HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

CPCF PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND BORDER PROTECTION & ANOR DEFENDANTS

CPCF v Minister for Immigration and Border Protection
[2015] HCA 1
28 January 2015
S169/2014

ORDER

The questions asked by the parties in the special case dated 21 August 2014 and referred for consideration by the Full Court be answered as follows:

Question 1

Did s 72(4) of the Maritime Powers Act authorise a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia, being India:

(a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations;

(b) in implementation of a decision by the Australian Government that the plaintiff (and others on the Indian vessel) should be taken to India without independent consideration by the maritime officer of whether that should be so; and

(c) whether or not, prior to the commencement of the taking of the plaintiff to India, an agreement or arrangement existed between Australia and India concerning the reception of the plaintiff in India?

Answer

(a) *Section 72(4) of the* Maritime Powers Act *2013 (Cth) authorised the plaintiff's detention at all times from 1 July 2014 to 27 July 2014. This question is not otherwise answered.*

(b) *Yes.*

(c) *Yes.*

Question 2

Did s 72(4) of the Maritime Powers Act authorise a maritime officer to:

(a) *take the steps set out in paragraph 20 in implementing the decision to take the plaintiff to India;*

(b) *detain the plaintiff for the purposes of taking the plaintiff to India?*

Answer

(a) *Yes.*

(b) *Yes.*

Question 3

Did the non-statutory executive power of the Commonwealth authorise an officer of the Commonwealth to:

(a) *take the steps set out in paragraph 20 for the purpose of preventing the plaintiff from entering Australia;*

(b) *detain the plaintiff for the purposes of taking the plaintiff to India?*

Answer

(a) *Unnecessary to answer.*

(b) *Unnecessary to answer.*

Question 4

Was the power under s 72(4) of the Maritime Powers Act to take the plaintiff to a place outside Australia, being India, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

Answer

No.

Question 5

Was any non-statutory executive power of the Commonwealth to take the plaintiff to a place outside Australia, being India, for the purpose of preventing the plaintiff from entering Australia, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

Answer

Unnecessary to answer.

Question 6

Was the detention of the plaintiff unlawful at any, and if so what period, from 1 July 2014 to 27 July 2014 and if so are they entitled to claim damages in respect of that detention?

Answer

No.

Question 7

Who should pay the costs of this special case?

Answer

The plaintiff.

Question 8

What if any order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?

Answer

The proceeding should be dismissed with consequential orders to be determined by a single Justice of this Court.

Representation

R Merkel QC and C L Lenehan with J Williams, D P Hume and R Mansted for the plaintiff (instructed by Shine Lawyers)

J T Gleeson SC, Solicitor-General of the Commonwealth and S P Donaghue QC with C J Horan and P D Herzfeld for the defendants (instructed by Australian Government Solicitor)

Interveners

G R Kennett SC for the Australian Human Rights Commission, intervening (instructed by Australian Human Rights Commission)

R M Niall QC with N M Wood for the Office of the United Nations High Commissioner for Refugees, as amicus curiae (instructed by Allens Lawyers)

CATCHWORDS

CPCF v Minister for Immigration and Border Protection

Migration – Refugees – Section 72(4) of *Maritime Powers Act* 2013 (Cth) authorised maritime officer to detain person for purpose of taking person to place outside Australia – Plaintiff on board vessel intercepted by Commonwealth officers in Australia's contiguous zone – Plaintiff detained on Commonwealth vessel which sailed to India in implementation of decision of National Security Committee of Cabinet ("NSC") – Where no agreement existed between Australia and India applicable to reception of plaintiff prior to commencement of taking of plaintiff to India – Where maritime officer implemented decision of NSC without independent consideration of whether plaintiff should be taken to India – Whether decision to detain and take plaintiff lawful – Whether power under s 72(4) subject to obligation to afford procedural fairness – Whether power constrained by Australia's international non-refoulement obligations.

Constitutional law (Cth) – Executive power of Commonwealth – Whether Commonwealth has power derived from s 61 of Constitution to authorise maritime officer to detain person for purposes of taking person outside Australia – Whether any such power subject to obligation to afford procedural fairness.

Words and phrases – "detain", "maritime officer", "non-refoulement obligations", "procedural fairness", "reasonable time", "take".

Constitution, s 61.
Maritime Powers Act 2013 (Cth), ss 5, 7, 16, 18, 69, 71, 72, 74, 97, 104(1).
Migration Act 1958 (Cth), ss 42, 189(3).

FRENCH CJ.

Introduction

1 On 29 June 2014, an Indian flagged vessel carrying the plaintiff and 156 other passengers was intercepted by an Australian border protection vessel ("the Commonwealth vessel") in the Indian Ocean about 16 nautical miles from the Australian territory of Christmas Island. The plaintiff is a Sri Lankan national of Tamil ethnicity, who claims to have a well-founded fear of persecution in Sri Lanka on grounds which would qualify him as a refugee under the Refugees Convention[1].

2 The interception took place within Australia's contiguous zone as declared pursuant to s 13B of the *Seas and Submerged Lands Act* 1973 (Cth) ("the SSLA")[2]. The officer in charge of the Commonwealth vessel authorised the interception on the basis of his suspicion, on reasonable grounds, that the Indian vessel was involved in a contravention of the *Migration Act* 1958 (Cth) ("the Migration Act"). The Indian vessel having become unseaworthy by reason of a fire in the engine house, its passengers were taken on board the Commonwealth vessel. They were detained on the Commonwealth vessel, which began sailing to India at the direction of the Australian Government, reflecting a decision of the National Security Committee of Cabinet ("the NSC") made on 1 July 2014. The detention and the taking of the passengers towards India was done in the purported exercise, by maritime officers, of maritime powers to detain and take persons to a place outside Australia pursuant to the *Maritime Powers Act* 2013 (Cth) ("the MPA"). The power invoked by the maritime officers was conferred by s 72(4) of that Act, applicable to persons detained in the contiguous zone:

> "A maritime officer may detain the person and take the person, or cause the person to be taken:
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> (a) to a place in the migration zone; or
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> (b) to a place outside the migration zone, including a place outside Australia."[3]

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1 The Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

2 Seas and Submerged Lands (Limits of Contiguous Zone) Proclamation 1999, notified in the *Commonwealth of Australia Gazette*, S148, 7 April 1999.

3 The term "migration zone" has the same meaning as in the Migration Act: MPA, s 8, definition of "migration zone". Relevantly, it comprises the areas consisting of

(Footnote continues on next page)

That subsection has to be read with s 74, which provides:

> "A maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place."

3 Having reached the vicinity of India on about 10 July 2014, the Commonwealth vessel remained there until about 22 July, when it became apparent that Australia would not, within a reasonable time, be able to reach an agreement with India which would permit the discharge of the passengers onto Indian territory. At the direction of the Minister for Immigration and Border Protection ("the Minister"), given for what were described opaquely in these proceedings as "operational and other reasons", the Commonwealth vessel then sailed to the Australian territory of the Cocos (Keeling) Islands. There the passengers, still purportedly detained under the MPA, were taken into immigration detention pursuant to s 189(3) of the Migration Act.

4 Injunctive proceedings had been instituted in this Court on behalf of the passengers while they were still on the high seas. The present proceedings, commenced by CPCF, allege that his detention on the Commonwealth vessel was unlawful and seek damages for wrongful imprisonment. A number of agreed questions, based upon agreed facts, have been referred to the Full Court by way of special case. The central question is whether maritime powers under the MPA, and/or the non-statutory executive power of the Commonwealth derived from s 61 of the Constitution, authorised the detention and taking of the plaintiff from Australia's contiguous zone to India. The particular questions and the answers to them are set out at the end of these reasons and are substantially to the effect that the detention and taking of the plaintiff was lawful pursuant to s 72(4) of the MPA.

5 The plaintiff relied upon Australia's obligations under international law as limiting the scope of the relevant maritime powers under the MPA or affecting their construction. It is necessary in that context to consider the relationship between the MPA and relevant international conventions, in particular the United Nations Convention on the Law of the Sea[4] ("UNCLOS") and the Refugees Convention.

> the States and Territories, land which is part of a State or Territory at mean low water and sea within the limits of both a State or a Territory and a port. It does not include sea within the limits of a State or Territory but not in a port: Migration Act, s 5(1).

4 Done at Montego Bay on 10 December 1982.

The *Maritime Powers Act* and international law

6 The MPA provides "enforcement powers for use in, and in relation to, maritime areas."[5] The powers are exercised by maritime officers[6]. They comprise members of the Australian Defence Force, officers of Customs, members or special members of the Australian Federal Police and persons appointed as maritime officers by the Minister[7].

7 The MPA provides for the exercise of powers with respect to vessels and people in Australia's territorial sea and on the high seas in the contiguous zone adjacent to the territorial sea. Section 7, headed "Guide to this Act", states that the powers can be used by maritime officers to give effect to Australian laws, international agreements to which Australia is a party and international decisions. Section 7 also provides that "[i]n accordance with international law, the exercise of powers is limited in places outside Australia." That may be taken as a declaration about substantive provisions of the Act, particularly ss 40–41, which limit the exercise of maritime powers on the high seas between Australia and other countries and in other countries — the term "country" in the MPA encompassing the territorial sea of a coastal State[8].

8 Section 7 cannot be elevated to support the plaintiff's contention that powers under the MPA are to be exercised "in accordance with international law". Nor is s 7 necessary to support the proposition that the MPA is to be construed in accordance with Australia's international legal obligations. That is true for any statutory provision able to be construed consistently with international law and international legal obligations existing at the time of its enactment. That proposition, in Australian law, dates back to the observation of O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*[9] that "every Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law". It has ample support in subsequent decisions of this

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5 MPA, s 7.

6 MPA, s 7.

7 MPA, s 104(1).

8 MPA, s 8, definition of "country".

9 (1908) 6 CLR 309 at 363; [1908] HCA 95.

Court[10]. On the other hand, if the terms of a statutory provision are clear, there may be no available interpretation that is consistent with international law.

9 The plaintiff submitted that the powers conferred on maritime officers by s 72(4) of the MPA to detain and take a person to a place outside Australia are constrained, textually or by application of common law interpretive principles, by Australia's non-refoulement obligations under the Refugees Convention. The non-refoulement obligation in respect of refugees is derived from Art 33(1) of the Convention, which provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The plurality in the *Malaysian Declaration Case* said of that obligation[11]:

> "for Australia to remove a person from its territory, whether to the person's country of nationality or to some third country willing to receive the person, without Australia first having decided whether the person concerned has a well-founded fear of persecution for a Convention reason may put Australia in breach of the obligations it undertook as party to the Refugees Convention and the Refugees Protocol, in particular the non-refoulement obligations undertaken in Art 33(1) of the Refugees Convention."

The plaintiff also called in aid an analogous obligation under Art 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "[n]o State Party shall expel, return

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10 See eg *Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 181 per Barton, Isaacs and Rich JJ; [1917] HCA 77; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68–69 per Latham CJ, 77 per Dixon J, 80–81 per Williams J; [1945] HCA 3; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204 per Gibbs CJ; [1982] HCA 27; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; [1992] HCA 64; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; [1995] HCA 20; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ; [1998] HCA 22; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29] per Gleeson CJ; [2003] HCA 2; *Coleman v Power* (2004) 220 CLR 1 at 27–28 [19] per Gleeson CJ; [2004] HCA 39; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 234 [247] per Kiefel J; [2011] HCA 32; *Momcilovic v The Queen* (2011) 245 CLR 1 at 36–37 [18] per French CJ; [2011] HCA 34.

11 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 191 [94] per Gummow, Hayne, Crennan and Bell JJ.

('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

10 The defendants argued that the non-refoulement obligation under the Refugees Convention only applied to receiving States in respect of refugees within their territories. There is support for that view in some decisions of this Court, the House of Lords and the Supreme Court of the United States[12]. The United Nations High Commissioner for Refugees, appearing as amicus curiae in these proceedings, submitted that when a State party to the Refugees Convention exercises effective control over a person who is a refugee outside the territory of the State, it attracts the non-refoulement obligation imposed by both the Refugees Convention and the Convention against Torture.

11 There is no textual basis in s 72(4) itself which would support a construction limiting the power which it confers by reference to Australia's non-refoulement obligations assuming they subsist extra-territorially. There is, however, a broad constraint imposed by s 74 of the MPA which is protective of the safety of persons taken to a place under s 72(4). The defendants contended for a restrictive reading of s 74. They submitted it did not apply to the "place" to which a person might be taken under s 72(4) but was directed to the power conferred on a maritime officer by s 71 to "place or keep a person in a particular place on the vessel". There is no warrant for such a restrictive reading of s 74, which follows both s 71 and s 72.

12 The content of the term "safe for the person to be in that place" in s 74 may be evaluative and involve a risk assessment on the part of those directing or advising the relevant maritime officers. A place which presents a substantial risk that the person, if taken there, will be exposed to persecution or torture would be unlikely to meet the criterion "that it is safe for the person to be in that place". The constraint imposed by s 74 embraces risks of the kind to which the non-refoulement obligations under the Refugees Convention and the Convention against Torture are directed. The existence of such risks may therefore amount to a mandatory relevant consideration in the exercise of the power under s 72(4) because they enliven the limit on that power which is imposed by s 74 at the point of discharge in the country to which the person is taken. However, whether

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12 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 45 [136] per Gummow J; [2000] HCA 55; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 15 [42] per McHugh and Gummow JJ; [2002] HCA 14; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1 at 29–30 [17] per Lord Bingham of Cornhill, Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell agreeing at 47 [48], 55 [72] and 66 [108] respectively; *Sale v Haitian Centers Council Inc* 509 US 155 (1993).

a person is entitled to the benefit of non-refoulement obligations in the place to which that person is taken does not of itself determine the question whether that is a safe place within the meaning of s 74.

13 I agree, for the reasons given by Hayne and Bell JJ, that given the agreement of the parties to the questions framed in the Special Case, Question 1(a) should not be regarded as hypothetical. There are, however, no facts set out in the Special Case from which it may be inferred that, assuming the plaintiff to be a refugee or otherwise at risk in Sri Lanka, taking him to India would have involved transgressing the limit imposed by s 74. There is no agreed fact in the Special Case to the effect that if the plaintiff had been taken to India and discharged on Indian territory, he would have been at risk of removal from India to a place in which he would not have been safe. That is relevant to the answer to Question 2. There is no basis for a conclusion that the discharge of the plaintiff in India would have contravened s 74.

14 In my opinion, Question 1(a) can be answered in the affirmative. It is sufficient, however, in order to reflect the common position of the majority, that it be answered:

> "Section 72(4) of the *Maritime Powers Act* 2013 (Cth) authorised the plaintiff's detention at all times from 1 July 2014 to 27 July 2014. This question is not otherwise answered."

Rescue obligations

15 Article 98 of UNCLOS provides that every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers, to render assistance to any person found at sea in danger of being lost[13]. Section 181 of the *Navigation Act* 2012 (Cth) accordingly imposes an obligation on the master of a vessel at sea to cause the vessel to proceed as fast as practicable to the assistance of persons in distress at sea[14]. The obligation applies to regulated Australian vessels[15], which term includes Australian customs vessels[16].

16 Australia is also a party to the International Convention on Maritime Search and Rescue ("the SAR Convention"). Parties to that Convention

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13 UNCLOS, Art 98(1)(a).

14 *Navigation Act*, s 181(1)(c).

15 *Navigation Act*, s 180(a).

16 *Navigation Act*, s 15(2).

undertake to adopt all legislative or other appropriate measures necessary to give full effect to it[17]. It requires that the State party responsible for the search and rescue region in which assistance is rendered to persons in distress at sea exercise primary responsibility for ensuring that coordination and cooperation occurs so that survivors are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the International Maritime Organization[18]. One of those guidelines provides that[19]:

> "The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea."

17 The Indian vessel, after interception by the Commonwealth vessel, became unseaworthy, thus engaging Australia's rescue obligations at international law in respect of its passengers and crew. The defendants did not contend that a characterisation of the interception as a rescue meant that the maritime officers on the Commonwealth vessel were doing other than exercising maritime powers under the MPA in detaining the plaintiff and other passengers and taking them to India. To the extent that the guidelines applicable to rescue operations might be taken to import an extra-territorial non-refoulement obligation in respect of the persons rescued, the consequences of that obligation for the exercise of the statutory power have already been dealt with. It is subsumed by the requirement imposed by s 74.

The United Nations Convention on the Law of the Sea

18 UNCLOS developed out of a process of codification of the international law of the sea which can be traced back at least as far as the Hague Codification Conference established by the League of Nations in 1930 to consider, among other things, the legal status of the territorial sea[20]. Following a study commencing in 1949 and recommendations by the International Law Commission of the United Nations in 1956, the Geneva Convention on the

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17 SAR Convention, Art I.

18 SAR Convention, Annex, par 3.1.9. The guidelines are contained in the Annex to the International Maritime Organization, Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued at Sea*, Resolution MSC 167(78) ("the International Maritime Organization Guidelines").

19 International Maritime Organization Guidelines, par 6.17.

20 Caminos, *Law of the Sea*, (2001) at xiii.

Continental Shelf was made in 1957 and was followed in 1958 by the Geneva Convention on the Territorial Sea and Contiguous Zone, which came into force in 1964, and the Geneva Convention on the High Seas, which came into force in 1962. As explained by Professor Shearer, the latter Convention[21]:

> "codified customary international law which regarded the high seas as incapable of appropriation by any State and as free for the commerce and navigation of all States. In particular, it is forbidden to States to assert jurisdiction on the high seas against foreign vessels except on suspicion of piracy or engaging in the slave trade."

A specified breadth for the territorial sea was not agreed to until the making of UNCLOS.

19 UNCLOS provides that "[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters ... to an adjacent belt of sea, described as the territorial sea"[22] and that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."[23] Every "State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."[24] Beyond the territorial sea there is a contiguous zone, which is explained in Art 33[25]:

> "In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea".

