this way does not expressly identify whether, or to what extent, there has been any exercise of power under those sections. Or, to put the same point another way, what exactly is meant by "the taking of steps for the purpose of informing the Minister of matters relevant to the possible exercise of power"? Given that the Commonwealth and the Minister submitted that the inquiries that were made were not undertaken under either s 46A or s 195A, but were made in exercise of non-statutory executive power, it is necessary to examine the matter further. To do that, it is necessary to begin by considering what the Minister has directed be done.

The Minister's announcement

37 On 29 July 2008, the Minister announced that the Government had decided to strengthen and enhance the RSA process. This announcement followed an earlier announcement by the Government "that asylum claims of future unauthorised boat arrivals would be processed on Christmas Island".

38 Following the announcement of 29 July 2008, the Department developed two procedural manuals describing the operation of the RSA process: one entitled "Refugee Status Assessment Procedures Manual" (the RSA Manual), and the other "Guidelines for the Independent Merits Review of Refugee Status Assessments" (the IMR Manual). Argument of the present matters proceeded on the basis that the editions of those manuals produced in September 2009 and August 2009 respectively were used in connection with the assessment and review of each plaintiff's claims.

39 The manuals were cast in terms that made plain that the processes for which each provided were to be applied to *all* unlawful non-citizens who entered Australia at an excised offshore place and who, as the RSA Manual said, raised "claims or information which prima facie may engage Australia's protection obligations".

40 The adoption of these procedures, and their application in these particular cases, can only be understood as implementing the announcements that have been mentioned: one that the Pacific Strategy would no longer be followed; the other that steps of the kind ultimately recorded in the RSA Manual and the IMR Manual would be undertaken as the means of meeting Australia's obligations under the Refugees Convention and Refugees Protocol, instead of following the Pacific Strategy. And if the power to remove offshore entry persons from Australia under s 198A was not to be used, the only statutory powers that could be engaged to avoid breaching Australia's international obligations were the powers under ss 46A and 195A.

The RSA Manual

41 The purpose of the RSA process was described in the RSA Manual as being "so that the Minister … can be advised whether Australia's protection obligations under the Refugees Convention are engaged". It was said that "[c]onsideration of the exercise of the Minister's power under s 46A to allow a visa application to be made will occur following assessment of protection obligations as outlined in this manual".

42 Much emphasis was given in the Manual to the RSA process being "a non-statutory process". But the source of the power to undertake the process was not identified. Rather, the Manual described what were said to be some consequences of the process being "a non-statutory process". In particular, it was said that "[t]his means that the *Migration Act*, the Migration Regulations 1994 … and Australian case law on the interpretations of the definition of a refugee and 'protection obligations' do not apply", though it was said that "officers should be guided by these as a matter of policy".

43 The Manual said that the common law rules of natural justice or procedural fairness were to be applied "to safeguard the fairness of the RSA procedures". The particular procedures laid down in the Manual were described as being "modelled closely on the onshore [p]rotection visa determination procedures". In that respect, it may be noted that, although the process was repeatedly described as "non-statutory", the Manual proceeded on a footing that suggested that some provisions of the *Migration Act* applied to at least some aspects of the process. So, for example, the directions given in the Manual about seeking further information or comment from a claimant proceeded on the footing that what the *Migration Act* describes as "non-disclosable information" (ss 5, 424A(3)(c)) need not be disclosed, regardless of whether procedural fairness would require that to be done.

44 If, at the end of the RSA process, an offshore entry person was found to be owed protection obligations, the Manual described the consequence as being that a submission would be prepared by the Department for the Minister "advising the Minister that Australia's protection obligations are engaged and seeking his/her agreement to lift the bar under s 46A of the Act". By contrast, if the officer making the assessment determined that the person was not a person to whom Australia has protection obligations, no submission would go to the Minister. Instead, an opportunity would be given to seek the review of the decision under the IMR process. If the outcome of the review was negative, an opportunity would be given to the person to provide any new or additional information which he or she wished the Department to take into consideration. A further assessment would be undertaken by the Department of whether any other international treaty obligation was engaged in the particular case. If no other international obligation was engaged, the process for removal of the person from Australia would begin.

The IMR Manual

45 As would be expected, much that was set out in the IMR Manual followed or reflected what was said in the RSA Manual. It is therefore not necessary to do more than mention some particular matters arising from the IMR Manual.

46 The system of Independent Merits Review was described, in the IMR Manual, as having been introduced as one of the new arrangements announced by the Minister on 29 July 2008. Previously, reviews of departmental assessments of refugee status had been undertaken by a senior officer of the Department.

47 Much emphasis was given in the IMR Manual (as it was in the RSA Manual) to the RSA process and the IMR process being "non-statutory". Again, however, the Manual did not seek to identify what power was being exercised. Rather, the consequences said to follow from the process being "non-statutory" were identified. In particular, it was said in the IMR Manual that independent reviewers "may still be guided by the legislated interpretations of the Refugees Convention in sections 36 and 91R-91U of the Act and Australian case law on the interpretation of 'protection obligations'", but it was also said to be "important to note that these sources of interpretation are not binding authorities".

