PLAINTIFF M70/2011 v MINISTER FOR IMMIGRATION & CITIZENSHIP

PLAINTIFF M106/2011 v MINISTER FOR IMMIGRATION AND CITIZENSHIP

OPINION

1. I have been asked by Marque Lawyers on behalf of the Edmund Rice Centre for my opinion as to whether this week's decision by the High Court of Australia in *Plaintiff M70* has the potential to render invalid any declaration of Nauru or Papua New Guinea as countries to which asylum seekers (*offshore entry persons)* may be taken by virtue of s.198A of the *Migration Act* 1958 (Cth).

2. For the reasons that follow and on the basis of the material with which I have been briefed I am of opinion that the Court's decision is likely to have that effect.

3. Section 198A (3) of the *Migration Act* provides relevantly:

> The Minister may:
>
> (a) declare in writing that a specified country:
>
> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
>
> (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
>
> (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
>
> (iv) meets relevant human rights standards in providing that protection…;

4. A majority of the High Court comprising Gummow, Hayne, Crennan and Bell JJ in a joint judgment and Kiefel J in a separate judgement, held that the existence of the access, protections and standards set out in s.198A (3) (i) –(iv) are jurisdictional facts which must be objectively discernible before a valid declaration of a specified country can be made by the Minister under the subsection, which declaration would then permit an authorised officer to take an *offshore entry person* to that other country.

5. In so doing the Court has demonstrated that which it had earlier observed in *Plaintiff M61/2010E v The Commonwealth* [2010] HCA 41 at [27], namely that the *Migration Act* at times goes beyond what is necessary to respond to Australia's international obligations under the 1951 Refugee Convention and its 1967 Protocol.

6. I pause to observe that there is a certain irony in the fact that s.198A was introduced in response to the decision of North J in the MV Tampa case in which case, subsequently, a majority of the Federal Court of Australia overruled his Honour, concluding that the Commonwealth Executive possessed power to prevent the entry of *aliens* quite independently of statute law (*Ruddock v Vadarlis* (2001) 110 FCR 491).

7. In *Plaintiff M70* the joint judgment suffices for present consideration as it comprises a majority of the members of a Full Court of the High Court and it embraces the *ratio decidendi* of the case. The majority held at [114] that because it was not necessary to decide whether any of the criteria stated in s.198A (3) (a) contained any factual element, it was unnecessary to decide whether Malaysia met *relevant human rights standards* and at [115] that the issue determinative of the case arose from a consideration of s.198A (3) (a) (i)-(iii) and in particular whether the *access* and *protection* referred to therein had to be legally assured in some way.

8. In a future case involving Nauru or Papua New Guinea there is no reason in principle why each of the four jurisdictional facts in sub-paragraphs (i)-(iv) would not fall for consideration. At stake will be the question of whether those countries are legally bound

by international law or their own domestic law to provide the specified access, protection and standards.

9. Papua New Guinea, as will be observed, is a Party to the Convention but with Reservations. Nauru signed the Convention on 17 June this year and will become a Party to it later this month. The existence of international obligations will thus be a point of distinction in a future challenge to any declaration of those countries under s.198A.

10. Further, it was relevant to the High Court's decision that Malaysia would not be processing the asylum claims of Australian *offshore entry persons* under its own laws or obligations but would merely permit the presence in its country of those persons and allow the UNHCR to process their refugee claims. That would not be the case with Nauru and Papua New Guinea as Australia would no doubt process the asylum claims in those countries. Whether that is a significant point of distinction however will inevitably raise the question of whether Nauru and Papua New Guinea are themselves legally obligated to provide the required access and protection or would simply be permitting Australia to fulfil the role that under the so called *Malaysian Solution* was to be fulfilled by the UNHCR. Paradoxically the question could also arise as to whether, in permitting asylum seekers to be held in assessment centres at Australia's dictate, Nauru and Papua New Guinea would be legally assuring the obligation to meet *relevant human rights standards*.

11. It is as well to observe at this point that the content of the *protection* obligations referred to in s.198A (3) includes not just protection against return to a country where an asylum seeker's life or freedom is threatened but also includes obligations once refugee status is established, including access to courts of law, education and employment and freedom of religion and residence.

12. The High Court found that neither under its agreement with Australia, (which was not legally binding), nor under international or domestic law was Malaysia bound to provide the access and protection required by s.198A (3) (a) (i)-(iii) and as a result the declaration by the Minister under the section was invalid. The question of whether Nauru or Papua

New Guinea can be the subject of a valid declaration will require an examination of all international obligations, domestic laws and factual circumstances which affect any of the four criteria in sub-paragraphs (i)-(iv).