The contiguous zone "may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured."[26]

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21 Shearer, "The Limits of Maritime Jurisdiction", in Schofield, Lee and Kwon (eds), *The Limits of Maritime Jurisdiction*, (2014) 51 at 56.

22 UNCLOS, Art 2(1).

23 UNCLOS, Art 2(3).

24 UNCLOS, Art 3.

25 UNCLOS, Art 33(1)(a).

26 UNCLOS, Art 33(2).

20 UNCLOS also provides that subject to the Convention, ships of all States enjoy the right of innocent passage through the territorial sea of a coastal State[27]. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State[28], but shall be considered to be prejudicial if, in the territorial sea, the foreign ship engages in the loading or unloading of any person contrary to the immigration laws and regulations of the coastal State[29]. There is no suggestion that the Indian vessel was intending to engage in innocent passage through Australian territorial waters.

21 It is necessary in considering UNCLOS and any other relevant international conventions or rules of international law to bear in mind that international law and convention or treaty obligations do not have a direct operation under Australian domestic law. Nor does the taxonomy of waters beyond the shoreline necessarily determine questions of the validity of laws extending to the waters, which, in any event, do not arise in these proceedings. Barwick CJ said in *New South Wales v The Commonwealth*[30]:

> "The test of validity of a law having an extra-territorial operation is its relationship to the peace, order and good government of the territory for the government of which the legislature has been constituted. If such a law did not so touch and concern that territory it would not be valid simply because it operated in the marginal seas. It would not achieve validity by its operation in the territorial sea."

Consideration of UNCLOS directs attention to the SSLA, which is part of the statutory background relevant to the enactment of the MPA.

The *Seas and Submerged Lands Act*

22 The SSLA, as enacted in 1973, recited that Australia was a party to the Geneva Convention on the Territorial Sea and the Contiguous Zone[31] and the Geneva Convention on the Continental Shelf[32], copies of which were scheduled to the Act. The validity of the SSLA was upheld in *New South Wales v The*

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27 UNCLOS, Art 17.

28 UNCLOS, Art 19(1).

29 UNCLOS, Art 19(2)(g).

30 (1975) 135 CLR 337 at 361–362; [1975] HCA 58.

31 Done at Geneva on 29 April 1958.

32 Done at Geneva on 29 April 1958.

Commonwealth on the basis that its provisions were within the legislative power of the Commonwealth to make laws with respect to external affairs under s 51(xxix) of the Constitution[33].

23 The SSLA declared and enacted, inter alia, that "the sovereignty in respect of the territorial sea ... is vested in and exercisable by the Crown in right of the Commonwealth."[34] The Governor-General was empowered from time to time by Proclamation to declare, not inconsistently with the Convention on the Territorial Sea and the Contiguous Zone, the limits of the whole or any part of the territorial sea[35]. The Act was amended by the *Maritime Legislation Amendment Act* 1994 (Cth) to reflect its reliance upon UNCLOS, in lieu of the two Geneva Conventions of 1958, and the ability which UNCLOS conferred at international law to declare a contiguous zone. The amendments introduced a recital into the Preamble of the Act declaring that Australia, as a coastal State, has the right under international law to exercise control within a contiguous zone to:

> "(a) prevent infringements of customs, fiscal, immigration or sanitary laws within Australia or the territorial sea of Australia;
>
> (b) to punish infringements of those laws."

The Schedules to the Act setting out the two 1958 Geneva Conventions were repealed and substituted with a Schedule setting out Pts II, V and VI of UNCLOS. A definition of "contiguous zone" was inserted, having the same meaning as in Art 33 of UNCLOS.

24 The 1994 amendments also introduced a new s 13A, which declared and enacted that "Australia has a contiguous zone." The limits of the whole or any part of the contiguous zone may be declared from time to time by the Governor-General, not inconsistently with UNCLOS[36] or any relevant international agreement to which Australia is a party[37]. A note to s 13A states that the rights of control that Australia, as a coastal State, has in respect of the contiguous zone of Australia are exercisable in accordance with applicable Commonwealth, State and Territory laws. The note, being part of the material in the Act, is part of the

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33 (1975) 135 CLR 337 at 364–366 per Barwick CJ, 377 per McTiernan J, 388–389 per Gibbs J, 472, 476 per Mason J, 498 per Jacobs J, 504 per Murphy J.

34 SSLA, s 6.

35 SSLA, s 7(1).

36 That is to say, s 4 of Pt II of UNCLOS.

37 SSLA, s 13B.

Act[38]. It has the character of a declaratory statement which directs attention to relevant domestic legislation.

25 The direct relevance of the SSLA in these proceedings is that it declares a contiguous zone for Australia and asserts Australia's rights in that zone, which give content to the geographical qualifications on the exercise of maritime powers under the MPA.

Maritime powers — overview

26 For the content of maritime powers it is necessary to look to Pt 3 of the MPA. The Guide to Pt 3, set out in s 50, states that maritime powers include powers to detain vessels, and to place, detain, move and arrest persons[39]. They may be exercised only in accordance with Pt 2[40] and are subject to the geographical limits set out in that Part. They are subject to processes set out in Pt 2 for authorising their exercise and can only be exercised by maritime officers who are the repositories of such authority.

Maritime powers — the geographical dimension

27 The "maritime areas" referred to in the MPA as areas in which maritime powers can be exercised are not expressly defined in that Act. However, the MPA extends to "every external Territory"[41] and to "acts, omissions, matters and things outside Australia."[42] The term "Australia", used in a geographical sense, includes "the territorial seas of Australia and the external Territories"[43]. Division 5 of Pt 2 sets out geographical limits on the exercise of powers under the Act. It contains seven substantive sections which define areas in which the Act does not authorise the exercise of powers unless certain circumstances exist and/or the powers are exercised for a specified purpose[44].

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38 *Acts Interpretation Act* 1901 (Cth), s 13(1).

39 MPA, s 50(e) and (f).

40 MPA, s 51.

41 MPA, s 4(1).

42 MPA, s 4(2).

43 MPA, s 8, definition of "Australia", par (b).

44 MPA, ss 40–41, 43–47.

28 The MPA does not authorise the exercise of powers in another country except in certain circumstances, none of which apply in this case[45]. "Country" is defined in its geographical sense to include "the territorial sea, and any archipelagic waters, of the country"[46]. Subject to certain exclusions, s 41 provides that the MPA does not authorise the exercise of powers in relation to a foreign vessel at a place between Australia and another country. "Australia" and "country" being defined to include territorial waters, a place "between Australia and another country" would be outside the territorial waters of the other country. It is not asserted that the Commonwealth vessel was at any time within India's territorial waters.

29 The geographical limit imposed by s 41 does not preclude the exercise of maritime powers in the contiguous zone of Australia to investigate or prevent a contravention of a customs or immigration law prescribed by the regulations occurring in Australia[47]. Nor does it preclude the exercise of powers to administer or ensure compliance with the Migration Act in its application to foreign vessels or persons on foreign vessels at a place between Australia and another country[48]. Section 41 therefore does not preclude the exercise of a maritime power to take persons detained in the contiguous zone to another country as an incident of preventing a contravention of Australian immigration law. The relevant maritime power derives from s 72(4).

Maritime powers — content

30 Maritime powers in relation to vessels are set out in Div 7 of Pt 3 of the MPA. A maritime officer may detain a vessel[49] and take it, or cause it to be taken, to a port or other place that the officer considers appropriate[50]. The officer may remain in control of the vessel or require the person in charge of the vessel to remain in control of it until the vessel is released or disposed of[51].

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45 MPA, s 40.

46 MPA, s 8, definition of "country", par (a).

47 MPA, s 41(1)(c).

48 MPA, s 41(1)(d) and s 8, definition of "monitoring law", par (c).

49 MPA, s 69(1).

50 MPA, s 69(2)(a).

51 MPA, s 69(2)(b).

31 Maritime powers in relation to persons are set out in Div 8 of Pt 3. A maritime officer may require a person on a detained vessel to remain on the vessel until it is taken to a port or other place, or permitted to depart from the port or other place[52]. Section 72(4) and s 74, which are of central significance in these proceedings, have been set out in the Introduction to these Reasons. Reference should, however, be made to s 72(5):

> "For the purposes of taking the person to another place, a maritime officer may within or outside Australia:
>
> (a) place the person on a vessel or aircraft; or
>
> (b) restrain the person on a vessel or aircraft; or
>
> (c) remove the person from a vessel or aircraft."

32 No question has been raised about the validity of the MPA. The Special Case is to be decided on the basis that the powers conferred on maritime officers by s 72(4) are validly conferred and include the power to detain and take a person from Australia's contiguous zone to another place, including to another country.

Maritime powers — purposes

33 Maritime powers are exercised within a purposive framework[53]. A maritime officer may exercise powers in accordance with an authorisation to:

(a) investigate a contravention[54]; and

(b) administer or ensure compliance with a monitoring law[55].

Maritime powers may also be exercised[56]:

> "(a) to investigate or prevent any contravention of an Australian law that the officer suspects, on reasonable grounds, the vessel ... to be involved in;

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52 MPA, s 72(3).

53 MPA, Pt 2, Div 4, subdiv C.

54 MPA, s 31(a).

55 MPA, s 31(b).

56 MPA, s 32(1).

(b) to administer or ensure compliance with any monitoring law".

A maritime officer, in exercising powers under the MPA, is to use only such force against a person or thing "as is necessary and reasonable in the circumstances."[57] In so doing the maritime officer "must not ... subject a person to greater indignity than is necessary and reasonable to exercise the powers"[58].

Maritime powers — the chain of command

34 Authorising officers may authorise the exercise of maritime powers in relation to a vessel in certain circumstances[59]. Those officers include the most senior maritime officer and the most senior member or special member of the Australian Federal Police who is in a position to exercise any of the maritime powers in person[60]. The exercise of maritime powers in relation to a vessel may be authorised if the authorising officer suspects, on reasonable grounds, that the vessel is involved in a contravention of an Australian law[61] — ie, if an Australian law has been, is being, or is intended to be, contravened on, or in the vicinity of, the vessel, or if there is some other connection between the vessel and a contravention, or intended contravention, of the law[62]. A vessel is also involved in a contravention of a law if it has been, is being, or is intended to be, used in contravention of the law[63]. The exercise of maritime powers in relation to a vessel may also be authorised for the purposes of administering or ensuring compliance with a "monitoring law"[64], a term which includes the Migration Act[65].

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57 MPA, s 37(1).

58 MPA, s 37(2)(a).

59 MPA, ss 17–22. An authorisation remains in force until it is spent or it lapses: MPA, s 23(1). It is spent when the continuous exercise of powers under the authorisation ends: MPA, s 23(2). It need not be in writing and it is not a legislative instrument: MPA, s 25.

60 MPA, s 16(1)(a)–(b).

61 MPA, s 17(1).

62 MPA, s 9(1).

63 MPA, s 9(2).

64 MPA, s 18.

65 MPA, s 8, definition of "monitoring law", par (c).

35 On the agreed facts in the Special Case, maritime officers on navy vessels and Australian customs vessels exercise maritime powers in the context of a chain of command in which they are governed by orders and instructions from superior or senior officers. In taking the plaintiff and other passengers to India, the maritime officers on the Commonwealth vessel were acting in accordance with a specific decision of the NSC and were implementing a general government policy to the effect that anybody seeking to enter Australia by boat without a visa will be intercepted and removed from Australian waters.

36 The plaintiff contended that the maritime officers, acting in accordance with the NSC decision, acted unlawfully because they were acting under the dictation of the NSC and because the government policy applied by the NSC itself admitted of no discretion. The NSC was said not to be an entity which has power under the MPA. It is not an authorising officer, nor a maritime officer. Maritime officers who simply "implemented" the NSC direction were therefore improperly exercising their power. That contention must be considered on the basis that the NSC comprises Ministers of the Executive Government of the Commonwealth with responsibility, among other things, for the implementation of government policy with respect to non-citizens seeking to enter Australia by boat without a visa.

37 The question whether, absent express power to do so, a Minister can direct a public official, for whom he or she is responsible, in the exercise of a statutory discretion has been the subject of different approaches in this Court from time to time[66]. The answer depends upon a variety of considerations including the particular statutory function, the nature of the question to be decided, the character of the decision-maker and the way in which the statutory provisions may bear upon the relationship between the Minister and the decision-maker[67].

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66 *R v Mahony; Ex parte Johnson* (1931) 46 CLR 131 at 145 per Evatt J; [1931] HCA 36; *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 192–193 per Kitto J, 200 per Taylor and Owen JJ, 206 per Windeyer J; [1965] HCA 27; *Salemi v MacKellar [No 2]* (1977) 137 CLR 396; [1977] HCA 26; *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 82–83 per Mason J; [1977] HCA 71; *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 429–430 per Mason and Wilson JJ; [1981] HCA 69. See generally O'Connor, "Knowing When to Say 'Yes Minister': Ministerial Control of Discretions Vested in Officials", (1998) 5 *Australian Journal of Administrative Law* 168.

67 *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 430 per Mason and Wilson JJ; *Wetzel v District Court of New South Wales* (1998) 43 NSWLR 687 at 688, 692–693.

38 The nature of the power conferred by s 72(4) of the MPA and the subject matter of that power are apt to raise questions of Australia's relationship with other countries. The question whether to take non-citizens detained in the contiguous zone to Australia or to another country is a matter appropriate for decision at the highest levels of government by Ministers of the Executive Government, who are responsible to the Parliament. The power conferred upon maritime officers by s 72(4) is a power in the exercise of which they could properly regard the direction of the NSC as decisive and which, as officers of a disciplined service subject ultimately to civilian control[68], they are bound to implement. Whether particular circumstances might prevent immediate compliance with such a direction is not a question which arises in this case.

39 The word "may" in s 72(4) confers a power that can be exercised according to the dictates of the existing structures within which maritime officers operate. Subject to practical constraints, such as weather conditions and the availability of fuel and provisions on a vessel, a maritime officer is not required to consider the exercise of the power as though it were a personal discretion requiring a weighing of relevant factors. When exercising the power under s 72(4) of the MPA in response to a high executive direction in pursuance of government policy, maritime officers do not thereby act under dictation and unlawfully. Question 1(b) in the Special Case should be answered accordingly.

The *Maritime Powers Act* and the executive power

40 Section 5 of the MPA is headed "Effect on executive power" and provides:

"This Act does not limit the executive power of the Commonwealth."

The defendants submitted that s 5 negatives any implication, otherwise available, that the MPA excludes Commonwealth executive power in relation to the matters to which it applies.

41 The MPA confers a range of powers on officers of the Executive Government of the Commonwealth, including authorising officers and maritime officers as defined in the Act. The exercise of those powers is conditioned by reference to the circumstances and locations in which they may be exercised and the purposes for which they may be exercised. Whatever the proper construction of s 5, it cannot be taken as preserving unconstrained an executive power the

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68 See *Defence Force Discipline Act* 1982 (Cth), s 27 and *Haskins v The Commonwealth* (2011) 244 CLR 22 at 47 [67] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 28 in relation to members of the Australian Defence Force, and the *Australian Federal Police Act* 1979 (Cth), s 40 with respect to members of the Australian Federal Police.

exercise of which is constrained by the MPA. Considerations of coherence in the legislative scheme point to that conclusion.

42 Any consideration of the non-statutory executive power must bear in mind its character as an element of the grant of executive power contained in s 61 of the Commonwealth Constitution. The history of the prerogative powers in the United Kingdom informs consideration of the content of s 61, but should not be regarded as determinative. The content of the executive power may be said to extend to the prerogative powers, appropriate to the Commonwealth, accorded to the Crown by the common law[69]. It does not follow that the prerogative content comprehensively defines the limits of the aspects of executive power to which it relates. It is not necessary in these proceedings to resolve the important constitutional question whether there was a power under s 61 which, absent the lawful exercise of power under the MPA, would have authorised the actions taken by the Commonwealth in this case. It follows that the answer to Questions 3 and 5 of the Special Case will be "Not necessary to answer."

A speculative taking — whether authorised by s 72(4)

43 Questions 1(c) and 2 raise issues about the construction of s 72(4) and whether the detention of the plaintiff in order to take him to India, in the absence of any consent or agreement by the Indian Government, was lawful.

44 The initial destination of the Indian vessel and its passengers was Christmas Island. None of the passengers had any right to enter Christmas Island. It is a contravention of s 42(1) of the Migration Act for a non-citizen to travel to Australia without a visa that is in effect. If a non-citizen is brought into Australia on a vessel without a relevant visa where the non-citizen is a person to whom s 42(1) applies, then the master, owner, agent, charterer and operator of the vessel are each guilty of an offence against s 229 of the Migration Act. The maritime power conferred by s 72(4) of the MPA may be exercised in the contiguous zone of Australia to investigate or prevent a contravention of the Migration Act occurring in Australia. Circumstances warranting the exercise of the power under s 72(4) for that purpose existed.

45 Detention pursuant to s 72(4) must be incidental to the exercise of the power to take the person detained to a particular place. Being incidental and therefore purposive it must not be obviously disproportionate in duration or

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69 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195 at 226 [86] per Gummow, Hayne, Heydon and Crennan JJ; [2010] HCA 27; see also *Williams v The Commonwealth* (2012) 248 CLR 156 at 227–228 [123] per Gummow and Bell JJ; [2012] HCA 23.

character to the purpose it serves[70]. It may include, as the plaintiff accepted, detention for a period sufficient to enable reasonable steps to be taken by the relevant maritime officer, or those giving him or her directions, to determine the place to which the detained person is to be taken. The power to detain does not authorise indefinite detention. It can only be exercised for a reasonable time having regard to its statutory purpose. Detention incidental to the implementation of a decision to take a person to another country would be unlawful if the taking decision itself were not authorised by law. The decision to take the plaintiff to India was said by the plaintiff to have been unlawful because s 72(4) does not authorise a person to be taken to another country which he or she did not have a right to enter unless an agreement or arrangement existed between Australia and that country permitting discharge of the person there.