48 The IMR process was subject to what the Department described as "a quality assurance check before an offshore entry person would be notified of the outcome of the IMR review". That process, now supervised by the Registrar of the Refugee Review Tribunal (while on secondment to the Department), was said to "primarily [involve] checking IMR recommendations for spelling, grammatical, cut and paste or other obvious errors". But it was a process that may "result in a suggestion being made to an independent reviewer that he or she may wish to consider an additional matter, consider more up to date country information, or clarify parts of a decision-record or recommendation".

49 At the end of the review, the reviewer was to make a recommendation about whether Australia had protection obligations to the claimant. If the reviewer concluded that Australia did have protection obligations to the claimant, a departmental officer would prepare a submission to the Minister for consideration of the exercise of power under either s 46A(2) or s 195A. If the reviewer concluded that Australia did not have protection obligations to the claimant, no submission would be made to the Minister. Steps of the kind described in connection with the RSA process for considering engagement of any other relevant international obligation would be undertaken and, subject to that, processes for removing the claimant would then begin.

Review by contractors

50 What, if any, significance attaches to the fact that, as noted at the outset of these reasons, the IMR process was conducted by persons engaged by an independent contractor, Wizard People Pty Ltd? That company (the contractor) had agreed with the Commonwealth that it

would make specified persons available to undertake reviews of unfavourable Refugee Status Assessments of offshore entry persons "seeking to engage Australia's protection obligations under the Refugees Convention". As noted above, the only function of the reviewer was to make a recommendation about whether protection obligations were owed. Any decision to permit the making of an application for a visa or to grant a visa would be made by the Minister. Any decision to remove a claimant would be made by a departmental officer.

51 It may be accepted, for the purposes of the present matters, that neither the contractor, nor any of the specified persons engaged by the contractor to perform the services it had agreed to provide, is an officer of the Commonwealth. More particularly, it may be accepted that the reviewers who are named as defendants in these matters are not officers of the Commonwealth. Accepting that to be so does not determine, however, whether relief of the kind sought by either plaintiff can now be granted. Rather, the observation that those who conducted the independent reviews are assumed not to be officers of the Commonwealth could determine only that a claim for mandamus, prohibition or injunction against those persons would not, standing alone, found the original jurisdiction of this Court under s 75(v) of the *Constitution*. In these particular matters, the jurisdiction of the Court is found in s 75(iii) (as matters in which the Commonwealth, or a person being sued on behalf of the Commonwealth, is a party), s 75(v) (as matters in which mandamus and injunction are sought against the Minister and either a departmental officer or the Secretary of the Department – all officers of the Commonwealth) and even, perhaps, s 75(i) (as matters arising under any treaty – the Refugees Convention and the Refugees Protocol). Accordingly, it is appropriate to leave, for another day, the question whether a party identified as "an independent contractor" nevertheless may fall within the expression "an officer of the Commonwealth" in s 75(v) in circumstances where some aspect of the exercise of statutory or executive authority of the Commonwealth has been "contracted out".

52 Instead, attention must be directed to what power was being exercised in each of these cases when, *while the claimant was detained,* a departmental officer undertook a Refugee Status Assessment and then an independent contractor reviewed that assessment. Was it, as the Commonwealth and the Minister submitted, no more than a non-statutory executive power to inquire? Was it, as Plaintiff M61 submitted, an exercise of power under s 46A or s 195A? Was it, as Plaintiff M69 submitted, an exercise of non-statutory executive power to inquire because s 46A is invalid? The question of validity must be examined first.

Validity of s 46A

53 The argument advanced on behalf of Plaintiff M69, that s 46A is wholly invalid, began from observations made in a number of

cases (50) about the special significance of s 75(v). As was said in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (51), "[a]n essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers (52)". Section 75(v) furthers that end by controlling jurisdictional error and makes it "constitutionally certain that there [is] a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power" (53).

54 The argument proceeded from these premises to a conclusion that, not only will the courts declare and enforce the limits of power, there must exist in every case limits on power that can be enforced. More particularly, it was submitted that there cannot be a grant of power on terms of the kind found in s 46A(7): that the person to whom the power is granted need not consider its exercise, whether asked to do so or in any other circumstances. Such a power, it was submitted, would be an arbitrary power, and the purpose of s 75(v) is to prevent arbitrary power. Further support for the argument was sought by reference to three other considerations. First, reference was made to the notion of rule of law and the well-known dictum of Dixon J in *Australian Communist Party v The Commonwealth* (54) that the *Constitution* is framed in accordance with many traditional conceptions of which some, including the rule of law, are simply assumed. Secondly, reference was made to what was said in *Kirk v Industrial Court (NSW)* (55): that to deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court "would be to create islands of power immune from supervision and restraint". Thirdly, reference was made to the uncontroversial proposition that "a non-judicial body cannot determine the limits of its own power".

55 As noted earlier, the particular conclusion urged, that s 46A(7) is invalid, proceeded from the broad proposition that there cannot be a valid grant of power without enforceable limits. The merits of that broader proposition need not be examined. The argument in this case necessarily focused upon a much narrower aspect of that broad proposition: whether there can be a valid grant of power on terms that *consideration* of the exercise of that power cannot be enforced.