13. As to Nauru I am instructed:

(a) There is no domestic legislation in Nauru which makes provision for asylum seekers.

(b) Nauru has the *Immigration Act 1999* – however, that Act does not contain any provision for asylum seekers to have their claims heard and processed, nor does it contain any protections for persons in that position.

(c) There was an amendment to the Immigration Act 1999 in 2005 but this amendment did not contain any further provision for asylum seekers.

(d) The domestic legislation in Nauru contains no protection for asylum seekers and in particular no protection from refoulement.

(e) Nauru has signed up to the Refugee Convention however the provisions of that Convention will not have any force in Nauru until 26 September 2011. It is a signatory to the following treaties:

(i) International Convention on the Elimination of all Forms of Racial Discrimination (1966);

(ii) the International Covenant on Civil and Political Rights (1966);

(iii) the Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment (1984).

(f) Nauru is not a signatory to any of the following treaties:

(i) the International Covenant on Economic, Social and Cultural Rights (1966);

(ii) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990);

(iii) Convention Relating to the Status of Stateless Persons.

14. I am also instructed that as well as its lack of domestic legislation and very limited and recently made international commitments in relation to asylum seekers, the state of Nauru cannot provide basic access and protection to asylum seekers because it is a country which has meagre financial means, with a GDP reported to be in the region of $28 million.

There are legitimate questions as to whether it is capable of resourcing a large inflow of asylum seekers.

15. It would seem that the Agreement between Australia and Nauru – which formed the basis for the 2001 declaration – cannot be practically enforced or relied upon. Leaving aside that it was entered into pursuant to a declaration made under s.198A some 10 years before Nauru signed the Refugee Convention, I am instructed that evidence of its inadequacy can be seen from three examples.

16. First there were multiple asylum seekers who were assessed as refugees in 2006 and 2007 but whom were not resettled in Australia or elsewhere by the Nauruan Government (albeit this was at the behest of the Australian Government). Second in 2006, when the Nauruan Government became frustrated at the length of time it was taking to find a resettlement country for one Iraqi refugee, the Nauruan Government threatened to impose a visa charge of $1.2 million per year. Third it was widely reported that during 2001 – 2004 that lawyers and journalists had severe restrictions on travel to Nauru, which would represent an impediment to any refugee seeking representation in order to challenge a failure to resettle or any other part of the application process.

17. With respect to Papua New Guinea (PNG) I am instructed, as to domestic legislation:

    (a) PNG has the Migration Act 1978. Section 3 prohibits entry into PNG without an entry permit. Entry may be refused if the person attempting to enter suffers from a mental illness, refuses to submit to a medical examination, is not in possession of a valid passport, and/or is unable to support himself: section 8. Section 15A gives the Minister power to determine non-citizens to be refugees. However, this Act does not contain any indication of the process that will be undertaken to determine whether an asylum seeker is a refugee, nor does it contain any reference to PNG's international obligations. Furthermore, Section 19 provides that there is no appeal against an act, decision or proposed act/decision of the Minister relating to the grant or cancellation of an entry permit (it is unclear whether the restriction on appeals applies to section 15A of the Migration Act 1978). There is no reference in the Act at all to the Refugee Convention, or to how asylum seekers would access protection or process – only one line in s15A that "*The Minister may determine a non-citizen to be a refugee for the purposes of this Act.*" The Act does not provide any detail on the rights and obligations of a person in PNG once he or she is granted refugee status.

(i) PNG does not bind itself in its domestic immigration legislation to protection for asylum seekers and refugees including protection from refoulement.

(ii) PNG has no domestic legislation as to stateless persons.

(iii) PNG has no domestic legislation as to rights of refugees once granted refugee status.

And as to international obligations:

(a) PNG is party to the Refugee Convention and Refugee Protocol, however with very significant reservations. PNG's reservations are as to:

(i) Article 17(1) (wage-earning employment), article 21 (housing), article 22(1)(education), article 26 (freedom of movement), article 31 (non-penalisation of refugees unlawfully present in the country of refuge), article 32 (expulsion safeguards) and article 34 (naturalisation).