46 As a matter of the internal logic of the statute, a decision to take a person to another country would not be a valid exercise of the power under s 72(4) if it were known, when the decision was taken, that the country was not one at which the person could be discharged and that there was no reasonable prospect that that circumstance would alter. The position is no different where the taking decision is entirely speculative, that is to say, it is not known at the time the decision is made whether it is capable of being performed and there is no basis for believing that the position would be altered within a reasonable time. The statute should not be taken as authorising a futile or entirely speculative taking and therefore a futile or entirely speculative detention.

47 A decision to take a person to another country may be made in accordance with the MPA when made in the knowledge or reasonably grounded belief that that country will allow the person to enter its territory. The grounds of the knowledge or belief may be based on information about the law and/or administrative practices of that country or upon its express agreement or consent to allow the person to be discharged there. In such cases, the possibility cannot be excluded that the position may alter by a change of law or practice, or by withdrawal of an agreement or consent previously given to permit a person to be discharged in that country. It may be that a particular person will be refused entry for reasons peculiar to that person. The decision to exercise the power to take a person to another country must necessarily be taken on the basis that, as a matter of probability, it will be able to be performed to completion. Where, as in this case, the proposed country of destination has not agreed to receive the person taken but there are negotiations in place with a view to reaching agreement, then the relevant maritime officer or those directing him or her may make a probabilistic assessment and determine that the process of taking a person to that country should commence on the basis that there is a reasonable possibility that

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70 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 366 [74] per Hayne, Kiefel and Bell JJ; see also at 351–352 [30] per French CJ; [2013] HCA 18.

agreement will be reached or consent received. Assessment of that kind of probability is a matter for the Executive. It does not go to the power conferred by s 72(4) unless the probability is such as to render the taking decision futile or entirely speculative.

48 The plaintiff submitted that at the time the defendants decided to take him to India he was not entitled to enter that country, the Commonwealth had no arrangement with India for him to enter that country, whether lawfully or unlawfully, and it was not practicable for the Commonwealth to effect his discharge there. Those circumstances, it was said, continued between 1 July 2014 and 23 July 2014. On the basis that when the decision to take him to India was made it was not practicable to effect his discharge there, the decision to take was not authorised by s 72(4). On that basis the incidental detention was said not to be authorised.

49 The defendants pointed out that the plaintiff's argument involved an acceptance that the permissible period of detention under s 72(4) included an allowance for time to take reasonable steps to determine whether the person could be discharged at the place to which he might be taken. The defendants submitted that to construe s 72(4) in the limited way for which the plaintiff contended would prolong the detention of persons under that provision by preventing travel to any other country occurring simultaneously with any negotiations with that country.

50 Given the generality with which the power conferred by s 72(4) is expressed, the primary constraint must be that its exercise is consistent with its statutory purpose in the circumstances of the case. Had the taking been deferred while negotiations were pursued, the Commonwealth vessel would have been able, consistently with s 72(4) as the plaintiff construes it, to remain at sea for as long as was reasonably necessary to determine whether negotiations were likely to yield an agreement to receive the plaintiff and other persons on the Commonwealth vessel. In the circumstances described in the Special Case, the exercise of the power under s 72(4), notwithstanding that no agreement had been reached with India as to the discharge of the plaintiff, could not be said to be invalid. It follows that Questions 1(c) and 2 should be answered in the affirmative.

The detention and taking and procedural fairness

51 The plaintiff submitted that the power under s 72(4) to detain and take him to India was conditioned upon compliance with an obligation, breached in this case, to give him an opportunity to be heard about the exercise of the power. General principles informing the implication of the requirements of procedural fairness and the exercise of statutory powers adverse to personal rights, freedoms and interests were invoked. Plainly, the exercise of the power under s 72(4) will have an adverse effect upon the liberty of the persons affected by it and,

depending upon the destinations to which they are taken, may have the potential to affect their ultimate safety and wellbeing. However, given the nature and purposes of the power and the circumstances in which it is exercised, the plaintiff's submission cannot be accepted.

52 As the defendants submitted, the power under s 72(4) is a power exercised, in this case, for the purpose of preventing a contravention of Australia's migration laws. The maritime officers exercising the power do so in a chain of command. They do so in circumstances contemplated by the MPA in which there is no appropriate administrative framework to afford persons to whom s 72 applies a meaningful opportunity to be heard. Moreover, the exercise of the powers under s 72(4) is to be undertaken for the purposes for which those powers are conferred and within a reasonable time.

53 The ultimate safety of persons taken to a place under s 72(4) is a mandatory relevant consideration by reason of s 74. It does not follow from that that the power conferred under s 72(4) is conditioned by the requirements of procedural fairness. Those exercising or directing the exercise of the power may inform themselves of facts relevant to the question of safety in a variety of ways which may include, or according to the circumstances require, obtaining information from the persons to be detained. It may, for example, be open to the directing authority or those exercising powers under the MPA to act upon information about the origin of the foreign vessel, the ethnicity of its passengers and general information about the country from which they have most recently departed in determining whether it is safe to return them to that place. While the obtaining of basic information from the passengers may be a necessary incident of compliance with the requirement of s 74 in particular circumstances, it is not a matter which goes to power under the rubric of procedural fairness. The answer to Question 4 is "No".

The questions and answers on the Special Case

54 The questions stated for the opinion of the Full Court should be answered as follows:

(1) Did s 72(4) of the Maritime Powers Act authorise a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia, being India:

(a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations;

Answer: Section 72(4) of the *Maritime Powers Act* 2013 (Cth) authorised the plaintiff's detention at all times from 1 July 2014 to 27 July 2014. This question is not otherwise answered.

(b) in implementation of a decision by the Australian Government that the plaintiff (and others on the Indian vessel) should be taken to India without independent consideration by the maritime officer of whether that should be so; and

Answer: Yes.

(c) whether or not, prior to the commencement of the taking of the plaintiff to India, an agreement or arrangement existed between Australia and India concerning the reception of the plaintiff in India?

Answer: Yes.

(2) Did s 72(4) of the Maritime Powers Act authorise a maritime officer to:

(a) take the steps set out in paragraph 20 in implementing the decision to take the plaintiff to India;

Answer: Yes.

(b) detain the plaintiff for the purposes of taking the plaintiff to India?

Answer: Yes.

(3) Did the non-statutory executive power of the Commonwealth authorise an officer of the Commonwealth to:

(a) take the steps set out in paragraph 20 for the purpose of preventing the plaintiff from entering Australia;

Answer: Not necessary to answer.

(b) detain the plaintiff for the purposes of taking the plaintiff to India?

Answer: Not necessary to answer.

(4) Was the power under s 72(4) of the Maritime Powers Act to take the plaintiff to a place outside Australia, being India, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

Answer: No.

(5) Was any non-statutory executive power of the Commonwealth to take the plaintiff to a place outside Australia, being India, for the purpose of preventing the plaintiff from entering Australia, subject to an obligation to

give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

Answer: Not necessary to answer.

(6) Was the detention of the plaintiff unlawful at any, and if so what period, from 1 July 2014 to 27 July 2014 and if so are they [sic] entitled to claim damages in respect of that detention?

Answer: No.

(7) Who should pay the costs of this special case?

Answer: The plaintiff.

(8) What if any order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?

Answer: Proceedings dismissed, consequential orders to be determined by a single Justice of this Court.

55 HAYNE AND BELL JJ. The *Maritime Powers Act* 2013 (Cth) ("the MP Act") provides for a "maritime officer" to exercise certain powers with respect to vessels in Australia's contiguous zone[71] and with respect to persons on those vessels.

56 The Special Case agreed by the parties in this matter asks questions arising out of steps taken by officers of the Commonwealth with respect to the plaintiff, one of a number of persons on an Indian flagged vessel detained by an Australian border protection vessel in Australia's contiguous zone near Christmas Island. The plaintiff and others from the Indian vessel were placed on board the border protection vessel (a "Commonwealth ship"[72]). The National Security Committee of Cabinet decided that they should be taken to India, which was the place from which the Indian vessel had sailed. The Commonwealth ship took the plaintiff and the others who had been on board the Indian vessel and "arrived near India" about ten days later.

57 The plaintiff and other passengers did not disembark in India. A little over three weeks after the decision to take the plaintiff and others to India, and about 12 days after the Commonwealth ship had "arrived near India", the Minister for Immigration and Border Protection decided that, "for operational and other reasons, it would not be practicable to complete the process of taking the plaintiff and the other persons from the Indian vessel to India within a reasonable period of time, and that those persons should be taken to the Territory of the Cocos (Keeling) Islands". This was done.

58 The plaintiff is a person of Tamil ethnicity and Sri Lankan nationality. At no material time did he have an Australian visa permitting him to travel to or enter Australia. It should be inferred that the plaintiff, and the other passengers, were not put off the Commonwealth ship in India because they had no right to enter India and no permission to do so.

59 The plaintiff alleges that his detention was unlawful for some or all of the time he was on board the Commonwealth ship and claims damages for wrongful imprisonment. The plaintiff puts that argument in several different ways and the Minister and the Commonwealth ("the Commonwealth parties") make a number

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71 Section 8 of the MP Act defines "contiguous zone" as having the same meaning as in the United Nations Convention on the Law of the Sea (1982) ("UNCLOS") [1994] ATS 31. Article 33 of UNCLOS describes the contiguous zone as "a zone contiguous to [the coastal State's] territorial sea" not extending beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

72 Defined in s 8 as "a vessel that is owned by, or in the possession or control of, the Commonwealth or a Commonwealth authority".

of separate answers to the claim. But both the claim made by the plaintiff and the answers given by the Commonwealth parties require that there first be an examination of the relevant provisions of the MP Act.

Maritime Powers Act 2013

60 For present purposes, the general scheme of the MP Act can be identified as having the following elements. Part 2 (ss 15-49) provides for the exercise of maritime powers. Relevantly, s 16 prescribes who may authorise the exercise of maritime powers in relation to a vessel. Those persons include[73] the person in command of a Commonwealth ship from which the exercise of powers is to be directed or coordinated. Section 17 provides that an authorising officer may authorise the exercise of maritime powers in relation to a vessel if the officer suspects, on reasonable grounds, that the vessel is involved in a contravention of Australian law. A "contravention" of Australian law includes[74] an offence against the law. Involvement in a contravention extends[75] to an *intended* contravention of the law.

61 If an authorisation under ss 16 and 17 is in force in relation to a vessel, a maritime officer may exercise maritime powers[76] in relation to that vessel in accordance with ss 31 and 32 and within the geographical and other limits specified in Div 5 of Pt 2 of the MP Act (ss 40-49).

62 Section 31 provides, in effect, that the maritime officer may exercise maritime powers to take whichever of a number of steps applies in accordance with the authorisation. Those steps include investigating the suspected contravention and ensuring compliance with a "monitoring law" (an expression which includes[77] the *Migration Act* 1958 (Cth) ("the Migration Act")). Section 32(1)(a) provides that the maritime officer may also exercise maritime powers "to investigate or prevent any contravention of an Australian law that the officer suspects, on reasonable grounds, the vessel ... to be involved in".

63 The limits on the exercise of maritime powers which are relevant to this case were provided by s 41(1)(c). That provision limited the exercise of

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73 s 16(1)(d).

74 s 8.

75 s 9.

76 s 30.

77 s 8.

maritime powers in relation to the Indian vessel (a "foreign vessel"[78]) in two relevant ways. First, there was a geographical limitation: the powers could be exercised only in the contiguous zone. Second, there was a purposive limitation expressed as disjunctive alternatives: to "investigate a contravention of a customs, fiscal, immigration or sanitary law prescribed by the regulations that occurred in Australia"[79] or to "prevent a contravention of such a law occurring in Australia"[80].

64 It may be noted that the first purpose (investigating a contravention) uses the phrase "that occurred in Australia". Hence, although a vessel may be involved in a contravention if it is intended to be used in contravention of the law, no contravention (even in that extended sense) had occurred *in Australia* before the Indian vessel was intercepted and detained. It follows that, even if, as the Commonwealth parties submitted, the relevant provisions of the MP Act may be read as using the word "investigate" with some extended meaning encompassing steps taken to prevent a future contravention, the first of the purposes referred to in s 41(1)(c) was not engaged in this case. Rather, the second purpose (preventing a contravention) was. And s 32(1)(a) provides power for a maritime officer to exercise maritime powers not only to investigate any (intended) contravention of an Australian law that the officer suspects, on reasonable grounds, the vessel to be involved in, but also to prevent that contravention.

65 The relevant contraventions of Australian law which it was sought to prevent by the exercise of maritime powers were contraventions of the Migration Act. In particular, s 42(1) of the Migration Act provided, at the times relevant to this case, that, subject to some presently irrelevant exceptions, "a non-citizen must not travel to Australia without a visa that is in effect". In addition, if the Indian vessel had entered Australian territorial waters, one or more persons on, or associated with, the vessel may have committed an offence against s 229 of the Migration Act (dealing with the carriage of non-citizens to Australia without documentation) or against one of ss 233A and 233C (dealing with people smuggling and aggravated people smuggling).

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78 s 8.

79 s 41(1)(c)(i).

80 s 41(1)(c)(ii).

66 Part 3 of the MP Act (ss 50-78) identifies "maritime powers". They include the power[81] to detain a vessel and powers[82] with respect to "placing and moving persons" on a detained vessel. The central focus of debate in this case is upon the latter group of maritime powers: the powers with respect to placing and moving persons on a detained vessel.

67 Section 72 of the MP Act applies[83] to a person who is on a detained vessel when it is detained, or is reasonably suspected of having been on a detained vessel when it was detained. Sub-sections (2)-(4) of s 72 give a maritime officer three powers in respect of such a person: power to return the person to the detained vessel[84]; power to require the person to remain on the detained vessel until it is either taken to a port or other place, or permitted to depart from the port or other place[85]; and power to detain and take the person, or cause the person to be taken:

> "(a) to a place in the migration zone; or
>
> (b) to a place outside the migration zone, including a place outside Australia."[86]

The last power (to detain and take) is the central focus of this case.

68 Section 72(5) provides that "[f]or the purposes of taking the person to another place" a maritime officer may within or outside Australia place the person on a vessel or an aircraft, restrain the person on a vessel or an aircraft or remove the person from a vessel or an aircraft. Section 74 provides that:

> "A maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place."

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81 s 69(1).

82 Div 8 of Pt 3 (ss 71-75).

83 s 72(1).

84 s 72(2).

85 s 72(3).

86 s 72(4).

The power to detain and take to a place outside Australia

69 The plaintiff claims that he was unlawfully detained for all or part of the time he was on board the Commonwealth ship. That allegation presents a number of issues about the construction and application of s 72(4) of the MP Act and, in particular, its provision that "[a] maritime officer may detain the person and take the person, or cause the person to be taken ... to a place outside the migration zone, including a place outside Australia". Those issues may be considered by reference to three questions. What is a "place outside Australia"? Once a decision has been taken about the place to which a person is to be taken, can the power be re-exercised and another place chosen? Must the maritime officer be satisfied, on reasonable grounds, that "it is safe for the person to be" in the place to which the person is to be taken?

70 The first two questions (What is a place outside Australia? and Can the power be re-exercised?) both bear upon whether India was a destination to which the plaintiff might be taken. The Commonwealth parties submitted, in effect, that he might be taken towards India in the hope that he might later be given permission to land. And they sought to support that submission by arguing that the power to detain and take may be exercised and re-exercised as occasion requires.

71 These reasons will show why these arguments should be rejected. The place to which a person is to be taken under s 72(4) must be a place which, at the time the destination is chosen, the person taken has a right or permission to enter. The plaintiff had neither the right to enter India nor permission to do so. The journey to India, and the plaintiff's consequential detention, were not done in execution of the statutory power.

72 The third question (about safety) bears upon whether the plaintiff could have been taken to a place where there is a real risk that he would be persecuted, including, in this case, the country of his nationality (Sri Lanka). If, as the Commonwealth parties contended, the plaintiff could have been taken to Sri Lanka, it may be arguable that the power to take given by s 72(4) is a power to take to *any* place chosen by the maritime officer (with or without direction from superiors). But these reasons will show why this contention should also be rejected.

73 Only once the issues presented by these three questions have been identified and resolved is it useful to consider the more particular questions asked by the parties in their Special Case. All of those more particular questions depend, either directly or indirectly, upon the proper construction of the MP Act.

74 It is necessary to approach the construction of the MP Act bearing in mind some relevant general principles.

Applicable general principles

Compulsive powers

75 The MP Act gives officers of the Commonwealth compulsive powers over vessels and persons. The powers may be exercised on reasonable suspicion of intention to contravene one or more Australian laws.

76 It is well-established that statutory authority to engage in what would otherwise be tortious conduct (in this case detaining a vessel and then detaining and taking a person to a place chosen by an officer of the Commonwealth) must be clearly expressed in unmistakable and unambiguous language[87]. The statutory powers at issue in this case are to be construed in accordance with that principle.

77 But in this case there is a further and important consideration. The particular powers were to be exercised outside Australia.

Exorbitant powers

78 As has been noted, the power to detain the Indian vessel (a foreign vessel) was exercised in Australia's contiguous zone. The contiguous zone is an area in which, under Art 33 of UNCLOS, the coastal state may "exercise the control necessary to ... prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea". The contiguous zone is not, in international law, a part of Australia's territorial sea[88] or, in Australian domestic law, "part of Australia"[89]. In international law, the contiguous zone is an area of the high seas in which Australia, as the coastal state, exercises no sovereignty or jurisdiction, only certain rights or powers of enforcement[90].

79 It may be accepted that exercising the control necessary to prevent infringement of laws of the kind described in Art 33 of UNCLOS would include a coastal state stopping in its contiguous zone an inward-bound vessel reasonably suspected of being involved in an intended contravention of one of those laws.