56 Contrary to the submissions on behalf of Plaintiff M69, neither s 46A as a whole, nor s 46A(7) in particular, is a provision which is of

(50) *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 668 [45]; *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J.
(51) (2007) 228 CLR 651 at 668 [46].
(52) *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152-153 [43].
(53) *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363.
(54) (1951) 83 CLR 1 at 193.
(55) (2010) 239 CLR 531 at 581 [99].

so little content as not to constitute an exercise of legislative power or to be a "law" as a rule of conduct or a declaration as to power, right or duty (56). The relevant content of the provision is readily expressed: "the Minister may … but need not consider whether to …" And that is not a form of grant of power unknown to the federal statute book, at least in recent years (57).

57 Grant of power on the terms set out in s 46A(7) does not clash with s 75(v), or with its place or purpose in the *Constitution*. Maintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise. Nor does it entail that every discretion to exercise a power must be read as if satisfaction of identified criteria would require its exercise (58). Yet it was one or other of these propositions which underpinned the arguments for invalidity.

58 Nor do considerations of the kind embraced by the expression "the rule of law" yield some contrary conclusion. As developed in argument, the relevant content of the rule of law was said to be that it is for the courts to enforce the limits on power and for the Parliament to confer a power on a Minister subject to limits. The contravention of the rule of law was described as being to prevent the constitutional jurisdiction in s 75(v) being exercised in relation to the power. But that is not so. Section 46A(7) does not prevent any exercise of jurisdiction under s 75(v).

59 The repository of the power given by s 46A does not determine the limits of the power. If the power is exercised, s 75(v) can be engaged to enforce those limits. No "island of power" is created. Rather, what s 46A(7) does is provide that the repository of the relevant power need not consider whether to exercise it. That is, there being no duty to exercise the power, mandamus will not go to compel its exercise. But that does no more than deny that the particular grant of power entails a duty to consider its exercise.

60 The challenge to the validity of s 46A(7) was not made good. No question therefore arises about the validity of the other provisions of s 46A.

61 This being so, the question – what power was exercised when Refugee Status Assessments and Independent Merits Reviews were

(56) cf *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [102], quoting *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 per Latham CJ.

(57) See, eg, *Migration Act*, ss 37A, 46B, 48B, 72, 91F, 91L, 91Q, 137N, 195A, 197AA-197AG, 261K, 351, 391, 417, 454, 495B, 501A, 501J, 503A; *Australian Citizenship Act 2007* (Cth), s 48; *Australian Crime Commission Act 2002* (Cth), s 9; *Commonwealth Radioactive Waste Management Act 2005* (Cth), s 3C; *Taxation Administration Act 1953* (Cth), Sch 1, s 357-70; *Trade Marks Act 1995* (Cth), s 84A.

(58) cf *Julius v Lord Bishop of Oxford* [1880] 5 AC 214; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106; *Leach v The Queen* (2007) 230 CLR 1.

conducted with respect to each plaintiff? – becomes was it, as the Commonwealth submitted, no more than a non-statutory executive power to inquire? Was it, as Plaintiff M61 submitted (and Plaintiff M69 adopted as an alternative argument), an exercise of power under s 46A or s 195A?

Power

62 The following six considerations bear upon the issue. First, the powers under ss 46A and 195A may *only* be exercised by the Minister *personally* (ss 46A(3), 195A(5)). Secondly, the assessment and review were made in consequence of a ministerial direction. Thirdly, in the circumstances of these cases, the continued detention of an offshore entry person, while an assessment and review were conducted, was lawful only because the relevant assessment and review were directed to whether powers under either s 46A or s 195A could or should be exercised. Fourthly, if, on assessment or subsequent review, it was decided that Australia did have protection obligations to the claimant, a submission concerning the exercise of power under s 46A would be made to the Minister. Fifthly, the plaintiffs submitted that a favourable assessment always or, as the plaintiffs put it, "automatically" led to the Minister exercising power under s 46A. Sixthly, if, on assessment or subsequent review, it was decided that Australia did not have protection obligations to the claimant, no submission would be made to the Minister.

63 Of these six considerations, it is the first three that are most important. They are the most important because they present not only an apparent tension between considerations, but also the means of resolving that tension. There is an appearance of tension between the first consideration (that the statute requires that the relevant powers to lift the bar under s 46A, or grant a visa under s 195A, can *only* be exercised by the Minister personally) and the third (the lawfulness of continued detention for the purposes of inquiry). There is the appearance of tension between those considerations because together they invite the question: how could continued detention under the *Migration Act* be lawful if what prolongs the detention (the Department making inquiries) has no statutory footing? Yet a central contention of the Commonwealth and the Minister was that the inquiries which were made, and which necessarily prolonged each plaintiff's detention, were not made under statute.

