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High Court upholds validity of designation of Papua New Guinea as regional processing country

In *Plaintiff S156-2013 v Minister for Immigration and Border Protection* [2014] HCA 22 the High Court unanimously upheld the validity of provisions of the *Migration Act 1958* that authorise the Minister for Immigration and Border Protection to designate an offshore processing country and direct that Unauthorised Maritime Arrivals (UMAs) be taken there. The Court characterised the challenged provisions as laws with respect to aliens under s 51(xix) of the Constitution, on the basis that the provisions facilitate the removal of aliens from Australia and therefore have a direct connection with the subject matter of s 51(xix). The Court also upheld the Minister's designation of Papua New Guinea (PNG) as a regional processing country and his direction that UMAs be taken there. The case provides a particularly clear example of the application of principles of constitutional characterisation.

Background

Regional processing under the Migration Act

Section 198AB of the Migration Act provides that the Minister may, by legislative instrument, designate that a country is a regional processing country if 'the Minister thinks that it is in the national interest to designate the country to be a regional processing country'. Section 198AB(3)(a) sets out the matters to which the Minister must have regard when considering the national interest for this purpose.

Section 198AD(2) provides that an officer must, as soon as reasonably practicable, take a UMA from Australia to a regional processing country. If there are two or more regional processing countries designated, s 198AD(5) provides that the Minister must, in writing, direct an officer to take a UMA, or a class of UMAs, to a specified regional processing country. An officer must comply with this direction (s 198AD(6)).

Regional processing in Papua New Guinea

On 9 October 2012 the Minister designated PNG as a regional processing country under s 198AB (the designation decision). The Parliament approved that designation.

On 29 July 2013, the Minister made a written direction under s 198AD for four classes of UMA – family groups, adult women not part of a family group, adult men not part of a family group and unaccompanied minors (the taking direction). The taking direction required officers to remove UMAs to either PNG or the Republic of Nauru (also designated as a regional processing country) if certain conditions set out in the direction were satisfied.

The plaintiff is a UMA transferred from Christmas Island to PNG in accordance with the ministerial direction.

The High Court's decision

Sections 198AB and 198AD are supported by the aliens power

The Court held that both s 198AB and 198AD 'operate to effect the removal of aliens from Australia' ([25]). The Court emphasised that provisions of this kind have a direct connection with the subject-matter of the aliens power under s 51(xix) and are clearly supported by that head of power ([22–25]): 'No further inquiry is necessary' ([25]).

The Court rejected the plaintiff's arguments that ss 198AB and 198AD were not supported by the aliens power because they did not satisfy a test of proportionality. Because the overall effect of the scheme was to detain UMAs in PNG, where their status as refugees may or may not be determined, the plaintiff argued ss 198AB and 198AD went significantly further than merely regulating the entry of aliens to, or providing for their removal from, Australia. According to the Court, the difficulty with the plaintiff's argument was that neither s 198AB nor s 198AD makes any provision for what happens to UMAs on their removal from Australia.

The Court also rejected the plaintiff's argument that the administrative arrangements between Australia and PNG for regional processing in PNG were relevant in assessing the validity of ss 198AB and 198AD: 'It is the operation and effect of the provisions themselves which fall for consideration, not Administrative Arrangements which are made independently of them' ([33]).

The designation decision is valid

The Court rejected the plaintiff's attempt to imply:

- a duty on the Minister, when making a decision to designate a processing country, to take into account any particular considerations
- a limit on those considerations.

The only precondition to designation was a statutory requirement to form an opinion that designation is in the national interest: 'What is in the national interest is largely a political question' ([40]). The only matter that the Minister is obliged to have regard to in considering the national interest is whether or not the country to be designated has given Australia any assurances as set out in s 198AB(3)(a) of the Act (see [39]–[44]).

The Court also rejected:

- a challenge of legal unreasonableness on the ground that the Minister failed to give weight to certain matters, as it relied upon the erroneous contention that the Minister was obliged to take those matters into account (see [45])
- a challenge on the basis there was no evidence that PNG would fulfil its assurances and ensure a program that was fair to UMAs, because there was no such statutory requirement (see [46]).

The taking direction is valid

The Court held that the three conditions that the taking direction placed on the removal (relating to the availability of facilities, services and accommodation for the relevant classes of UMA and keeping family groups together) 'involved simple inquiries, not an evaluative process' and that, accordingly, the direction was sufficiently specific to enable officers to comply with it (see [47]–[49]).

AGS was instructed on behalf of the Commonwealth.

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