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87 See, for example, *Coco v The Queen* (1994) 179 CLR 427 at 436; [1994] HCA 15.

88 UNCLOS, Arts 3, 4 and 33. See also *Seas and Submerged Lands Act* 1973 (Cth), ss 3(1) (definition of "contiguous zone"), 5, 6, 13A and 13B.

89 *Acts Interpretation Act* 1901 (Cth), s 15B(1), (2) and (4).

90 O'Connell, *The International Law of the Sea*, (1984), vol 2 at 1058; Rothwell and Stephens, *The International Law of the Sea*, (2010) at 78.

Because there must be a power to stop the vessel, it may be accepted that there is a power to detain the vessel (at least for the purposes of investigating whether there is a threat of a relevant contravention). But whether, for the purposes of international law, Art 33 permits the coastal state to take persons on the vessel into its custody or to take command of the vessel or tow it out of the contiguous zone remains controversial[91].

80 It is not necessary or appropriate to attempt to resolve any controversy about the proper construction of Art 33. The Commonwealth parties did not submit that international law recognises the right of a coastal state to take steps of the kind described with respect to vessels or persons on vessels stopped and detained in the contiguous zone, and they accepted, correctly, that there is controversy about these matters. They did submit that Australia had exclusive jurisdiction over the Commonwealth ship and all persons on it. So much may readily be accepted, but it is a conclusion that is beside the point and it does not deny the exorbitant character of the powers in issue.

81 Recognising that Australia had exclusive jurisdiction over the Commonwealth ship and all aboard it is beside the point because the questions about the scope of the power given by the MP Act to detain and take the plaintiff to a place outside Australia remain unanswered.

82 The Special Case proceeds from the agreed premise that the plaintiff, and others on the Indian vessel, were persons to whom s 72 of the MP Act applied. Even if, contrary to that fact, the plaintiff and others from the Indian vessel were to be treated as having boarded the Commonwealth ship voluntarily (because, as is agreed, the Indian vessel had become unseaworthy), officers of the Commonwealth thereafter sought to exercise the powers given by s 72 of the MP Act. More particularly, in purported execution of those powers, Australian officials alone determined where the plaintiff and others were to be taken and held them aboard the Commonwealth ship for that purpose. Those are powers properly seen as exorbitant powers which "run counter to the normal rules of comity among civilised nations"[92].

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91 See, for example, Shearer, "Problems of Jurisdiction and Law Enforcement against Delinquent Vessels", (1986) 35 *International and Comparative Law Quarterly* 320 at 330; Rothwell and Stephens, *The International Law of the Sea*, (2010) at 80.

92 *Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA* [1979] AC 210 at 254 per Lord Diplock.

83 The exorbitant nature of the powers is further reason to construe[93] the provisions strictly.

Statutory misfire?

84 The Commonwealth parties submitted that certain constructions of the MP Act would "strangle" the power given by that Act. It may be accepted that the MP Act should not readily be construed in a way which would make it misfire by stripping it of some relevant practical operation. But no consideration of that kind arises in this case.

85 There was, and could be, no dispute that a maritime officer has taken a person to a place outside Australia only when, at that place, the maritime officer ceases[94] to detain the person by discharging the person from custody. And a maritime officer cannot discharge the person from custody in a jurisdiction other than Australia without the permission (or at least acquiescence) of that jurisdiction.

86 If the power given by s 72(4) did not permit taking the plaintiff to India (because he had no permission to land there) and did not permit taking him to Sri Lanka (because he asserted a fear of persecution in that country), a maritime officer, nevertheless, could take the plaintiff either to a place in Australia or to a place outside Australia. More particularly, the plaintiff could be taken to any country with which Australia had made an arrangement for reception of such persons. And it is always to be recalled that, at the time of the events giving rise to this case, Australia had made arrangements with both the Republic of Nauru and the Independent State of Papua New Guinea for reception and processing of unauthorised maritime arrivals. (Both Nauru and Papua New Guinea were then designated under s 198AB of the Migration Act as regional processing countries.)

87 Whether the particular arrangements made with Nauru and Papua New Guinea permitted Australian officials to take persons detained in the contiguous zone to those countries was not explored in argument. But of immediate relevance to the issues of construction is the observation that Australia can make, and has made, standing arrangements with other countries which permit Australian authorities to take foreign nationals to those other countries. Hence, submissions that the MP Act would misfire, or that the power given by the Act would be "strangled", if the plaintiff's construction of the Act were adopted are

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93 *Siskina* [1979] AC 210 at 254-255 per Lord Diplock.

94 s 97.

properly seen as misplaced. They are submissions that ignore the making of standing arrangements of the kind described.

Text and context

88 In opening the case for the Commonwealth parties, the Solicitor-General of the Commonwealth submitted[95] that this Court should look at the questions which arise in the matter through a "prism" or "framework" in which "the Parliament in the expressed terms it has used and the expressed limitations on power of which there are some, has quite deliberately drawn a careful balance between the needs of law enforcement in a unique maritime environment, the rights and interests of persons and Australia's international obligations". And as developed, the submissions for the Commonwealth parties appeared, at least at times, to approach the issues of construction of the MP Act on the footing that regard should be had only to the text of the MP Act and that its text should be given the fullest and most ample construction possible[96].

89 This Court has emphasised many times the need to grapple with the text of a statute. And of course the MP Act must be construed with proper regard for the practical context within which it will operate. As the Replacement Explanatory Memorandum for the Bill which became the MP Act said[97], "[e]nforcement operations in maritime areas frequently occur in remote locations, isolated from the support normally available to land-based operations and constrained by the practicalities involved in sea-based work". But no statute can be construed as if it stands isolated from the wider legal context within which it must operate. The MP Act cannot be construed by searching only for the largest meaning its words could bear. The compulsive and exorbitant nature of the powers precludes that approach.

A place outside Australia

90 The power given by s 72(4) to detain and take a person to a place outside Australia is understood better as a single composite power than as two separate powers capable of distinct exercise. That is, the power to detain referred to in s 72(4) is better understood as given in aid of the power to take. And together,

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95 [2014] HCATrans 227 at 3652-3665.

96 [2014] HCATrans 228 at 4458-4479.

97 Australia, Senate, Maritime Powers Bill 2012, Replacement Explanatory Memorandum at 1.

the words "detain" and "take", read in the context provided by s 72(5)[98], show that the power is one which may be exercised without the consent of the person concerned.

91 The power to detain and take is to take to "a place". As has been explained, the place to which a person is taken must be a place at which the maritime officer can discharge the person from the detention that has been effected for the purposes of taking. In the words of s 72(5)(c), the place must be one at which the maritime officer may remove the person from the vessel or aircraft by which the person has been taken to that place. At least ordinarily, the "place" would be within the jurisdiction of another state. That would usually be so if the taking is effected by aircraft and it may be doubted that some wider operation should be given to the power when the taking is effected by a vessel. It may be, however, that "a place" would include a vessel subject to the jurisdiction of another state. These questions about the outer limits of the power need not be decided in this case.

92 What is presently important is that the power is to take to "*a* place", not "*any* place", outside Australia. The use of the expression "a place" connotes both singularity and identification. That is, the power is to take to *one* place *identified* at the time the taking begins, not to whatever place outside Australia seems at the time of discharge to be fit for that purpose. Because the place to which a person may be taken is an identified place at which the person may be discharged from Australian custody, the destination of the taking must be a place which, at the time it is selected, the person has the right or permission to enter.

93 This understanding of the power is required by the text of s 72(4). It is reinforced by recognition of the compulsive and exorbitant nature of the power. It is further reinforced by considering whether the power can be exercised and re-exercised.

Successive destinations?

94 If a decision is made to take a person to an identified place outside Australia, can the power be re-exercised and a different place chosen? Is the

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98 "For the purposes of taking the person to another place, a maritime officer may within or outside Australia:

(a) place the person on a vessel or aircraft; or

(b) restrain the person on a vessel or aircraft; or

(c) remove the person from a vessel or aircraft."

power given by s 72(4) one to be exercised "from time to time as occasion requires"[99]?

95 The better view may well be that the power given by s 72(4) can be re-exercised "as occasion requires". But that invites close attention to what are the limits on the power itself, and what kind of "occasion" may permit and require its re-exercise. That attention is invited because the possibility of re-exercise of the power "from time to time" provokes consideration of how often the power can be re-exercised and what effect any, let alone repeated, re-exercise of the power would have on the liberty of the person concerned.

96 It was not suggested that the powers given by s 72(4) may be exercised in a manner which would lead to the indefinite detention of a person who was on board a vessel detained in Australia's contiguous zone. The Commonwealth parties rightly accepted that the powers must be exercised within reasonable times. But that does not entail that the person must be taken to the closest available destination. It is important to recognise that, because the power is to take to a place in Australia *or* to a place outside Australia, the relevant decision-maker must have a reasonable time within which to decide to what place the person is to be taken and then a further reasonable time to take the person to that place. But there are limits to the destination to which a person may be taken.

97 In *Plaintiff S4/2014 v Minister for Immigration and Border Protection*[100], this Court said that:

> "The duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced[101] by the courts, and, ultimately, by this Court."

This principle reinforces the construction of s 72(4) that has already been described. For the purposes of s 72(4) of the MP Act, a place may be chosen as the place to which a person is to be taken only if, at the time the destination is chosen, the person has the right or permission to enter that place. This case shows why that conclusion follows from the principle described in *Plaintiff S4/2014*.

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99 *Acts Interpretation Act* 1901 (Cth), s 33(1).

100 (2014) 88 ALJR 847 at 853 [29]; 312 ALR 537 at 543; [2014] HCA 34.

101 *Crowley's Case* (1818) 2 Swans 1 at 61 per Lord Eldon LC [36 ER 514 at 531].

98 The Commonwealth ship took the plaintiff and others from the Indian vessel towards India and "arrived near India" about ten days after the National Security Committee decided that this should be their destination. But, the plaintiff and others not having permission to land in India, they were not discharged in that country, and a further twelve days elapsed before the decision was made to take them to the Territory of the Cocos (Keeling) Islands. If, as the Commonwealth parties submitted, the power to take to a place outside Australia can be re-exercised from time to time, as occasion requires, once negotiations with India were thought not sufficiently likely to allow for landing the plaintiff and others soon enough, a different destination outside Australia could then have been chosen. And a further period would have elapsed while negotiations were had to allow the plaintiff and others to land in that other place. Presumably, if those negotiations did not bear fruit soon enough, the process could be repeated. But what is soon enough? How many attempts can be made? How long can detention be prolonged?

99 This is not to confine the power given by s 72(4) by reference to "extreme examples" or "distorting possibilities"[102]. Nor is it to assume that the power would be exercised "improperly or venally"[103]. The facts and circumstances of this case are enough to suggest the real possibility of prolongation of detention while political and diplomatic discussions take place in the course of searching for a willing country of reception. And if the power can be re-exercised as occasion requires, the length of detention will likely be determined by matters peculiar to the particular destination or destinations that is or are chosen. They are matters dependent upon the agreement or acquiescence of another state. They are, therefore, matters outside the control of the Commonwealth or its officers. Hence, the length of detention would depend upon the particular (unconstrained) decision to choose as the destination to which a person subject to s 72 of the MP Act should be taken a place (or succession of places) which that person has no right or permission to enter. That is reason enough to reject a construction of s 72(4) which would permit taking a person to a place which that person has no right or permission to enter.

100 Some emphasis was given in this case to the fact that the plaintiff and others on the Indian vessel had set off from India. And from time to time in argument, it was suggested that the place of departure was "an obvious" (even "the most obvious") place to which they should be taken. But why should that be

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102 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 380-381 [87]-[88]; [1998] HCA 22.

103 *Egan v Willis* (1998) 195 CLR 424 at 505 [160]; [1998] HCA 71.

so? India is not the country of nationality[104] of either the plaintiff or the others on the Indian vessel. Departure from India said nothing about whether the plaintiff, or the others, were living lawfully in that country and there is nothing in the Special Case which says anything about the status in that country of the plaintiff or anyone else on the Indian vessel. There is, then, no basis for treating India as an obvious place to which the plaintiff could or should be returned.

101 Further, if the power to take to a place outside Australia permits a maritime officer to take a person to a place where it is *hoped* that the person might be allowed to land, how would a court (and ultimately this Court) determine whether the person has been detained longer than reasonably necessary to be taken from the contiguous zone to his or her eventual destination? How is a court (and ultimately this Court) to judge whether that hope has been explored with sufficient diligence to make the consequential detention not unduly, and thus not unlawfully, prolonged? If neither a right to land nor an existing permission to do so is required, and hope of landing will do, what level of hope must exist?

102 The Special Case refers to the need, in this case, for "diplomatic negotiations between Australia and India (including the time required to arrange and undertake meetings at a Ministerial level)". Is a court to inquire into the course taken in diplomatic discussions between Australia and the government of a place about whether, or on what terms, that government would grant permission to land to persons whom Australia wishes to leave in that place but who have no right or permission to enter? And if a court cannot or should not do that, how would the lawful duration of the detention be judged?

103 By contrast, if a place may be chosen as the place to which a person is to be taken only if, at the time the destination is chosen, the person has the right or permission to enter that place, the reasonable length of detention is readily capable of being judged by reference to wholly objective considerations like the time necessary to identify a place where the person has the right or permission to enter, travel time to that place, any need for the vessel to be resupplied, the state of weather conditions on the journey and the like[105].

104 If, for any reason or no reason, the government of the place to which the person is being taken refuses to allow that person to exercise a right of entry to

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104 cf *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (*Malaysian Declaration Case*) (2011) 244 CLR 144 at 190 [92]; [2011] HCA 32.

105 cf MP Act, s 96, providing for the matters to be taken into account in determining whether a maritime officer has done something as soon as practicable under Pt 5 of that Act.

the country or revokes the permission which existed, there would be an "occasion" on which the power to take to a place could be re-exercised. Subject to that limited qualification, the power to detain and take to a place outside Australia can be exercised to take only to a place which, at the time the destination is chosen, the person has the right or permission to enter.

Section 74 and a "safe" place

105 Section 74 provides that "[a] maritime officer must not place ... a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place". When a maritime officer, acting under s 72(4), takes a person to a place outside Australia, must the place to which the person is taken be a place at which the officer is satisfied, on reasonable grounds, it is safe for the person to be?

106 The Commonwealth parties submitted that s 74 deals only with what happens between detention (presumably detention of a vessel) and the discharge from detention. Hence, so the argument ran, a maritime officer may lawfully remove a person from an aircraft or vessel in the place of destination without any regard for what lies at or after the foot of the aircraft's steps or the vessel's gangplank.

107 Such a reading of s 74 is inconsistent with its text, read in the context provided by the MP Act as a whole and s 72 in particular. Section 72(4) and s 74 are both directed to a maritime officer. The former provision gives such an officer power to detain and take a person to "a place". The latter provision forbids the officer placing the person "in a place" unless satisfied that it is safe for the person to be in that place. There is no reason to read the words "a place" in s 74 as if they do not include what s 72(4) refers to as "a place". And to read the provisions of s 74 as not speaking to the officer's conduct in removing a person from an aircraft or vessel would depend upon treating s 74 as ceasing operation *before* the maritime officer concerned has completed the task required by s 72(4). There is no warrant for doing that. It is, therefore, not necessary to consider[106] whether an officer of the Commonwealth could lawfully be authorised to exercise a statutory power of the kind in issue in this case without reasonable care for the safety of the person concerned.

108 Section 74 may be engaged in a very wide variety of circumstances. In this case, the circumstances in which the Indian vessel was intercepted and detained suggested that it was very probable that those on board the vessel would claim to be refugees. The plaintiff was asked questions about his personal and

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106 cf *The Commonwealth v Mewett* (1997) 191 CLR 471; [1997] HCA 29.

biographical details and it was known that he was a Sri Lankan national. He was not asked why he had left Sri Lanka or where he wanted to go.

109 The reference in s 74 to a person being "safe" in a place must be read as meaning safe from risk of physical harm. A decision-maker who considers whether he or she is satisfied, on reasonable grounds, that it is safe for a person to be in a place must ask and answer a different question from that inferentially posed by the Refugees Convention[107]. But there is a very considerable factual overlap between the two inquiries. Many who fear persecution for a Convention reason fear for their personal safety in their country of nationality.

110 If, then, it had been intended to take the plaintiff to Sri Lanka, a maritime officer could not have been satisfied, on reasonable grounds, that it was safe to put him in that place without asking the plaintiff some further questions including, at least, whether he feared for his personal safety in that place. And if, as might be expected, the plaintiff did say that he feared going back to Sri Lanka, and the maritime officer could not decide that the fear was ill-founded, the maritime officer could not be satisfied, on reasonable grounds, that it would be safe to place him there.

111 This conclusion is significant for two reasons. First, it is a conclusion that denies the argument of the Commonwealth parties that a maritime officer could lawfully have decided that the plaintiff should be taken to Sri Lanka, whether or not he claimed to be a refugee. Section 74 precluded taking him to Sri Lanka without asking at least whether he feared for his personal safety in that place.

112 Second, the conclusion obviates the need to consider whether the obligations which Australia has assumed under the Refugees Convention and other international instruments referred to in the Special Case[108] are relevant to construing the ambit of the power given by s 72(4). By acceding to the Refugees Convention, Australia has undertaken to other parties to the Convention obligations with respect to certain persons who are unable to seek the diplomatic

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107 The Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967). See *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388-390 per Mason CJ, 399-400 per Dawson J, 406-407 per Toohey J, 429-431 per McHugh J; [1989] HCA 62.

108 The International Covenant on Civil and Political Rights (1966); [1980] ATS 23 ("the ICCPR") and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); [1989] ATS 21 ("the CAT").

or consular protection[109] of their country of nationality. It is unnecessary to decide whether these obligations are relevant to the construction of the MP Act. It is unnecessary to decide whether the MP Act should be construed[110] as giving an officer of the Commonwealth power to act outside Australia, on the high seas, in a way which would breach the obligations Australia has undertaken under these international instruments.