64 It is not readily to be supposed that a statutory power to detain a person permits continuation of that detention at the unconstrained discretion of the Executive. Yet a proposition of that kind lay at the heart of the submissions advanced on behalf of the Commonwealth and the Minister. The Commonwealth and the Minister submitted that detention of an offshore entry person was permitted while the officer detaining the person awaited the *possibility* of the exercise of power under either s 46A or s 195A. That is, the obligation to bring to an end the detention of an unlawful non-citizen who is covered by s 193(1)(c),

who has not subsequently been immigration cleared, and who has not made (and cannot make) a valid application for a visa, by removing that person from Australia as soon as reasonably practicable, was said to be suspended for so long as there remains a possibility (presumably a reasonable possibility) of an exercise of power under s 46A or s 195A.

65 Several points may be made about this proposition. First, the existence of any relevant possibility is wholly within the control of the Executive. It follows that the period of an individual's detention would be wholly within the control of the Executive. Secondly, deciding whether there is a relevant possibility of the exercise of power under either s 46A or s 195A would require some prediction of the likelihood of the exercise of a personal non-compellable power. A criterion of that kind is a very uncertain basis for determining whether detention is lawful or unlawful. Such a construction of the relevant provision should not be adopted unless no other construction is reasonably open. Instead, accommodation of the provisions governing detention and its duration, with what is done in relation to the possible exercise of power under ss 46A and 195A, must seek a firmer statutory foundation.

66 In these cases, that foundation is revealed by recognising the significance of the second matter that has been identified: that the inquiries that are made for the purposes of both the RSA and IMR processes are made in consequence of the decision announced in July 2008. There would otherwise appear to be an irreducible tension between the exercise of a statutory power to detain in a way that prolongs detention, because inquiries are being made, and those inquiries having no statutory foundation. This tension does not arise if the decision to establish and implement the RSA and IMR procedures, announced by the Minister, is understood not just as a direction to provide the Minister with advice about whether power under s 46A or s 195A can or should be exercised, but as a decision by the Minister to consider whether to exercise either of those powers in respect of any offshore entry person who makes a claim that Australia owes the claimant protection obligations.

67 Although the parties gave some prominence in argument to each of the other three considerations identified earlier as bearing upon the question of power, each is less important than the first three that have just been discussed. So, although it is right to observe, as the Commonwealth and the Minister emphasised, that no submission is put before the Minister if the outcome of the RSA and IMR processes is unfavourable to the claimant, that fact does not, of itself, deny that the Minister has begun the task of considering whether to exercise power under either s 46A or s 195A. That the Minister has begun that task is shown by consideration of the first three matters that have been mentioned. Likewise, while the plaintiffs sought to demonstrate that a favourable assessment or review has always led to the Minister exercising power under either s 46A or s 195A, that fact (if it be so)

may assist in showing that the Minister has begun to consider whether to exercise the relevant power, but standing alone it does not require that conclusion.

68 It is convenient at this point to deal with how resolution of the issue that is now under consideration fits in with what is usually called the "Carltona principle" (59). The Carltona principle has been described (60) as a principle of agency, distinct from a delegation of power, which allows an agent to act in the principal's name and use all of the principal's power. The Commonwealth and the Minister submitted that, while the Carltona principle would allow activities of a Minister's Department to be attributed to a Minister, the position is different where (as here) the relevant powers are ones which the statute requires be exercised by the Minister personally. The Commonwealth and the Minister further submitted that an analogy could be drawn between the circumstances of these cases and those provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which deal with conduct for the purpose of making a decision and which were held, by the Federal Court of Australia in *Margarula v Minister for Environment* (61), to be confined to conduct of the relevant decision-maker. Here, so the Commonwealth and the Minister submitted, the departmental inquiries should not be found to be any exercise of the Minister's powers under either s 46A or s 195A.

69 It is not necessary to decide whether the analogy which the Commonwealth and the Minister sought to draw is apt. Nor is it necessary to attempt to identify the limits of the Carltona principle. What is presently important is that what the Department did, in conducting assessments and obtaining reviews, was done in consequence of a ministerial decision that those steps be taken. In requiring those steps to be taken, the Minister did not seek to (and did not) delegate any power. But the fact that the steps were taken in consequence of a ministerial decision is important.

70 Exercise of the powers given by ss 46A and 195A is constituted by two distinct steps: first, the decision to *consider* exercising the power to lift the bar or grant a visa and secondly, the decision whether to lift the bar or grant a visa. The Minister is not obliged to take either step. Sections 46A(7) and 195A(4) expressly provide that the Minister does not have a duty to consider whether to exercise the relevant power. And ss 46A(2) and (3) and 195A(2) and (5) make plain that it is for the Minister personally to decide whether to exercise the relevant power. But here, the effect of the Minister's announcement was that, instead of

(59) *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560. See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 37-38 per Mason J; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 449-453 [176]-[188] per Gummow and Hayne JJ.

(60) Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed (2009), pp 343-345 [6.45].

(61) (1999) 92 FCR 35.

removing offshore entry persons from Australia to a declared country under the powers given under s 198A, consideration would be given to exercising the powers given by ss 46A and 195A in every case in which an offshore entry person claimed that Australia owed that person protection obligations. The outcome of that consideration in any individual case would depend upon the result of the processes established by the Department in response to the ministerial announcement. But in order that Australia *not* breach the international obligations it had undertaken in the Refugees Convention and Refugees Protocol, consideration would be given, in every case, to the exercise of the only statutory powers available when the Pacific Strategy was no longer to be pursued: the powers given by ss 46A and 195A. Having decided that he should consider the exercise of power under s 46A or s 195A with respect to every offshore entry person who thereafter claimed that Australia owed that person protection obligations, the Minister required his Department to undertake the inquiries necessary to make an assessment and, if needs be, review the conclusion reached.