(ii) According to UNHCR, "The Government of Papua New Guinea acceded to the 1951 Refugee Convention and its 1967 Protocol in 1986 but with reservations affecting refugees' rights (including areas of employment, housing, education, freedom of movement, expulsion and access to naturalization). In 2005, there was already agreement to lift five of the seven reservations and a submission was made to the NEC. Since this submission has never been dealt with, all seven reservations are still applicable."[1]

(iii) PNG is a signatory to the following treaties:

a) International Convention on the Elimination of all Forms of Racial Discrimination (1966) – acceded 27 January 1982;

b) International Covenant on Economic, Social and Cultural Rights (1966) – acceded 21 July 2008;

c) International Covenant on Civil and Political Rights (1966) – acceded 21 July 2008.

(iv) However, PNG has not acceded to other key human rights treaties,

d) Convention Relating to the Status of Stateless Persons;

e) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990);

f) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

18. I am instructed that the actual practices of PNG, which would inform the Minister's beliefs about whether the protections and access would actually be afforded, indicate that there is less than adequate provision for access to refugee processes and/or protection.

19. The *Migration Act* 1978 (PNG) does not contain any processes by which refugees may have their claims heard, nor does it set out how their claims will be assessed or what will happen if they are granted refugee status.

20. The *Migration Act* 1978 makes no reference to PNG's international obligations.

21. PNG's accession to the Refugee Convention was made on the basis of very significant reservations. These reservations mean that the proper protections can't and or won't be provided to asylum seekers.

22. A UNHCR Report of 2009 stated that *the Government of Papua New Guinea does not have a policy framework on refugees in place. There are various issues which need further discussions and deliberations so that the Government can clearly develop its vision on how to deal with West Papuan and non-Melanesian asylum-seekers and refugees in Papua New Guinea.*

23. The UNHCR Report further found that *The current Migration Act and its 1989 amendments authorize the Minster of Foreign Affairs "to determine a non-citizen to be a refugee". The current legislation does not provide any details on the way in which this determination is to be made or their rights and obligations in PNG once they are granted refugee status (e.g. type of documentation to be provided to them, residency status, access to labour market). A revision of the Migration Act was undertaken and a draft was finalized in 2005; this draft contains refugee related provisions as an Annex. Currently, persons seeking refugee status in PNG do not have access to any assistance during the determination process and after recognition. There is no legislation and structures in place regulating their status and assistance in PNG.*" And further "*The Citizenship Act and different regulations provide the criteria for access to PNG Citizenship. There are no exceptions for refugees and the rather high administration fee of Kina 10,000 is not affordable by the majority of the refugees.*

24. A letter dated 21 August 2011 from the Refugee Council of Australia to the Ministers for Foreign Affairs and Trade and Immigration and Citizenship stated that *PNG, a state party to the Refugee Convention but with multiple reservations, has little or no capacity to respond to the asylum seekers to be transferred from Australia. It has no effective domestic refugee status determination system and relies entirely on UNHCR to carry out all its national obligations under the Refugee Convention. It is also highly unlikely to be able to offer durable solutions for people found to be refugees while being forced to remain on Manus Island.*

25. Savitri Taylor, a Senior Lecturer in the School of Law at La Trobe University in the article 'The Impact of Australian-PNG Border Management Cooperation on Refugee Protection' comments that *Section 15A of the Migration Act gives the Minister for Foreign Affairs and Immigration the power to grant refugee status. However, there is presently no legislative framework or established administrative procedure for refugee status determination. Refugee status determination is conducted by the PNG government, but in an ad hoc manner.*

26. Finally I am instructed that the UNHCR's overall assessment of PNG's compliance under the 1951 Refugee Convention is *very poor.*

27. In *Plaintiff M61/2010E v The Commonwealth* [2010] HCA 41 at [34] the High Court observed that the changes to the Migration Act effected by the enactment of ss. 46A and 198A reflect *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.* It is axiomatic therefore in my view and readily apparent from the decision in *Plaintiff M70* that Australia may only transfer those obligations to another country by means of a declaration under s.198A if that other country is legally required to observe those obligations equally.

28. It follows in my opinion that on the facts and material with which I am briefed that any declaration of Nauru or Papua New Guinea under s.198A (3) would, notwithstanding the obvious points of distinction, likely meet the same fate as the recently invalidated declaration with respect to Malaysia based on the Arrangement entered into on 25 July 2011 and signed by the Minister and the Malaysian Minister of Home Affairs.

29. The reasoning that informs my opinion means that equally, any judicial review of the Minister's consent under the *Immigration (Guardianship of Children) Act* 1946 to send unaccompanied minors to Nauru or Papua New Guinea would likely succeed.

Dated: 3 September 2011

S.P. ESTCOURT QC
Dawson Chambers