113 The more particular questions asked by the parties in the Special Case must then be considered in the light of these conclusions about the proper construction of the MP Act. First, the s 72(4) power to detain and take to a place outside Australia permits detention and taking only to a place which the person has, at the time the destination is chosen, a right or permission to enter. Second, s 74 requires that a maritime officer may take a person to a place outside Australia only if satisfied, on reasonable grounds, that the person will be safe in that place.

114 These conclusions about the proper construction of ss 72 and 74 provide the necessary basis for considering the questions stated in the Special Case. Before considering those questions, however, it is convenient to deal with a point which the plaintiff put at the forefront of his written submissions. The plaintiff submitted that "there was an obligation to give the plaintiff an opportunity to be heard prior to any exercise of statutory or (if it exists) non-statutory power to take the plaintiff to a place outside Australia and that obligation was breached". Was the exercise of power under s 72 subject to an obligation to give the plaintiff an opportunity to be heard?

Procedural fairness and s 72

115 As already mentioned, s 72 gives a maritime officer three powers in respect of a person who is on a detained vessel when it is detained, or is reasonably suspected of having been on board a detained vessel when it was detained: to return the person to the vessel; to require the person to remain on the vessel; and to detain and take the person to a place in Australia or a place outside Australia. A maritime officer need not give a person to whom s 72

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109 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 21 [62]; [2002] HCA 14; *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 8 [19]; [2004] HCA 18.

110 *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69 per Latham CJ, 77 per Dixon J, 80-81 per Williams J; [1945] HCA 3; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; [1995] HCA 20; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97].

applies any opportunity to be heard about which of those three powers will be exercised or how the power will be exercised.

116 Each of the powers given by s 72 is a compulsive power and each is available[111] only because the person concerned is, or is reasonably suspected of having been, on a detained vessel. As has already been seen, a foreign vessel cannot be detained outside Australian territorial waters except in the contiguous zone and only then for the purpose of investigating or preventing actual or intended contravention of Australian law.

117 Section 74 of the MP Act deals expressly with the personal safety of a person who is or was on a detained vessel. But apart from considerations of personal safety, the person from the detained vessel has no relevant right, interest or expectation[112] which may be adversely affected by the decision about which of the three powers given by s 72 is to be used in consequence of the vessel's detention, or about how one or other of those powers is to be used. It may be accepted, for the purposes of argument, that the person's rights, interests or expectations are affected by the vessel being detained and, in consequence, he or she becoming subject to s 72. But that affecting of rights, interests and expectations has happened by the time a maritime officer comes to deciding which of the powers given by s 72 is to be used and how it is to be used. So, for example, detention of the vessel, and consequent prevention of the commission of a suspected contravention of the law, may well have defeated some expectation of the persons on the vessel about seeking to enter Australia. But that expectation has already been defeated when the maritime officer is deciding *where* the person from the detained vessel should be taken or placed.

118 Because s 74 deals expressly with personal safety, s 72's conferral of power on a maritime officer to decide where a person who is or was on a detained vessel should be taken or placed (whether on the detained vessel or elsewhere) should not be read as obliging the maritime officer to give the person a hearing about which of the powers is to be exercised or how it will be exercised. More particularly, in deciding whether to detain and take to a place in Australia or to a place outside Australia a maritime officer is not obliged to ask the person which of those courses should be taken.

119 These conclusions do not detract from the force of s 74, and are not to be understood as doing so. A maritime officer may not place a person in a place

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111 s 72(1).

112 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100 [39]; [2000] HCA 57; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97]; [2012] HCA 31.

unless satisfied, on reasonable grounds, that it is safe for the person to be in that place. There will be many circumstances in which a maritime officer will not have reasonable grounds for concluding that it is safe for a person to be in a place if the officer has not asked the person whether he or she has reason to fear for his or her safety there. But, subject to the operation of s 74, the plaintiff's general submission that the exercise of power under s 72 was subject to an obligation to give the plaintiff an opportunity to be heard should not be accepted.

The questions in the Special Case

120 Leaving aside questions about the costs of the Special Case and about orders either disposing of the proceeding or providing for its further conduct, the parties asked six questions. Questions 1, 2 and 4 were directed to the power under s 72(4) of the MP Act. Questions 3 and 5 were directed to the "non-statutory executive power of the Commonwealth". Question 6 asked generally whether the detention of the plaintiff was unlawful for any and what part of the time he was on board the Commonwealth ship and, if so, whether he is entitled to claim damages in respect of that detention. It will be convenient to deal with the questions in that order: first the questions about s 72(4), then the questions about non-statutory executive power and finally the question about unlawful detention.

121 One preliminary point must be made. The parties agreed in stating the questions as "the questions of law arising in the proceeding"[113]. To submit, as the Commonwealth parties did, that one of the agreed questions is hypothetical, or should not be answered for want of sufficient facts, does not sit easily with the agreement that necessarily underpins the parties proceeding by way of special case. The matters advanced in argument as presenting difficulties in answering the question should have been drawn to attention before the Special Case was referred for argument before a Full Court.

The s 72(4) questions

122 Question 1 asks whether s 72(4) authorised a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to India. The question identifies three different considerations as affecting that general question. They are described as:

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113 High Court Rules 2004, r 27.08.1.

"(a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations[114];

(b) in implementation of a decision by the Australian Government that the plaintiff (and others on the Indian vessel) should be taken to India without independent consideration by the maritime officer of whether that should be so; and

(c) whether or not, prior to the commencement of the taking of the plaintiff to India, an agreement or arrangement existed between Australia and India concerning the reception of the plaintiff in India".

These three considerations may be referred to respectively as "non-refoulement", "chain of command" and "permission to land".

123 The third of the considerations (permission to land) has been considered. For the reasons that have been given, s 72(4) did not authorise taking the plaintiff to a place where, at the time the destination was chosen, he did not have a right or permission to enter. At no relevant time did the plaintiff have the right or permission to enter India. Further, s 74 prevented a maritime officer "placing" the plaintiff in India unless satisfied, on reasonable grounds, that it was safe for the plaintiff to be in that place. These conclusions require that the question be answered in the plaintiff's favour. But the exact form of answer requires some further examination of the two other considerations to which it refers: non-refoulement and chain of command.

Non-refoulement

124 The Special Case states no fact suggesting that the plaintiff would not be "safe" in India and there is, therefore, no basis for assuming that he would not be. Nor does the Special Case state any fact suggesting that in India there was at any relevant time a risk of the kind referred to in the Special Case in defining the "non-refoulement obligations": "a real risk of the plaintiff suffering persecution as defined in the Refugees Convention or significant harm of the kind described in Art 7 of the ICCPR and Art 3 of CAT by being refouled, directly or indirectly,

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114 The Special Case described the "non-refoulement obligations" as obligations "under or to the effect of Art 33(1) of the Refugees Convention, Art 7 of the [ICCPR] and Art 3 of the [CAT] ... where there is a real risk of the plaintiff suffering persecution as defined in the Refugees Convention or significant harm of the kind described in Art 7 of the ICCPR and Art 3 of CAT by being refouled, directly or indirectly, to Sri Lanka prior to his protection claims being determined in accordance with law".

to Sri Lanka prior to his protection claims being determined in accordance with law". Again, there is no basis for assuming that there was such a risk.

125 Hence, so much of Question 1 as asks about exercise of the s 72(4) power "whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations" must be understood as asking whether the matter described was a mandatory relevant consideration. It may be accepted that, as the Commonwealth parties pointed out, the consideration described in the question invites attention to Indian domestic law and there is no fact agreed in the Special Case about the content of that law. And it may further be accepted that, as the Commonwealth parties also pointed out, assessing the risk of refoulement requires consideration of state practice as well as the domestic law of that state. But if these observations reveal deficiencies in the facts on which the question is based or in the way in which the question is framed, they are deficiencies for which both sides of the litigation must take equal responsibility.

126 Having regard to these observations, and in the light of the conclusion that s 74 requires that a maritime officer be satisfied that it is safe to place a person in the place to which that person is taken, the answer which is given to Question 1 should reflect the conclusion reached about s 74 but otherwise decline to deal with whether, or to what extent, questions of non-refoulement are mandatory relevant considerations or otherwise bear upon the construction of the powers given by s 72(4).

Chain of command

127 The plaintiff submitted that the maritime officer who detains and takes a person to a place outside Australia must independently consider where the person is to be taken. That is, the power given by s 72(4) was said to be one which the maritime officer concerned must exercise personally.

128 Section 104(1) of the MP Act provides that each of four classes of person is a maritime officer: a member of the Australian Defence Force, an officer of Customs (within the meaning of the *Customs Act* 1901 (Cth)), a member or special member of the Australian Federal Police, and any other person appointed as a maritime officer by the Minister. The first three classes of persons are members of disciplined and hierarchical forces. Each member of those forces is subject to the command of superiors and ultimately each force is, and the individual members of the force are, subject to the control of the Executive government.

129 Why, against this background, the disposition of persons taken into Australian custody from a vessel detained on that part of the high seas which is within Australia's contiguous zone should be a matter for the personal decision of

a particular maritime officer was not explained. Nor was it explained how the relevant maritime officer was to be identified or how attribution of the power to an individual would fit with the disciplined and hierarchical character of those services whose members are maritime officers. The assumption implicit in the plaintiff's submission was that the decision was to be made by the most senior maritime officer at the scene. But if that is so, why should that officer not be subject to command from higher authority in the service? Why should the head of the relevant service not be subject to direction from relevant Ministers about the exercise of the powers? No satisfactory answer or explanation was, or can be, given in respect of these questions to support the construction of s 72(4) for which the plaintiff contended.

130 The lack of satisfactory answer to these questions is reason enough to reject the construction of s 72(4) proffered on behalf of the plaintiff. But there is an additional affirmative reason for preferring a construction which would permit a maritime officer to take to a place determined at whatever level in the chain of command (up to and including the civilian control exercised by relevant Ministers) is judged appropriate in the particular circumstances of the case.

131 As has been noted, s 74 obliges a maritime officer to consider whether a person who is detained and taken to a place under s 72(4) will be safe in that place. These are issues about which a maritime officer on the scene must be able to obtain advice from others, including from within the command structure of the organisation of which the particular officer is a member. If, as might have been expected to be the case here, a person detained claims to fear persecution in his or her country of nationality, a maritime officer will be better able to reach the degree of satisfaction required by s 74 if the decision about where to take the person is made on the basis of better information than may be available at the scene. That may mean that the decision will be taken at whatever point in the chain of command and civilian control is best able to identify what courses of action are available.

132 For these reasons, the facts that the National Security Committee decided that those on the Indian vessel should be taken to India and that maritime officers acted in accordance with that decision do not render the consequent detention and taking beyond the power given by s 72(4).

Answering Question 1

133 Having regard to the conclusions that have been reached, a "speaking" answer, rather than bare affirmative or negative answers, should be given to the first of the questions stated for the opinion of the Court. And the answer that is given should be to the whole of the question and should not treat the three sub-paragraphs as posing separate questions. We would answer the question:

"Section 72(4) of the *Maritime Powers Act* 2013 (Cth) did not authorise a maritime officer to detain and take the plaintiff to India when, at the time that destination was chosen, the plaintiff had neither the right nor permission to enter India. Subject to that limitation, s 72(4) authorised a maritime officer to detain and take the plaintiff, a person reasonably suspected of having been on the Indian vessel when it was detained under that Act, to a place outside Australia determined by the National Security Committee of Cabinet, and to place the plaintiff in that place if the officer was satisfied, on reasonable grounds, that it would be safe for the plaintiff to be in that place.

Otherwise it is not appropriate to answer this question."

Answering Question 2

134 Question 2 in the Special Case reads:

"Did s 72(4) of the *Maritime Powers Act* authorise a maritime officer to:

(a) take the steps set out in paragraph 20 in implementing the decision to take the plaintiff to India;

(b) detain the plaintiff for the purposes of taking the plaintiff to India?"

The steps set out in par 20 of the Special Case were detaining the plaintiff (and others) on the Commonwealth ship while it travelled towards India and continuing to detain the plaintiff (and others) on the Commonwealth ship "while waiting for it to become practicable to complete the taking of those persons to India".

135 Because the plaintiff had no right or permission to enter India, s 72(4) did not authorise a maritime officer to detain and take the plaintiff to India, whether by implementing the steps described in the Special Case or otherwise. Both parts of Question 2 should be answered "No".

Answering Question 4

136 Question 4 asks whether the power under s 72(4) to take the plaintiff to a place outside Australia, being India, was subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, whether that obligation was breached. Having regard to the conclusions already reached about the absence of power under that provision to take the plaintiff to India, it is not necessary to answer this question.

Non-statutory executive power

137 The Commonwealth parties submitted that, even if s 72(4) did not authorise the detaining and taking of the plaintiff to India, the non-statutory executive power of the Commonwealth did.

138 Question 3 in the Special Case reads:

> "Did the non-statutory executive power of the Commonwealth authorise an officer of the Commonwealth to:
>
> (a) take the steps set out in paragraph 20 for the purpose of preventing the plaintiff from entering Australia;
>
> (b) detain the plaintiff for the purposes of taking the plaintiff to India?"

As has already been noted, the steps set out in par 20 of the Special Case were detaining the plaintiff (and others) on the Commonwealth ship while it travelled towards India and continuing to detain the plaintiff (and others) on the Commonwealth ship "while waiting for it to become practicable to complete the taking of those persons to India".

139 Question 5 asks whether any non-statutory executive power of the Commonwealth to take the plaintiff to "a place outside Australia, being India" was subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, whether that obligation was breached.

140 The Commonwealth parties emphasised that s 5 of the MP Act provides that "[t]his Act does not limit the executive power of the Commonwealth". The plaintiff emphasised that s 3 provides that "[t]his Act binds the Crown in each of its capacities".

141 The essence of the argument advanced by the Commonwealth parties about the so-called "non-statutory executive power" is best captured by Roskill LJ in *Laker Airways Ltd v Department of Trade*[115], when his Lordship asked "can the Crown, having failed to enter through the front door ... enter through the back door and in effect achieve the same result by that means of entry"? In this case the Commonwealth parties submitted that if what was done was not authorised by the MP Act, they could enter through what amounts to the back door of the so-called "non-statutory executive power" and achieve the same result by that means of entry. It is greatly to be doubted that the MP Act, and s 5 in particular, should be read as permitting so strange a result. Rather, it is

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115 [1977] QB 643 at 719.

probable that s 5 of the MP Act should be read as saying no more than that no negative inference should be drawn about the ambit of executive power from the enactment of the MP Act. And that would be a construction of s 5 which would sit more easily with s 3 providing that the MP Act binds the Crown in each of its capacities. For the reasons that follow, however, it is not necessary to decide this question.

142 Consideration of whether some non-statutory executive power of the Commonwealth could authorise the detention of the plaintiff on board the Commonwealth ship must begin with a clear identification of the content of the question that is asked. The question is not asking about whether a power exists or what the extent of that power may be. The relevant question is much narrower and more focused. It is whether the exercise of a power (described no more precisely than as a "non-statutory executive power") justified what otherwise would be a false imprisonment and any associated trespass to the person.

143 This being the relevant question, it is not useful to begin by asking what power Australia as a nation, or the Executive government in particular, has to regulate the arrival of aliens within Australian territory. Nor is it useful to appeal, as so much of this aspect of the argument on behalf of the Commonwealth parties did, to notions of "the defence and protection of the nation"[116]. Arguments beginning in those ideas depend ultimately on assertion[117]: that the government of the nation *must* have the power to regulate who enters the nation's territory and *must* have the power to repel those who seek to do so without authority. But even if it were to be accepted that it is necessary or appropriate (or even, if relevant, convenient) that the government have such a power, observations of that kind would not answer the questions[118] about the scope of the power and the organ or organs of government which must exercise it. And no matter whether those assertions are said to be rooted in the royal prerogative or said to inhere in the notion of the executive power of the Commonwealth vested by s 61 of the Constitution in the Queen and "exercisable by the Governor-General as the Queen's representative", they remain assertions about a capacity to project force at, or in this case beyond, the geographical boundaries of the nation. Those assertions can then be tested only by resort to

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116 [2014] HCATrans 228 at 6625-6626, 6647.

117 Selway, "All at Sea – Constitutional Assumptions and 'The Executive Power of the Commonwealth'", (2003) 31 *Federal Law Review* 495.

118 Winterton, *Parliament, the Executive and the Governor-General*, (1983) at 29-30; Evans, "The Rule of Law, Constitutionalism and the MV Tampa", (2002) 13 *Public Law Review* 94 at 97; Zines, "The Inherent Executive Power of the Commonwealth", (2005) 16 *Public Law Review* 279 at 281, 291-292.

notions of "sovereignty"[119] and "jurisdiction"[120], which all too often are used to mask deeper questions about their meaning and application.

144 What is presently in issue is whether the so-called "non-statutory executive power" provides an answer to a claim made in an Australian court that officers of the Commonwealth committed a tort against the plaintiff. That is, the Commonwealth parties seek to assert that the plaintiff's claim for damages for wrongful imprisonment is met by saying that his detention was an exercise of a species of executive power.

145 As this Court's decision in *Blunden v The Commonwealth*[121] shows, it is necessary to begin by asking what law is to be applied in deciding the plaintiff's claim. And in this case, answering that question requires recognition that the jurisdiction being exercised is federal jurisdiction, under s 75(iii) of the Constitution, as a matter in which the Commonwealth and a person being sued on behalf of the Commonwealth are parties. Section 80 of the *Judiciary Act* 1903 (Cth) is thus engaged and "[s]o far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution ... shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth", govern the Court in its exercise of the federal jurisdiction conferred by s 75(iii).