71 There having been a decision to consider exercise of the relevant powers in the present and other similar cases, the unchallenged assumption made in these matters, that detention during the conduct of the assessment and review processes was lawful, is seen to be soundly based. The obligation to remove as soon as reasonably practicable, imposed by s 198(2), is read in the light of other provisions of the *Migration Act*. The express reference in s 198(2)(c) to the possibility of making a valid application for a visa accommodates the consideration of whether to exercise the powers given by ss 46A and 195A. The accommodation is founded upon the taking of the first step towards the exercise of those statutory powers: the decision to consider their exercise. It is not founded upon necessarily uncertain prognostications about whether exercise of the available powers will ever be considered.

Limits on power?

72 What, if any, relevant limits are there on the way in which the assessment and any subsequent review are conducted?

73 For the reasons that have already been given, the inquiries undertaken in making a Refugee Status Assessment, and any subsequent Independent Merits Review, were inquiries made after a decision to consider exercising the relevant powers and for the purposes of informing the Minister of matters that were relevant to the decision whether to exercise one of those powers in favour of a claimant. Those being the circumstances in which the inquiries were conducted, it is not necessary to examine the submissions advanced on behalf of Plaintiff M69 and the Commonwealth and the Minister about whether exercise of non-statutory executive power is or may be limited by a requirement to afford procedural fairness. Rather, the inquiries having the particular statutory foundations that have been identified,

the principles that govern what limits there are to the way in which the assessment and any subsequent review are conducted are well established.

74 It was said, in *Annetts v McCann* (62), that it can now be taken as settled that when a statute confers power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, principles of natural justice generally regulate the exercise of that power. In *Kioa v West*, different views were expressed about whether the requirements of procedural fairness arise from the common law (63) or instead depend upon drawing an implication from the legislation which confers authority to decide (64). It is unnecessary to consider whether identifying the root of the obligation remains an open question (65) or whether the competing views would lead to any different result. It is well established, as held in *Annetts* (66), that the principles of procedural fairness may be excluded only by "plain words of necessary intendment".

75 In the present cases, the Commonwealth and the Minister submitted that, if any power was being exercised under s 46A(2) (and they submitted that it was not), there was no implied obligation to afford procedural fairness because the power is not a power to destroy, defeat or prejudice a right; it is a discretionary power to confer a right. This submission was framed in a way that took up only part of what was said in *Annetts*. Reference was made in *Annetts* to power to destroy, defeat or prejudice not just rights but also interests or legitimate expectations. It will not be necessary to explore in this case what place the notion of legitimate expectations has in this field of discourse (67). It is enough to say that the references in *Annetts* to "prejudice", "interests" and "legitimate expectations" suggest that the contrast which the Commonwealth and the Minister sought to draw between destruction, defeat or prejudice of a right, on the one hand, and a discretionary power to confer a right, on the other, proceeds from too narrow a conception of the circumstances in which an obligation to afford procedural fairness might arise. The more comprehensive statement of principle by Mason J in *FAI Insurances Ltd v*

(62) (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ. See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 61 [51] per McHugh, Gummow and Hayne JJ; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258 [11].

(63) (1985) 159 CLR 550 at 584 per Mason J.

(64) (1985) 159 CLR 550 at 609, 615 per Brennan J.

(65) *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 142-143 [168]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258-259 [11]-[13].

(66) (1990) 170 CLR 596 at 598. See also *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396.

(67) See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1.

Winneke (68) sufficiently answers the submissions by the Commonwealth and the Minister. His Honour said that the obligation to afford procedural fairness is not limited to cases where the exercise of the power affects rights in the strict sense, but extends to the exercise of a power which affects an interest or a privilege. It is then important, in the present matters, to identify the rights and interests affected.

Rights or interests affected?

76 Contrary to the submissions of the Commonwealth and the Minister, the Minister's decision to consider whether power should be exercised under either s 46A or s 195A directly affected the rights and interests of those who were the subject of assessment or review. It affected their rights and interests directly because the decision to consider the exercise of those powers, with the consequential need to make inquiries, prolonged their detention for so long as the assessment and any necessary review took to complete. That price of prolongation of detention is a price which some claimants may have paid without protest. After all, they sought entry to Australia and this was the only way of achieving that end. And they claimed that return to their country of nationality entailed a real risk of persecution. But even if it were the fact that individuals were content to have detention prolonged, that must not obscure that what was being done, for the purposes of considering the exercise of a statutory power, had the consequence of depriving them of their liberty for longer than would otherwise have been the case.