146 In this case, the events giving rise to the claim occurred on the high seas. Some of the events, including the initial detention of the plaintiff, took place in Australia's contiguous zone but the rest of the events occurred beyond that zone. The tort of which complaint is made is, for that reason, what the choice of law writers have described[122] as a "maritime tort". As four members of this Court said[123] in *Blunden*:

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119 cf H W R Wade, "The Basis of Legal Sovereignty", [1955] *Cambridge Law Journal* 172; *R v Kidman* (1915) 20 CLR 425 at 436 per Griffith CJ; [1915] HCA 58.

120 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 per Isaacs J; [1907] HCA 76; *Lipohar v The Queen* (1999) 200 CLR 485 at 516-517 [78]-[79] per Gaudron, Gummow and Hayne JJ; [1999] HCA 65.

121 (2003) 218 CLR 330; [2003] HCA 73.

122 See, for example, Dicey, Morris and Collins, *The Conflict of Laws*, 15th ed (2012), vol 2 at 2215-2217.

123 (2003) 218 CLR 330 at 340 [23] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

> "where ... the relevant events giving rise to a 'maritime tort' occurred on the high seas, one asks what body of law other than that in force in the forum has any better claim to be regarded by the forum as the body of law dispositive of the action litigated in the forum?[124]"

In this case, where the detention was on board an Australian ship, no law other than Australian law has any claim to be dispositive of the action.

147 Accordingly, the immediately relevant question is whether, under Australian law, the Commonwealth may meet a claim for wrongful imprisonment by saying only that the detention was effected by officers of the Commonwealth in pursuance of instructions given by the Executive government to prevent the persons concerned entering Australian territory without a visa. Does the executive power of the Commonwealth of itself provide legal authority for an officer of the Commonwealth to detain a person and thus commit a trespass?

148 That question must be answered "No". It is enough to repeat what was said in *Chu Kheng Lim v Minister for Immigration*[125]:

> "Neither public official nor private person can lawfully detain [an alien who is within this country, whether lawfully or unlawfully] or deal with his or her property except under and in accordance with some positive authority conferred by the law[126]. Since the common law knows neither lettre de cachet nor other executive warrant authorizing arbitrary arrest or detention, *any officer of the Commonwealth Executive who purports to authorize or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provision*." (emphasis added)

149 No later decision of this Court casts any doubt on the accuracy of this statement. There is no basis for limiting the force of what is said there, or treating[127] the decision as not dealing with whether, absent statutory authorisation, the Executive has power to detain. No doubt, the passage quoted

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124 cf Foote, *A Concise Treatise on Private International Law*, 5th ed (1925) at 524.

125 (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ; [1992] HCA 64.

126 See, generally, *Kioa v West* (1985) 159 CLR 550 at 631; [1985] HCA 81; *Ex parte Lo Pak* (1888) 9 LR (NSW) 221 at 244-245; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 79-80; [1925] HCA 53; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528-529; [1987] HCA 12.

127 cf *Ruddock v Vadarlis* (2001) 110 FCR 491 at 543 [195], 544 [197].

from *Chu Kheng Lim* focused upon the exercise of power within Australia. This case concerns actions taken beyond Australia's borders. But why should some different rule apply there, to provide an answer to a claim made in an Australian court which must be determined according to Australian law?

150 To adopt and adapt what was said in *Chu Kheng Lim*, why should an Australian court hold that an officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of an alien without judicial mandate can do so outside the territorial boundaries of Australia without any statutory authority? Reference to the so-called non-statutory executive power of the Commonwealth provides no answer to that question. Reference to the royal prerogative provides[128] no answer. Reference to "the defence and protection of the nation" is irrelevant, especially if it is intended to evoke echoes of the power to declare war and engage in war-like operations. Reference to an implied executive "nationhood power" to respond to national emergencies[129] is likewise irrelevant. Powers of those kinds are not engaged in this case. To hold that the Executive can act outside Australia's borders in a way that it cannot lawfully act within Australia would stand legal principle on its head.

151 Both parts of Question 3 in the Special Case should be answered "No". Those answers make it unnecessary to answer Question 5.

Unlawful detention

152 For the reasons which have been given, taking the plaintiff to India was not authorised by s 72(4) or by any non-statutory executive power of the Commonwealth. It follows that the plaintiff's detention on the Commonwealth ship for so long as he was being taken to India and while the ship was "near India" "waiting for it to become practicable to complete the taking" of the plaintiff and others to India was not authorised. And, depending upon what further facts may be revealed at trial about journey times and related issues, it may be that part of the time taken to travel from "near India" to the Territory of the Cocos (Keeling) Islands was longer than would have been reasonably necessary to take the plaintiff from the point at which the Indian vessel was detained to the place in Australia at which he was ultimately discharged from the Commonwealth ship.

153 The Commonwealth parties submitted that none of these observations matters. Rather, so they submitted, it is necessary to recognise that, if, following the detention of the Indian vessel, the plaintiff had been taken immediately to a

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128 *Entick v Carrington* (1765) 2 Wils KB 275 at 291 [95 ER 807 at 817].

129 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23.

place in Australia, he would at once have been detained under s 189 of the Migration Act and would have been subject to the regional processing provisions of subdiv B of Div 8 of Pt 2 of that Act. The Commonwealth parties submitted that, in these circumstances, the plaintiff should be held to have no claim to anything more than nominal damages.

154 The submission made by the Commonwealth parties takes as its premise that the detention in fact effected by officers of the Commonwealth was not lawful. The submission is that the plaintiff can have no remedy for that unlawful conduct, other than nominal damages, because, no matter how long the unlawful detention persisted and no matter what were the conditions of the detention which was in fact effected, the plaintiff could and would have been subject, in *another* place and under *different* conditions, to a lawful deprivation of his liberty. The differences are probably reason enough to reject the submission. But there is a more fundamental reason to do so.

155 The submission of the Commonwealth parties implicitly assumed that damage is the gist of the tort of false imprisonment. It is not. Like all trespassory torts, the action for false imprisonment is for vindication of basic legal values: in this case the value long assigned by the common law to liberty from restraint, especially restraint at the behest of government. False imprisonment is, and long has been[130], actionable without proof of special damage. Hence, demonstrating that a plaintiff was unaware of the imprisonment[131], or for some other reason suffered no substantial loss[132], neither denies the availability of the action nor provides a defence to it. Such matters are relevant, if at all, only to the assessment of damages but do not, of themselves, require the conclusion that only nominal damages may be awarded.

156 One other strand of argument advanced on behalf of the Commonwealth parties should be identified and considered briefly. They submitted that once aboard the Commonwealth ship, the plaintiff and others who had been on the Indian vessel were subject to the control of the commander of the Commonwealth ship. Hence, the argument continued, it was open to the commander to make the particular arrangements that were made for accommodating the plaintiff and others on board the ship. So much may be

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130 See, for example, *Huckle v Money* (1763) 2 Wils KB 205 [95 ER 768]; Pollock, *The Law of Torts*, (1887) at 159, 188-193.

131 See Prosser, "False Imprisonment: Consciousness of Confinement", (1955) 55 *Columbia Law Review* 847. See also *Murray v Ministry of Defence* [1988] 1 WLR 692 at 703; [1988] 2 All ER 521 at 529.

132 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245.

accepted for the purposes of argument. But the central complaint which the plaintiff makes is about his being detained on the Commonwealth ship, not about the conditions in which he was detained. The conditions in which he was detained may or may not be relevant to damages. It is neither necessary nor desirable to express any view about whether that is so. For immediate purposes it is enough to observe that the lawfulness of the plaintiff's detention directs attention to whether coming under the control of the commander of the Commonwealth ship for the period the plaintiff was on board that ship was lawful. Those are questions determined by the proper construction and application of the MP Act and, in particular, s 72.

157 Whether this is a case in which only nominal damages should be allowed should not be decided on the facts recorded in the Special Case. Plainly, such a verdict is open in a case where a form of lawful detention was available and would have been effected. But it would not be right to foreclose the examination that can take place only at a trial of whether the differences between the form of detention (as to both place and conditions of detention) actually effected and the form of detention which could and would lawfully have been effected may warrant allowing more than nominal damages.

158 Question 6 should be answered accordingly.

Other issues

159 Several other issues were touched on in the course of the argument of this matter.

160 It is not necessary to consider either the plaintiff's argument that the decision to take the plaintiff and others to India was made for an impermissible or improper purpose of deterring others or the riposte of the Commonwealth parties that this claim falls outside the scope of the Special Case. The conclusion reached about the places outside Australia to which a person may be taken, coupled with the operation of s 74, renders further consideration of these questions unnecessary in this case.

161 In addition, as has already been noted, it is not necessary in this case to decide whether or to what extent the ambit of the power given by s 72(4) is affected by Australia's accession to the Refugees Convention, the ICCPR or the CAT.

162 Finally, there remain the last two questions in the Special Case, about costs and orders for the further conduct of the matter. Although the answers which should be given to the questions stated in the Special Case are not those propounded by the plaintiff, and although several of the arguments advanced on the plaintiff's behalf either have not been accepted or need not be considered, the

plaintiff has had sufficient success to warrant his having his costs. The defendants should pay the costs of the Special Case.

163 The matter should be remitted to the Federal Circuit Court of Australia for such further interlocutory steps as that Court considers necessary and thereafter for trial.

Conclusion and orders

164 For these reasons, the questions asked in the Special Case should be answered as follows:

1. Did s 72(4) of the *Maritime Powers Act* authorise a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia, being India:

   (a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations;

   (b) in implementation of a decision by the Australian Government that the plaintiff (and others on the Indian vessel) should be taken to India without independent consideration by the maritime officer of whether that should be so; and

   (c) whether or not, prior to the commencement of the taking of the plaintiff to India, an agreement or arrangement existed between Australia and India concerning the reception of the plaintiff in India?

   Answer:

   Section 72(4) of the *Maritime Powers Act* 2013 (Cth) did not authorise a maritime officer to detain and take the plaintiff to India when, at the time that destination was chosen, the plaintiff had neither the right nor permission to enter India. Subject to that limitation, s 72(4) authorised a maritime officer to detain and take the plaintiff, a person reasonably suspected of having been on the Indian vessel when it was detained under that Act, to a place outside Australia determined by the National Security Committee of Cabinet, and to place the plaintiff in that place if the officer was satisfied, on reasonable grounds, that it would be safe for the plaintiff to be in that place.

   Otherwise it is not appropriate to answer this question.

2. Did s 72(4) of the *Maritime Powers Act* authorise a maritime officer to:

(a) take the steps set out in paragraph 20 in implementing the decision to take the plaintiff to India;

(b) detain the plaintiff for the purposes of taking the plaintiff to India?

Answer: (a) No.

(b) No.

3. Did the non-statutory executive power of the Commonwealth authorise an officer of the Commonwealth to:

(a) take the steps set out in paragraph 20 for the purpose of preventing the plaintiff from entering Australia;

(b) detain the plaintiff for the purposes of taking the plaintiff to India?

Answer: (a) No.

(b) No.

4. Was the power under s 72(4) of the *Maritime Powers Act* to take the plaintiff to a place outside Australia, being India, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

Answer: It is not necessary to answer this question.

5. Was any non-statutory executive power of the Commonwealth to take the plaintiff to a place outside Australia, being India, for the purpose of preventing the plaintiff from entering Australia, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

Answer: It is not necessary to answer this question.

6. Was the detention of the plaintiff unlawful at any, and if so what period, from 1 July 2014 to 27 July 2014 and if so [is he] entitled to claim damages in respect of that detention?

Answer:

The detention of the plaintiff during some or all of the period from 1 July 2014 to 27 July 2014 was unlawful and the plaintiff is entitled to claim damages in respect of that detention. Both the duration of the unlawful

detention and the amount of damages to be allowed for that detention (whether nominal or substantial) should be determined at trial.

7. Who should pay the costs of this Special Case?

Answer: The defendants.

8. What if any order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?

Answer:

The matter should be remitted to the Federal Circuit Court of Australia for such further interlocutory steps as that Court considers necessary and thereafter for trial.

165 CRENNAN J. The plaintiff is a Sri Lankan national of Tamil ethnicity. He was one of 157 people removed from an unseaworthy Indian flagged vessel in Australia's contiguous zone to a Commonwealth ship on 29 June 2014, about 16 nautical miles from Christmas Island. None of the persons on the Indian vessel had a visa entitling him or her to enter Australia.

166 The Indian vessel had been travelling since June 2014 from Pondicherry in India towards Christmas Island. On or about 26 or 27 June 2014, a person on the Indian vessel called the Australian Maritime Safety Authority and requested assistance. On 29 June 2014, the Indian vessel was intercepted by the Commonwealth ship, and all of the persons on the Indian vessel were detained on the Indian vessel. The same day, those persons, including the plaintiff, were removed from the Indian vessel and placed on the Commonwealth ship.

167 Implementing a decision of the National Security Committee of Cabinet made on 1 July 2014, the Commonwealth ship travelled towards India (between 1 July and about 10 July 2014), arrived near India (on about 10 July 2014), and waited near India (between about 10 July and about 22 July 2014). Then, implementing a decision of the Minister for Immigration and Border Protection made on or about 23 July 2014, the Commonwealth ship travelled to the Territory of the Cocos (Keeling) Islands (between 23 July and 27 July 2014). On 27 July 2014, the plaintiff and the other persons from the Indian vessel disembarked the Commonwealth ship at the Territory of the Cocos (Keeling) Islands, and were detained under s 189(3) of the *Migration Act* 1958 (Cth) ("the Migration Act").

168 The plaintiff claims to have a well-founded fear of persecution in Sri Lanka, and to be a person in respect of whom Australia owes non-refoulement obligations by reference to the Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) ("the Refugees Convention"), the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984).

169 There are no facts in the special case which establish that the plaintiff fears persecution in India or that he fears direct or indirect refoulement to Sri Lanka from India. While the special case is silent about the circumstances in which the plaintiff was in India before setting out for Christmas Island on the Indian vessel, there is no fact in the special case from which it could be inferred that he had no permission to be and remain in India prior to his departure from the Indian port of Pondicherry, or that India was not a safe place for him. As at 1 July 2014, the Australian government had no agreement or arrangement in place with the government of India for the persons from the Indian vessel to be taken to India, and it may be inferred that there was no such agreement as at 23 July 2014.

170 On 7 July 2014, while the Commonwealth ship was travelling towards India, a person representing a class which included the plaintiff issued a writ of summons and obtained an interim injunction from this Court restraining the Minister and the Commonwealth of Australia ("the defendants"), until 4:00 pm the following day, from removing persons in the class into the custody of the government of Sri Lanka. On 8 July 2014, the Solicitor-General of the Commonwealth gave an undertaking to the Court on behalf of the defendants not to engage in the restrained conduct without giving 72 hours' written notice.

171 In these proceedings, commenced in the original jurisdiction of the High Court, the plaintiff seeks declaratory relief and damages in relation to his detention on the Commonwealth ship between 1 July and 27 July 2014. (The plaintiff does not complain of his detention on the Indian vessel on 29 June 2014 or of his transfer later that day from that vessel to the Commonwealth ship.) Until 29 July 2014 (shortly after the date of the plaintiff's disembarkation at the Territory of the Cocos (Keeling) Islands), the plaintiff also sought injunctive relief, among other things, to restrain the defendants from taking him to Nauru or Papua New Guinea.

172 The defendants did not contest that the plaintiff was detained on the Commonwealth ship between 1 July and 27 July 2014 ("the detention"). The essential question in this proceeding is whether the detention was lawful.

173 The tort of false (ie unlawful) imprisonment is a form of trespass to the person. It is committed when one person subjects another to total deprivation of freedom of movement without lawful justification or consent. If a plaintiff proves that he or she has been imprisoned by a defendant it is for the defendant to prove lawful justification or consent[133].

174 The defendants' answer to the plaintiff's case is that the detention was authorised by s 72(4) of the *Maritime Powers Act* 2013 (Cth) ("the Act").

175 The special case states six substantive questions for the consideration of this Court directed to the plaintiff's claim that the detention was unlawful and that appropriate relief includes damages for wrongful detention and false imprisonment.

176 Question 6 asks:

> "Was the detention of the plaintiff unlawful at any, and if so what period, from 1 July 2014 to 27 July 2014 and if so [is the plaintiff] entitled to claim damages in respect of that detention?"

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133 See *Myer Stores Ltd v Soo* [1991] 2 VR 597. See also *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [2001] 2 AC 19 at 28 per Lord Steyn.

177 For the reasons which follow, that question must be answered "No".

The Act

178 The Act provides powers ("maritime powers") for use in, and in relation to, maritime areas for the purpose of giving effect to Australian laws and certain international agreements and decisions.

179 An "authorising officer"[134] may authorise the exercise of maritime powers in relation to a vessel if the vessel is suspected, on reasonable grounds, of being involved in a contravention of an Australian law[135], or for the purposes of administering or ensuring compliance with a monitoring law[136]. A "contravention" of an Australian law includes, but is not limited to, an offence against the law[137].

180 Since 1994, unlawful entry to and presence in Australia has not been an offence under the Migration Act[138]. Section 42(1) of the Migration Act relevantly provides that "a non-citizen must not travel to Australia without a visa that is in effect." It was common ground that the plaintiff would have contravened s 42(1) if he had succeeded in travelling to Australia on the Indian vessel[139].

181 The exercise of maritime powers is subject to a number of limits. In general, an authorisation must be given under Div 2 of Pt 2 of the Act before maritime powers may be exercised in relation to a vessel[140]. Once an

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134 See Act, s 16.

135 Act, s 17.

136 Act, s 18. The Migration Act is a "monitoring law": see Act, s 8.

137 Act, s 8.

138 See *Al-Kateb v Godwin* (2004) 219 CLR 562 at 598 [86] per Gummow J; [2004] HCA 37.

139 If the Indian vessel had entered Australian territorial waters, those operating the vessel (and others associated with the vessel) may have committed an offence against s 229 of the Migration Act (prohibiting the carriage of non-citizens to Australia without documentation) or ss 233A and 233B of the Migration Act (dealing with the offences of people smuggling and aggravated people smuggling).

140 See Act, s 30. An authorising officer authorised the exercise of maritime powers in relation to the Indian vessel on 29 June 2014, on the basis that he suspected, on

(Footnote continues on next page)

authorisation is in force, maritime powers may only be exercised for the purposes set out in Div 4 of Pt 2 of the Act[141]. The exercise of maritime powers is also subject to the geographical limits set out in Div 5 of Pt 2 of the Act. Relevantly, maritime powers may be exercised in relation to a foreign vessel in the contiguous zone only for certain limited purposes[142], reflecting the fact that Australia is a signatory to the United Nations Convention on the Law of the Sea (1982).

182 It was common ground that the power to determine who may enter Australia and to exclude non-citizens is an incident of a state's sovereignty over territory[143]. Furthermore, the plaintiff did not contest that he was subject to the defendants' limited authority and control in the contiguous zone.

183 The maritime power at the centre of this proceeding is set out in s 72(4) of the Act. Section 72 is in Div 8 of Pt 3, which deals with "[p]lacing and moving persons". So far as is presently relevant, s 72 provides as follows:

> "(1) This section applies to a person:
>
> (a) on a detained vessel or detained aircraft; or
>
> (b) whom a maritime officer reasonably suspects was on a vessel or aircraft when it was detained.
>
> ...
>
> (4) A maritime officer may detain the person and take the person, or cause the person to be taken:

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reasonable grounds, that the vessel was involved in a contravention of the Migration Act.

141 See Act, ss 31 and 32. Relevantly, s 32(1)(a) provides that a maritime officer may exercise maritime powers "to investigate or prevent any contravention of an Australian law that the officer suspects, on reasonable grounds, the vessel ... to be involved in".

142 See Act, s 41(1)(c). Section 41(1)(c)(ii) has the effect that a maritime officer may exercise maritime powers in relation to a foreign vessel in the contiguous zone to prevent a contravention of the Migration Act occurring in Australia.

143 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 29-32 per Brennan, Deane and Dawson JJ; [1992] HCA 64. See also *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12-13 [18] per Gleeson CJ; [2004] HCA 49.

(a) to a place in the migration zone; or

(b) to a place outside the migration zone, including a place outside Australia.

(5) For the purposes of taking the person to another place, a maritime officer may within or outside Australia:

(a) place the person on a vessel or aircraft; or

(b) restrain the person on a vessel or aircraft; or

(c) remove the person from a vessel or aircraft."

184 It can be seen that s 72(4)(b) provides for the exercise of a compound power to detain and take to a place outside the migration zone ("the s 72(4)(b) power"). There is no express statutory requirement that a person detained under s 72(4) be taken to a place "as soon as practicable"[144].

185 Before turning to consider s 72(4)(b) in more detail, it is worth noting some further provisions relevant to the exercise of the power.

186 Section 74, also in Div 8 of Pt 3, provides that a maritime officer "must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place." Section 95, in Pt 5 of the Act, provides that "[a] person arrested, detained or otherwise held under this Act must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment."

187 Finally, s 97, also in Pt 5 of the Act, provides that:

"(1) If a person is detained and taken to another place under subsection 72(4) (persons on detained vessels and aircraft), the detention ends at that place.

(2) Subsection (1) does not prevent:

(a) the person being taken to different places on the way to the other place; or

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144 cf Act, s 98 (which imposes such a requirement for a person detained under s 73) and s 101 (which imposes such a requirement for a person arrested under the Act). See also Act, s 96 (which sets out factors which must be taken into account in determining when a maritime officer has done something "as soon as practicable").

(b) the arrest of the person; or

(c) the detention of the person under another Australian law; or

(d) the exercise of any other power in relation to the person."

The questions

188 The significant question to be determined is whether s 72(4), both as a matter of construction, and for consistency with Ch III of the Constitution, requires that, prior to any exercise of the power to take a person to a place outside the migration zone, there must be an agreement between Australia and another country permitting the person to enter and remain in the place to which the person is to be taken ("a prior agreement") (Question 1(c)).

189 A subsidiary question is whether the s 72(4)(b) power, exercised to take the plaintiff to India, was subject to an obligation to afford the plaintiff procedural fairness, in the form of a hearing, before commencing the journey (Question 4).

190 There were also questions arising from the plaintiff's contentions that the s 72(4)(b) power was subject to limitations to be implied from Australia's non-refoulement obligations under the Refugees Convention (Question 1(a)) and the chain of command applicable to maritime officers (Question 1(b)).

191 An understanding of the arguments concerning the construction of s 72(4)(b) is facilitated by reference to the following passage from the special case:

"Between 1 July 2014 and about 23 July 2014, maritime officers on the Commonwealth ship implemented the decision to take the plaintiff and the other persons from the Indian vessel to India by:

(a) between 1 July 2014 and about 10 July 2014, causing the Commonwealth ship to travel towards India, and continuing to detain the plaintiff and the other persons from the Indian vessel on the Commonwealth ship during that period;

(b) between about 10 July 2014 and about 22 July 2014, after the Commonwealth ship arrived near India, continuing to detain the plaintiff and the other persons from the Indian vessel on the Commonwealth ship while waiting for it to become practicable to complete the taking of those persons to India, the duration of that wait being influenced by the absence of the favourable weather conditions required to make it safe to disembark the persons from the Indian vessel, the time required to conduct diplomatic negotiations between Australia and India (including the time

> required to arrange and undertake meetings at a Ministerial level) and, between about 18 July 2014 and 21 July 2014, the travel and other steps required for the re-provisioning of the Commonwealth ship.
>
> On or about 23 July 2014, the First Defendant decided that, for operational and other reasons, it would not be practicable to complete the process of taking the plaintiff and the other persons from the Indian vessel to India within a reasonable period of time, and that those persons should be taken to the Territory of the Cocos (Keeling) Islands."

Question 1(c): a prior agreement?

192 Section 72(4), expressed in clear language, positively authorises derogation from rights of persons on a detained vessel (including by deprivation of personal liberty)[145], so as to prevent a contravention of the Migration Act.

193 The grant of a power to detain and take a person from the contiguous zone to a place outside the migration zone in order to prevent a contravention of the Migration Act includes a power to move a person over the seas to a destination in another country, irrespective of the person's wishes or preferences, provided the person is not subjected to cruel, inhuman or degrading treatment[146]. It was not contested that a destination chosen for the purposes of s 72(4)(b) may be other than a person's preferred destination or a destination to which he or she would go voluntarily.

194 Some may consider the use of such powers harsh, in circumstances where the plaintiff might have reached Australian territorial waters had the Indian vessel not become unseaworthy, and they may oppose the policy underlying the Act for that reason. When considering provisions in the Migration Act which clearly and unambiguously authorised executive detention of children, Gleeson CJ explained that the role of the Court is not to frustrate such legislation on the basis of opposition to the policy underlying such provisions[147]. That explanation is apt here.

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145 See *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528-529 per Deane J; [1987] HCA 12; *Chu Kheng Lim* (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ. See also *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 307-311 [307]-[314] per Gageler and Keane JJ; [2013] HCA 39.

146 Act, s 95.

147 *Re Woolley* (2004) 225 CLR 1 at 9 [9]. See also *Burton v Honan* (1952) 86 CLR 169 at 179 per Dixon CJ; [1952] HCA 30.

195 In that context, it might be noted that, under the Refugees Convention, refugees are not invariably able to claim protection in their preferred choice of country[148].

The arguments

196 The plaintiff contended that a power to take a person to a place outside the migration zone necessarily implies that the place chosen as a destination must be a place where the reception of the person will be achieved. This was said to require an agreement to that effect at the time when a decision to take is made under s 72(4)(b). The constitutional principles for which *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[149] stands as authority were also invoked as compelling that interpretation, not least so as to ensure that the plaintiff was not indefinitely detained at the discretion or whim of the Executive. Applying that interpretation of s 72(4)(b), it was submitted that, if there was no agreement between Australia and India as at 1 July 2014, it was never "practicable" to discharge the plaintiff in India. The absence of such an agreement meant that, from 1 July 2014, the detention was not authorised as it was not reasonably capable of being seen as necessary for the purpose of taking the plaintiff to a place outside the migration zone within the meaning of s 72(4)(b). Alternatively, it was submitted that, even if the discharge of the plaintiff in India was practicable at the commencement of the journey to India on 1 July 2014, that discharge and reception subsequently became impracticable.

197 The defendants relied on the clear language of s 72(4)(b). They contended that, provided the s 72(4)(b) power is exercised within a reasonable time[150] and in accordance with the express requirements in the Act, detention for the purpose of preventing the entry into Australia of a person who has no right to enter Australia is not incompatible with Ch III. The defendants contended that neither s 72(4)(b) nor Ch III of the Constitution requires that the decision to take a person to a place, and an ability to discharge the person at that place, coincide in time. It was submitted that a place to which a person is to be taken may change if, having

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148 See Hathaway, *The Rights of Refugees Under International Law*, (2005) at 161, 332-333. See also Lauterpacht and Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) 87 at 110-111, 122 and 159-160.

149 (1992) 176 CLR 1.

150 See *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 573-574 per Dixon J, 590 per Williams J; [1949] HCA 65. See also *Folkard v Metropolitan Railway Co* (1873) LR 8 CP 470.

arrived near the chosen place, it would not be practicable to complete taking the person to that place within a reasonable time.

198 The word "practicable" was used in the paragraphs of the special case extracted above and by all parties in their arguments to mean "capable of achievement".

A textual limitation?

199 The general question of construction to which the statutory language gives rise is: to which places (within power) can a person be taken? The power to detain and take is clearly expressed, but the statutory phrase "a place outside the migration zone" is a description of wide application.

200 Reference has already been made to a number of limitations on the s 72(4)(b) power, both express (the need for an authorisation[151], the requirement to exercise the power for a particular purpose[152], geographical limitations[153], the requirement that a person not be placed in a place which is not safe[154], and the need for treatment consonant with human dignity[155]) and implied (the need to exercise the power within a reasonable time[156]). To these can be added the need to exercise the power in good faith[157]. These limitations make it plain that the defendants are not empowered to take someone in the plaintiff's position to any place on the earth's surface.

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151 Act, s 30.

152 Act, Div 4 of Pt 2.

153 Act, Div 5 of Pt 2.

154 Act, s 74.

155 Act, s 95.

156 See *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 573-574 per Dixon J, 590 per Williams J.

157 See *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J; [1947] HCA 21; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 523 [59] per French CJ; [2009] HCA 4; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 180 [59] per French CJ, 194 [109] per Gummow, Hayne, Crennan and Bell JJ; [2011] HCA 32. See also Bingham, *The Rule of Law*, (2010) at 62.

201 There are also practical limitations. The exercise of a power to take a person to a place outside the migration zone may be affected by weather conditions and dangerous seas; fuel, provisioning and safe navigation will all be critical considerations. As noted in the second reading speech for the Maritime Powers Bill 2012[158]:

> "Enforcement operations in maritime areas frequently occur in remote locations, isolated from the support normally available to land-based operations and constrained by the practicalities involved in sea-based work.
>
> ...
>
> The unique aspects of the maritime environment merit a tailored approach to maritime powers, helping to ensure flexibility in their exercise and to assist maritime officers to deal with quickly changing circumstances and often difficult and dangerous situations."

202 Further, if a taking under s 72(4)(b) involves taking to a country which is not a person's country of nationality, an exercise of the power cannot be completed without cooperation between Australia and the relevant country. That cooperation cannot be compelled. Even taking a person to his or her country of nationality (at his or her request) assumes that the country of nationality can be expected to honour its international responsibilities (an assumption which appears to have been made in *Chu Kheng Lim*[159]).

203 It can be accepted that a prior agreement permitting disembarkation of a person at a place outside the migration zone (other than his or her country of nationality) may render more probable the prospect of a successful disembarkation. However, contingencies such as natural disasters or the revocation of a prior agreement may confound assumptions made at the commencement of a journey and render the taking of a person to a place (in train, and once practicable) incapable of achievement.

204 Such considerations suggest that, although a prior agreement may be a desirable and sufficient condition for commencing a coercive journey to a place outside the migration zone, the existence of a right or a permission to disembark at the commencement of a journey cannot be determinative of the lawfulness of any detention for that purpose. A right can be denied, a permission revoked or

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158 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 May 2012 at 6224-6225.

159 See *Al-Kateb* (2004) 219 CLR 562 at 604 [109] per Gummow J.

natural events intervene, having the effect that a permission will not necessarily coincide with the arrival of a detained person.

205 Section 72(4)(b) permits a maritime officer to take a person to a place outside the migration zone in order to prevent a contravention of the Migration Act, if it is practicable to disembark the person at that place, within a reasonable time. The section contains no requirement that there be any degree of certitude of disembarkation beyond practicability within a reasonable time. That construction has the support of authorities to which both parties made reference[160].

206 A statutory purpose of taking a person to a place outside the migration zone in order to prevent a contravention of the Migration Act is a statutory purpose which is relevantly indistinguishable from a statutory purpose of removing from Australia a person detained in custody as an unlawful non-citizen. The limitation on an express power to detain to achieve either of those statutory purposes is "practicability". Only once it is clear that a taking (or removing) has become incapable of achievement is the power to detain for that purpose exhausted.

207 The plaintiff's construction of s 72(4) advances "certainty" rather than "practicability" as the criterion of the lawfulness of the detention. That approach does not reflect the statutory language. It is not congruent with the maritime conditions in which decisions under s 72(4) must be made. Further, it constrains the scope of "place" in s 72(4)(b) in a way that has the potential to frustrate, rather than advance, the objects and purposes of the Act.

208 It can be accepted that it might be beyond power (including for want of good faith) to commence a journey to a place if the facts and circumstances are that there is no prospect of successful disembarkation. But that is not this case.

209 The choice of India as a place to take the plaintiff was rational. He had connections with India: he was there before he left, there are no facts in the special case which indicate that it was not a safe place for him, and the vessel on which he travelled from India was an Indian flagged vessel.

210 There is no fact in the special case which indicates that the s 72(4)(b) power was exercised in bad faith or that the period from 1 July to 27 July 2014 was not a reasonable time within which to take the plaintiff to an initial chosen destination of India (s 72(4)(b)) and a subsequent chosen destination of Australia (s 72(4)(a)).

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160 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; [2012] HCA 46; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; [2013] HCA 53.

211 In the light of that construction of s 72(4), the detention of the plaintiff was lawful. Between 1 July and 23 July 2014, during which time diplomatic negotiations occurred, the plaintiff's disembarkation in India was practicable, and was authorised by s 72(4)(b). Once it became evident that the plaintiff's disembarkation could not be achieved, the plaintiff's continued detention between 23 July and 27 July 2014 was for the purpose of taking him to the Territory of the Cocos (Keeling) Islands, and was authorised by s 72(4)(a).

212 There is one further observation that can be made. Australia is a signatory to the International Convention on Maritime Search and Rescue (1979) ("the SAR Convention"), which obliges states to coordinate and cooperate to ensure that "survivors assisted are disembarked from the assisting ship and delivered to a place of safety"[161]. The responsibility to disembark rescued persons and deliver them to "a place of safety" must be discharged "as soon as reasonably practicable"[162].

213 There is inherent tension between the obligations of Australian authorities (whether under the SAR Convention or otherwise) to assist persons in the contiguous zone on unseaworthy vessels in conditions of distress and danger, the federal legislature's object of preventing contraventions of the Migration Act in the contiguous zone, and the preference of persons like the plaintiff to access non-refoulement obligations under the Refugees Convention in Australia rather than in another country. That inherent tension is not unlike the inherent tension in the Refugees Convention between humanitarian concerns for the individual and that aspect of state sovereignty concerned with the exclusion of entry by non-citizens[163].

214 An interpretation of s 72(4)(b) which has the potential to impose conflicting duties and obligations on maritime officers who transfer persons from an unseaworthy vessel (which could be found, as a fact, to be a rescue), and who exercise simultaneously or almost simultaneously the maritime powers under consideration, risks creating an incoherence in the law, not unlike the incoherence deprecated by this Court in *Sullivan v Moody*[164].

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161 SAR Convention, Annex, par 3.1.9.

162 SAR Convention, Annex, par 3.1.9.

163 See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 273-274 per Gummow J; [1997] HCA 4.

164 (2001) 207 CLR 562 at 579-580 [50]-[53]; [2001] HCA 59.

A constitutional limitation?

215 The constitutional principles for which *Chu Kheng Lim* stands are part of the backdrop to the task of statutory construction, and the reasoning in *Chu Kheng Lim* was given a good deal of attention in argument. However, there is nothing in the constitutional principles for which *Chu Kheng Lim* stands which compels acceptance of the plaintiff's construction of s 72(4)(b), namely that a taking under s 72(4)(b) is beyond power unless, before it commences, there is an agreement between Australia and another country permitting the person (detained in the defendants' custody and taken to that country) to be disembarked in that other country.

216 A convenient starting point is what was said of *Chu Kheng Lim* in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*, in the joint judgment of Crennan, Bell and Gageler JJ[165]:

> "The constitutional holding in *Lim* was that ... laws authorising or requiring the detention in custody by the executive of non-citizens, being laws with respect to aliens within s 51(xix) of the Constitution, will not contravene Ch III of the Constitution, and will therefore be valid, only if: 'the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.'
>
> The necessity referred to in that holding in *Lim* is not that detention *itself* be necessary for the purposes of the identified administrative processes but that the *period* of detention be limited to the time necessarily taken in administrative processes directed to the limited purposes identified. The temporal limits and the limited purposes are connected such that the power to detain is not unconstrained ... A non-citizen can therefore invoke the original jurisdiction of the Court under s 75(iii) and (v) of the Constitution in respect of any detention if and when that detention becomes unlawful. What begins as lawful custody under a valid statutory provision can cease to be so." (emphasis in original; footnotes omitted)

217 Following *Chu Kheng Lim*, the connection between the temporal limits and the limited purposes of executive detention of persons who are non-citizens

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165 (2013) 251 CLR 322 at 369-370 [138]-[139].

has been affirmed by this Court on many occasions where the achievement of a statutory obligation has been conditioned on temporal limits[166].