77 Because the Minister was not bound to exercise power under either s 46A or s 195A, no matter what conclusion was reached in the assessment or review, it cannot be said that a decision to consider exercising the power affected some right of the offshore entry person to a particular outcome. The offshore entry person had no right to have the Minister decide to exercise the power or, if the assessment or review were favourable, to have the Minister exercise one of the relevant powers in his or her favour. Nonetheless, once it is decided that the assessment and review processes were undertaken for the purpose of the Minister considering whether to exercise power under either s 46A or s 195A, it follows from the consequence upon the claimant's liberty that the assessment and review must be procedurally fair and must address the relevant legal question or questions. The right of a claimant to liberty from restraint at the behest of the Australian Executive is directly affected. The claimant is detained for the purposes of permitting the Minister to be informed of matters that the Minister has required to be examined as bearing upon whether the power will be exercised.

78 The Minister having decided to consider the exercise of power under either or both of ss 46A and 195A, the steps that are taken to inform that consideration are steps towards the exercise of those statutory

(68) (1982) 151 CLR 342 at 360.

powers. That the steps taken to inform the consideration of exercise of power may lead at some point to the result that further consideration of exercise of the power is stopped does not deny that the steps that were taken were taken towards the possible exercise of those powers. Nor does it deny that taking the steps that were taken directly affected the claimant's liberty. There being no exclusion by plain words of necessary intendment, the statutory conferral of the powers given by ss 46A and 195A, including the power to decide to *consider* the exercise of power, is to be understood as "conditioned on the observance of the principles of natural justice" (69). Consideration of the exercise of the power must be procedurally fair to the persons in respect of whom that consideration is being given. And likewise, the consideration must proceed by reference to correct legal principles, correctly applied.

79 What relief is to be afforded if the inquiries that are made are not procedurally fair, or if those inquiries do not proceed by reference to correct legal principles, correctly applied, raises separate issues that will be considered later in these reasons. It is first necessary to examine whether what was done in these two cases was procedurally unfair or attended by relevant legal error.

Plaintiff M61 – Procedural fairness and error of law

80 The written and oral submissions advanced on behalf of Plaintiff M61 about procedural fairness and error of law focused upon the review of the Refugee Status Assessment that was conducted by the third-named defendant (the reviewer). The steps taken by the fourth-named defendant in conducting the initial Refugee Status Assessment were rightly treated as overtaken by the subsequent review. The reviewer concluded that Plaintiff M61 did not meet the definition of a refugee set out in Art 1A of the Refugees Convention (as amended by the Refugees Protocol) and recommended that he should not be recognised as a refugee.

The reviewer's reasons

81 It is necessary to notice three aspects of the reasons the reviewer stated for forming the opinions he did.

82 First, early in his statement of reasons, the reviewer said that:

> "While this merits review is not bound by Australian law and is of a non-statutory nature, it is appropriate to have regard to Australian legislation and relevant case law as an aid to the interpretation of the Refugees Convention."

83 Secondly, the reviewer set out a list of the material that he had before him. Those documents included a submission by the plaintiff's adviser and a copy of a statement that the plaintiff had made. In the submission, the plaintiff's adviser described the plaintiff's claims as having two bases. First, the adviser submitted that the plaintiff feared

(69) *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J.

that, if he was returned to his country of nationality (Sri Lanka), he would suffer persecution or substantial discrimination amounting to a gross violation of human rights (or both) at the hands of Sri Lankan authorities or "pro-government paramilitary groups". The submission stated that the feared persecution or discrimination was on account of six matters (including ethnicity and imputed political opinion on account of his brother's membership of the Liberation Tigers of Tamil Eelam – "LTTE"). The submission went on to state a second and separate claim. It said that country information indicated that the plaintiff also faced a risk of harm on account of "his profile as a shop owner" and on account of his membership of particular social groups: "Tamil business owners" or "Tamils who are perceived to be wealthy". The plaintiff referred in his statement to the matters which were said to demonstrate the foundation of this second claim.

84 In his reasons, the reviewer considered the first set of claims. He did not examine, and did not refer in his reasons, to the second claim.

85 The third point to notice about the reviewer's reasons is that he did not accept that the plaintiff had left his country, and could not return there, for the reasons he claimed. An important basis for the conclusion that the plaintiff's fears were not well founded was information provided to the reviewer by the Department as country information. In the course of the reviewer's interviewing the plaintiff, none of that country information was put to the plaintiff. In particular, none of the propositions recorded in the reviewer's reasons – that groups whom the plaintiff said he feared were now joining and integrating into the mainstream of politics, that magistrates and judges were ordering the release of LTTE suspects, and that the way in which the authorities dealt with persons returning to Sri Lanka did not accord with the plaintiff's description of his treatment on return from Egypt in 2008 – were raised with him or his adviser for their comment or consideration.

Reviewable error?

86 Each aspect of the reviewer's reasons that has been noted reveals error.

87 First, the determination of whether Australia had protection obligations to the plaintiff was to be made according to law. It is an essential characteristic of the judicature established by Ch III that it declares and determines the limits of power conferred by statute upon decision-makers (70). The various legislative powers for which the *Constitution* provides are expressed as being "subject to" the *Constitution* and thus to the operation of Ch III, in particular to the exercise of jurisdiction conferred by s 75 (71). The reasoning supporting decisions made in particular controversies acquires a

(70) *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152-153 [43].

(71) *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 632.

permanent, larger and general dimension as an aspect of the rule of law under the *Constitution* (72).

88 One of the powers whose exercise was being considered was the power to lift the bar under s 46A and permit the plaintiff to make a valid application for a protection visa. Exercise of that power on the footing that Australia owed protection obligations to the plaintiff would be pointless unless that determination was made according to the criteria and principles identified in the *Migration Act*, as construed and applied by the courts of Australia. For the purposes of the Minister considering the exercise of power under s 46A, what the RSA Manual and the IMR Manual both referred to as "Australian legislation and relevant case law" had, therefore, to be treated as binding upon those who made the assessments and those who reviewed those assessments, not just as "aid[s] to the interpretation of the Refugees Convention".

89 Although expressed generally – as whether Australia owed the plaintiff protection obligations – the fundamental question to which the assessment and review processes were directed had to be understood as whether the criterion stated in s 36(2) (73), as a criterion for grant of a protection visa, was met. Necessarily, that question had to be understood by reference to other relevant provisions of the *Migration Act*, and the decided cases that bear upon those provisions. If the legislation and case law were treated as no more than aids to interpretation, the assessment or review would not address the question that the Minister had to consider when deciding whether to lift the bar under s 46A. Whether another, different, question about the application of the Refugees Convention (as amended) according to some understanding of the Convention different from that adopted in Australian legislation and case law could be relevant to the issues presented by the possible application of s 195A need not be considered.

90 Secondly, failing to address one of the claimed bases for the plaintiff's fear of persecution meant that the Minister was not informed about a matter that bore upon the question that the Minister had asked to be considered: whether Australia owed the plaintiff protection obligations. The failure to deal with the claim was a denial of procedural fairness (74).

91 Thirdly, procedural fairness required the reviewer to put before the plaintiff the substance of matters that the reviewer knew of and considered may bear upon whether to accept the plaintiff's claims. The

(72) *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 69 [158].

(73) Section 36(2) provides: "A criterion for a protection visa is that the applicant for the visa is: (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who: (i) is mentioned in paragraph (a); and (ii) holds a protection visa."

(74) *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 at 1092 [24], 1102 [95]; 197 ALR 389 at 394, 408.

Migration Act makes special provision about how the Refugee Review Tribunal is to conduct its reviews. It provides (s 424A(1)) that the Tribunal must give an applicant "clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". But that obligation is subject to qualifications. In particular, it does not extend (s 424A(3)(a)) to information "that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member". Hence country information is treated as a class of information which need not be drawn to the attention of applicants for review by the Refugee Review Tribunal. But those provisions were not engaged in respect of Independent Merits Reviews of the kind now under consideration or, we would add, in respect of the initial Refugee Status Assessments. The reviewer should have put to the plaintiff for his consideration and comment those aspects of country information known to the reviewer which the reviewer considered may bear upon the claims the plaintiff made. He did not.

92 What follows from these conclusions will be considered later in these reasons under the heading "What relief may be granted?" Before dealing with that subject, it is necessary to undertake the same kind of analysis of the case of Plaintiff M69 as has just been made in relation to Plaintiff M61.

Plaintiff M69 – Procedural fairness and error of law

93 Plaintiff M69 made a number of complaints about want of procedural fairness and error of law. Although his submissions were directed to both the recommendation made at the end of the Refugee Status Assessment and the Independent Merits Review, attention can be confined to the latter recommendation. And having regard to what has already been said in relation to similar complaints by Plaintiff M61, the treatment of the complaints made by Plaintiff M69 may be quite brief.

94 Plaintiff M69 alleged that the third defendant (the reviewer) made the same error of law as was made in the case of Plaintiff M61 by treating the *Migration Act* and decided cases as no more than guides to determining the issues presented. The plaintiff further alleged that he, like Plaintiff M61, had been denied an opportunity to deal with adverse country information. He further alleged that, after the reviewer had completed her review, but before the plaintiff was notified of its result, the plaintiff made a sur place claim. That claim arose out of the broadcasting of some images of persons in immigration detention who were being moved from Christmas Island to a detention centre on the mainland. The plaintiff's sur place claim was not considered by the reviewer.

The reviewer's reasons

95 In her reasons, the reviewer made a deal of reference to country information concerning the state of affairs in the plaintiff's country of origin (Sri Lanka) and, in particular, the Jaffna district and a hospital at which the plaintiff said he had worked. She concluded that this, and

other country information, supported the conclusion that the plaintiff was not at risk for the reasons he claimed. The reviewer relied on country information available to her to conclude, contrary to the plaintiff's contention, that the plaintiff's illegal exit from Sri Lanka did not put him at risk.

Reviewable error?

96 It is sufficient for present purposes to conclude that, for the reasons given in connection with Plaintiff M61, the first and second complaints made on behalf of Plaintiff M69 were made good. It is not necessary to consider any of the other ways in which the plaintiff put his case.

97 For the reasons given in relation to Plaintiff M61, the reviewer made an error of law by treating the *Migration Act* and decided cases as no more than guides to decision making.

98 As for want of procedural fairness, it may well be that some of the facts said to be revealed by country information were sufficiently put to the plaintiff or his adviser for comment. It is plain, however, that the reviewer did not put to the plaintiff country information she had before her concerning the treatment of failed asylum seekers returning to Sri Lanka. Not putting the substance of the country information to the plaintiff for his consideration and comment denied him procedural fairness.

What relief may be granted?

99 Because ss 46A and 195A both state, in terms, that the Minister does not have a duty to consider whether to exercise the power given by the section, mandamus will not issue to compel the Minister to consider or reconsider exercising either power. That the Minister decided to consider exercising the powers and, for that purpose, directed the making of Refugee Status Assessments and Independent Merits Reviews does not entail that, if the process of inquiry miscarried, the Minister can be compelled again to consider exercising the power.

100 As was explained in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (75), the unavailability of mandamus entails that there is no utility in granting certiorari to quash the recommendation which the reviewer made in each of these matters. It is thus not necessary to consider whether certiorari to quash the recommendations would lie. More particularly, it is not necessary to examine whether, as was submitted (76) on behalf of the Commonwealth and the Minister, certiorari will not go to quash a decision or recommendation prior to the final exercise of a discretion that directly affects legal rights unless that decision or recommendation

(75) (2003) 211 CLR 441 at 461 [48].

(76) Referring to *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471 at 475; 8 ALR 691 at 699; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580-581, 595; *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159-165, 178-180; *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 at 888.

must be taken into account by the ultimate decision-maker. (In considering the exercise of power under either s 46A or s 195A, the Minister might, but need not, take account of the recommendations made by those who had conducted an assessment or review of an assessment of an offshore entry person's claim that Australia owes that person protection obligations.) Nor is it necessary to examine whether, or how, the proposition advanced on behalf of the Commonwealth and the Minister, expressed as it is in absolute terms, might permit or require modification to accommodate cases such as the present, where the right that is affected by conducting the impugned process of decision making is a right to liberty. The claims to certiorari and mandamus must be refused.

101 Although the plaintiffs' claims for certiorari and mandamus should be rejected, a declaration should be made in each case that the processes undertaken to arrive at the reviewer's recommendation were flawed in the respects that have been identified. In many cases, the conclusion that certiorari and mandamus do not lie would require the further conclusion that no declaration of right should be made. Why should a declaration be made in these matters?

102 The power to grant declaratory relief is a power which "[i]t is neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise" (77). As pointed out in *Ainsworth v Criminal Justice Commission* (78), it is a form of relief that is confined by considerations which mark out the boundaries of judicial power.

103 In the circumstances of this litigation it cannot be said that a declaratory order by the Court will produce no foreseeable consequences for the parties (79). Declaratory relief is directed here to determining a legal controversy; it is not directed to answering some abstract or hypothetical question (80). Each plaintiff has a "real interest" (81) in raising the questions to which the declaration would go. In these cases, the procedures which are said to be infirm were conducted for the purpose of informing the Minister of matters directly bearing upon the exercise of power to avoid breach by Australia of its international obligations. The statutory powers to the exercise of which the inquiries were directed are placed in the statutory and historical context earlier described. That context demonstrates the importance attached to the performance of the relevant international obligations by both the legislative and executive branches of the Government of the Commonwealth. Moreover, there is a considerable public interest in the

(77) *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437; *Ainsworth* (1992) 175 CLR 564 at 581-582.
(78) (1992) 175 CLR 564 at 582. See also *Pape* (2009) 238 CLR 1 at 68 [152].
(79) *Gardner v Dairy Industry Authority (NSW)* (1977) 138 CLR 646 (note); 52 ALJR 180 at 188; 18 ALR 55 at 69 per Mason J; at 189; 71 per Aickin J.
(80) *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-356 [46]-[47].
(81) *Russian Commercial & Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448, quoted with approval in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438.

observance of the requirements of procedural fairness in the exercise of the relevant powers (82).

104 Accordingly, each plaintiff should have a declaration moulded in terms similar to the declaration made by this Court in *Ainsworth*.

Orders

105 In each matter there should be a declaration that, in recommending to the Minister that the plaintiff was not a person to whom Australia has protection obligations, the third-named defendant made an error of law, in that he (or in the matter of Plaintiff M69, she) did not treat the provisions of the *Migration Act 1958* (Cth) and the decisions of Australian courts as binding, and further, failed to observe the requirements of procedural fairness. The Commonwealth and the Minister should pay the plaintiffs' costs. Otherwise, each application should be dismissed.

In each matter:

1. *Declare that, in recommending to the second defendant that the plaintiff was not a person to whom Australia has protection obligations, the third defendant made an error of law, in that the third defendant did not treat the provisions of the Migration Act 1958 (Cth) and the decisions of Australian courts as binding, and, further, failed to observe the requirements of procedural fairness.*
2. *Application otherwise dismissed.*
3. *First and second defendants to pay the plaintiff's costs.*

Solicitors for plaintiff M61, *Allens Arthur Robinson*.

Solicitors for plaintiff M69, *Holding Redlich*.

Solicitor for the defendants, *Australian Government Solicitor*.

CJH

(82) cf *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at 134 [25].