218 What those authorities show is that the temporal limits of executive detention of a non-citizen connected to the achievement of limited statutory purposes are not necessarily capable of arithmetical calculation because the achievement of a statutory purpose (for example, removal from Australia) may require internal administrative processes, which necessarily take time. In the different statutory context of the Act, diplomatic negotiations seem no different. What those authorities also demonstrate is that a circumstance of that kind poses no difficulties. This Court is well-equipped to assess whether it can be concluded that the achievement of a statutory purpose is a practical possibility or not, and is accustomed to doing so[167]. For those reasons, the plaintiff's interpretation of s 72(4)(b) is not necessary to ensure respect for the plaintiff's personal liberty or to avoid indefinite detention or detention at the discretion or whim of the Executive government.

Question 1(a): risk of refoulement

219 The Refugees Convention is a part of the context of the Act, considered widely[168]. If the s 72(4)(b) power had been invoked to return the plaintiff to Sri Lanka or to take the plaintiff to a place outside the migration zone which was not safe, questions might have arisen about an interpretation of s 72(4)(b) consistent with Australia's obligations under the Refugees Convention[169]. However, no such issues arose on the facts in the special case.

220 Following established practice, no decision should be made in the absence of a state of facts requiring a decision in order to do justice in the case or to determine the rights of the parties[170].

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166 See, for example, *Plaintiff M47* (2012) 251 CLR 1; *Plaintiff M76* (2013) 251 CLR 322; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847; 312 ALR 537; [2014] HCA 34. See also *Al-Kateb* (2004) 219 CLR 562 at 572-573 [3], 579 [25] per Gleeson CJ, 606 [115], 607 [117] per Gummow J.

167 See *Plaintiff M47* (2012) 251 CLR 1; *Plaintiff M76* (2013) 251 CLR 322.

168 See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; [1997] HCA 2.

169 Refugees Convention, Art 33(1). See also Hathaway, *The Rights of Refugees Under International Law*, (2005) at 161, 333.

170 See *Plaintiff M76* (2013) 251 CLR 322 at 344 [31] per French CJ, 372 [148] per Crennan, Bell and Gageler JJ.

Question 1(b): chain of command

221 The relevant facts, relevant provisions of the Act and related legislation, and submissions concerning Question 1(b), are set out in the reasons of others, and are not repeated here save as necessary to explain these reasons.

222 As a member of an organisation specified in s 104 of the Act, a maritime officer is subject to the command of his or her superiors within that organisation's hierarchical structure. Each organisation (which includes its members) is subject ultimately to the control of the Executive government.

223 As mentioned above, a decision to take a person over the seas from the contiguous zone to a place outside the migration zone is a decision which will usually require cooperation between Australia and relevant authorities in another country, which cooperation cannot be compelled. The nature of the decision to exercise the s 72(4)(b) power shows it to be a decision which a maritime officer plainly would not be able to make. For that reason alone, the implied limitation which the plaintiff seeks to read into s 72(4)(b) (that the maritime officer must make the decision) must be rejected.

224 The nature of the decision to exercise the s 72(4)(b) power can be compared with the nature of a decision under s 74 of the Act, as to whether a place is "safe". It may be appropriate for a maritime officer to make a decision under s 74, with or without the assistance of his or her superiors in the command structure of his or her organisation, because plainly the maritime officer may be most immediately and best placed to make that decision.

225 The circumstances here, that the National Security Committee of Cabinet decided that persons (including the plaintiff) from the Indian vessel should be taken to India and that maritime officers on the Commonwealth ship acted to implement that decision from 1 July to 23 July 2014, do not invalidate the exercise of the s 72(4)(b) power undertaken in respect of the plaintiff.

Question 4: procedural fairness

226 Question 4 asks whether the exercise of the s 72(4)(b) power was subject to an obligation to give the plaintiff an opportunity to be heard. Requirements of procedural fairness depend critically upon the terms of the legislation under consideration, especially as it affects a person's rights, interests or expectations, and the facts and circumstances of the particular case. What has been said in these reasons concerning the chain of command is also relevant to this branch of the plaintiff's argument.

227 Having noted that, I agree with the reasons of Gageler J for answering "No" to Question 4, and have nothing to add.

Other questions

228 These reasons support the conclusion that the detention of the plaintiff was authorised under s 72(4) of the Act and was lawful. That makes it unnecessary to consider the alternative source of lawful support for the detention of the plaintiff, s 61 of the Constitution, rendering it unnecessary to answer Questions 3 and 5.

Questions and answers

229 The questions stated for the opinion of the Court should be answered as follows:

1. Did s 72(4) of the Maritime Powers Act authorise a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia, being India:

   (a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations;

   (b) in implementation of a decision by the Australian Government that the plaintiff (and others on the Indian vessel) should be taken to India without independent consideration by the maritime officer of whether that should be so; and

   (c) whether or not, prior to the commencement of the taking of the plaintiff to India, an agreement or arrangement existed between Australia and India concerning the reception of the plaintiff in India?

Answer:

(a) This question does not arise on the facts agreed in the special case.

(b) Yes.

(c) Yes.

2. Did s 72(4) of the Maritime Powers Act authorise a maritime officer to:

   (a) take the steps set out in paragraph 20 in implementing the decision to take the plaintiff to India;

(b) detain the plaintiff for the purposes of taking the plaintiff to India?

Answer:

(a) Yes.

(b) Yes.

3. Did the non-statutory executive power of the Commonwealth authorise an officer of the Commonwealth to:

(a) take the steps set out in paragraph 20 for the purpose of preventing the plaintiff from entering Australia;

(b) detain the plaintiff for the purposes of taking the plaintiff to India?

Answer: It is not necessary to answer this question.

4. Was the power under s 72(4) of the Maritime Powers Act to take the plaintiff to a place outside Australia, being India, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

Answer: No.

5. Was any non-statutory executive power of the Commonwealth to take the plaintiff to a place outside Australia, being India, for the purpose of preventing the plaintiff from entering Australia, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

Answer: It is not necessary to answer this question.

6. Was the detention of the plaintiff unlawful at any, and if so what period, from 1 July 2014 to 27 July 2014 and if so [is the plaintiff] entitled to claim damages in respect of that detention?

Answer: No.

7. Who should pay the costs of this special case?

Answer: The plaintiff.

8. What if any order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?

Answer: The proceeding should be dismissed with consequential orders to be determined by a single Justice of this Court.

230 KIEFEL J. The plaintiff is a person of Tamil ethnicity and Sri Lankan nationality. In June 2014 he left India on an Indian-flagged sea vessel ("the Indian vessel") which had 157 people on board. Its destination was Christmas Island. None of the persons on board held a visa which would permit them to enter Australia. On or about 26 or 27 June 2014 a person on the Indian vessel contacted the Australian Maritime Safety Authority and requested assistance. The Indian vessel was subsequently intercepted by an Australian Customs vessel ("the Australian vessel") approximately 16 nautical miles from Christmas Island, in the contiguous zone which lies outside Australia's territorial sea.

231 Customs officers from the Australian vessel boarded the Indian vessel and detained the persons on board it. These actions were authorised by the person in command of the Australian vessel. At some point thereafter, the engine of the Indian vessel seized and then caught fire, causing irreparable damage to the engine. As a result, the Indian vessel became unseaworthy. The plaintiff and the other persons were removed to the Australian vessel.

232 On 1 July 2014 the National Security Committee of Cabinet of the Australian Government ("the NSC") decided that the persons from the Indian vessel should be taken to India. The decision was an implementation of Government policy that persons who are not Australian citizens and who seek to enter Australia by boat without a visa will be intercepted and removed from Australian waters. At that time the Australian Government had no agreement or arrangement in place with the Government of India which would permit the disembarkation of the persons from the Indian vessel in India.

233 Between 1 and about 10 July 2014 the Australian vessel travelled towards India with the plaintiff and the other persons detained on board. Between about 10 and about 22 July 2014, after the Australian vessel arrived near India (but presumably not in its territorial waters), the plaintiff and the others continued to be detained whilst the successful conclusion of diplomatic negotiations between Australia and India, necessary to allow disembarkation to occur, and favourable weather conditions, were awaited.

234 On or about 23 July 2014 the first defendant, the Minister for Immigration and Border Protection, determined that, for "operational and other reasons", it would not be practicable to complete the process of taking the plaintiff and the other persons to India within a reasonable amount of time and that they should instead be taken to the Territory of the Cocos (Keeling) Islands, which is within Australia's migration zone. On 27 July 2014 the plaintiff and the other persons arrived in that place, and were there detained pursuant to s 189(3) of the *Migration Act* 1958 (Cth).

235 The plaintiff claims that he is a refugee within the meaning of the Refugees Convention[171] in that he claims to have a well-founded fear of persecution in Sri Lanka. Whilst on board the Australian vessel he was asked questions concerning his personal and biographical details, but was not asked questions as to why he left Sri Lanka or India and whether he claimed to be a person in respect of whom Australia might owe non-refoulement obligations. He was not given an opportunity to comment upon where he might be taken.

236 Whilst on board the Australian vessel, the plaintiff was permitted to speak to lawyers in Australia, which he did through interpreters. Proceedings were brought on his behalf in the original jurisdiction of this Court against the Minister and the Commonwealth ("the Commonwealth defendants"). It is not necessary to detail the claims initially made or the history of the proceedings. It is sufficient to observe that at an early directions hearing in this matter, which took place whilst the plaintiff was on board the Australian vessel travelling to a destination then unknown to the plaintiff and his legal advisors, an undertaking was given by the Commonwealth defendants not to surrender or deliver the plaintiff and the others into the custody of the Government of Sri Lanka, without prior notice.

237 The plaintiff later amended his claim to seek a declaration that his detention on board the Australian vessel, between the time the Australian vessel left the contiguous zone, or shortly thereafter, and the time he was brought to Australia, was unlawful and to seek damages for wrongful detention and imprisonment.

The Questions Stated

238 The parties subsequently stated questions for the opinion of the Full Court of this Court as follows:

> "(1) Did s 72(4) of the Maritime Powers Act authorise a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia, being India:
>
> (a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations;
>
> (b) in implementation of a decision by the Australian Government that the plaintiff (and others on the Indian vessel) should be taken to India without independent

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

consideration by the maritime officer of whether that should be so; and

(c) whether or not, prior to the commencement of the taking of the plaintiff to India, an agreement or arrangement existed between Australia and India concerning the reception of the plaintiff in India?

(2) Did s 72(4) of the Maritime Powers Act authorise a maritime officer to:

(a) take the steps set out in paragraph 20 in implementing the decision to take the plaintiff to India;

(b) detain the plaintiff for the purposes of taking the plaintiff to India?

(3) Did the non-statutory executive power of the Commonwealth authorise an officer of the Commonwealth to:

(a) take the steps set out in paragraph 20 for the purpose of preventing the plaintiff from entering Australia;

(b) detain the plaintiff for the purposes of taking the plaintiff to India?

(4) Was the power under s 72(4) of the Maritime Powers Act to take the plaintiff to a place outside Australia, being India, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

(5) Was any non-statutory executive power of the Commonwealth to take the plaintiff to a place outside Australia, being India, for the purpose of preventing the plaintiff from entering Australia, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

(6) Was the detention of the plaintiff unlawful at any, and if so what period, from 1 July 2014 to 27 July 2014 and if so are they [sic] entitled to claim damages in respect of that detention?

(7) Who should pay the costs of this special case?

(8) What if any order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?"

239 Paragraph 20 of the Special Case, to which reference is made in the Questions Stated, outlines the steps taken between 1 and 23 July 2014 to implement the decision to take the plaintiff and the other persons to India.

240 The issue for this Court is whether the detention of the plaintiff was justified. If the answer to the first part of Question (6) is that the plaintiff's detention in the relevant period was unlawful, the question of the plaintiff's entitlement to damages falls to be determined.

241 As the Questions Stated disclose, the Commonwealth defendants rely upon two, alternative, sources of lawful authorisation: the *Maritime Powers Act* 2013 (Cth) ("the MP Act") and a non-statutory Commonwealth executive power which is said to exist in addition to the powers given by the MP Act.

242 Questions (1), (2) and (4) are directed to the exercise of power under s 72(4), which appears in Pt 3 of the MP Act. Part 3 deals with maritime powers. Section 72(4) applies to a person on a detained vessel[172] and provides that:

> "A maritime officer may detain the person and take the person, or cause the person to be taken:
>
> (a) to a place in the migration zone; or
>
> (b) to a place outside the migration zone, including a place outside Australia."

243 Question (2) is framed generally and may be understood to permit statements of conclusion, drawn from the answers to Question (1), and in particular as to whether s 72(4) authorised the plaintiff's detention.

244 Questions (1) and (4) concern whether the power given by s 72(4) required, for its valid exercise, that certain conditions be met: that a maritime officer personally make the decision as to where the plaintiff is to be taken and make it independently of others, including the NSC; that the plaintiff be entitled to the benefit of non-refoulement obligations in that country; that, before the decision is made, the plaintiff be given an opportunity to comment on the exercise of the power; and that the country of destination chosen be one with which Australia has an existing arrangement or agreement which would enable him to be disembarked in that country.

245 Questions (3) and (5) are directed to a non-statutory power of the Executive Government. Those questions ask whether such a power authorised the detention of the plaintiff for the purposes of taking him to India and whether

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172 *Maritime Powers Act* 2013 (Cth), s 72(1).

it was subject to an obligation to afford the plaintiff an opportunity to comment on the exercise of the power.

246 Shortly stated, the non-statutory Commonwealth executive power is said by the Commonwealth defendants to be the power to exclude or expel an alien, which would require an associated power of detention. The power in question is said to reside in s 61 of the Constitution, the scope of which is informed by the prerogative rights of the Crown. This non-statutory executive power is claimed to exist even though the MP Act contains similar powers and, as will be seen, provides for the conditions of their exercise in some detail.

The MP Act

247 The Guide to the MP Act[173] states that the Act provides a broad set of enforcement powers for use in, and in relation to, maritime areas. What constitutes a maritime area is not defined. The MP Act applies to a vessel, installation, aircraft or protected land and to a person who is on, or in the vicinity of, one of these things. In the balance of these reasons reference will be limited to the MP Act's application to vessels and persons on them.

248 The maritime powers, which are set out in Pt 3, may be exercised by maritime officers, who are defined as members of the Australian Defence Force ("the ADF") and the Australian Federal Police, and officers of Customs[174]. Additionally, the Minister may appoint a maritime officer[175].

249 Whilst the exercise of maritime powers is not limited to Australian waters, it is acknowledged[176] that, "[i]n accordance with international law, the exercise of powers is limited in places outside Australia." Section 40 provides that the MP Act does not authorise the exercise of maritime powers at a place in another country unless one of a number of conditions is met. One of the conditions is that the powers are exercised at the request of or with the agreement of the other country[177].

250 In relation to a foreign vessel that is outside Australia's territorial sea, such as the Indian vessel, maritime powers may only be exercised in the circumstances

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173 *Maritime Powers Act* 2013, s 7.

174 *Maritime Powers Act* 2013, s 104(1).

175 *Maritime Powers Act* 2013, s 104(1)(d).

176 *Maritime Powers Act* 2013, s 7.

177 *Maritime Powers Act* 2013, s 40(a).

provided by s 41(1) of the MP Act. Section 41(1)(c)(ii) provides that maritime powers may be exercised in the contiguous zone of Australia to prevent a contravention of certain laws occurring in Australia. ("Contiguous zone" bears the same meaning[178] as in the United Nations Convention on the Law of the Sea (1982).) The detention of the Indian vessel occurred in that zone. However, once the persons on board that vessel were transferred to the Australian vessel, the limitation in s 41(1) no longer applied.

251 The exercise of maritime powers with respect to vessels requires authorisation. If an "authorising officer" suspects, on reasonable grounds, that a vessel is involved in a contravention of an Australian law, the officer may authorise the exercise of maritime powers in relation to that vessel[179]. An "authorising officer" is defined by s 16(1):

> "For the purposes of authorising the exercise of maritime powers in relation to a vessel, installation, aircraft, protected land area or isolated person, each of the following is an ***authorising officer***:
>
> (a) the most senior maritime officer who is in a position to exercise any of the maritime powers in person;
>
> (b) the most senior member or special member of the Australian Federal Police who is in a position to exercise any of the maritime powers in person;
>
> (c) the most senior maritime officer on duty in a duly established operations room;
>
> (d) the person in command of a Commonwealth ship or Commonwealth aircraft from which the exercise of powers is to be directed or coordinated;
>
> (e) a person appointed in writing by the Minister."

In the present case the authorising officer was the person in command of the Australian vessel. It is accepted that the authorising officer had reasonable grounds to suspect that the Indian vessel "was involved in a contravention" of the *Migration Act*[180]. The purposes for which maritime powers may be exercised

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178 *Maritime Powers Act* 2013, s 8.

179 *Maritime Powers Act* 2013, s 17(1).

180 Section 233A of the *Migration Act* 1958 (Cth) creates an offence of people smuggling.

include the investigation of contraventions of Australian law and, relevantly, the prevention of contraventions[181].

252 Other purposes for which maritime powers may be exercised include[182] the administration of, and ensuring compliance with, a "monitoring law", which is defined to include[183] the *Migration Act*, the *Customs Act* 1901 (Cth), the *Fisheries Management Act* 1991 (Cth), the *Torres Strait Fisheries Act* 1984 (Cth) and certain provisions of the *Criminal Code* (Cth). Additional powers are given by reference to international agreements[184] which provide for the exercise by Australia of powers in relation to vessels, where the powers are prescribed by regulation and are exercised for the purposes of administering, ensuring compliance with or investigating a contravention of the agreement.

253 Maritime powers may be exercised on, or in any part of, a vessel; in relation to any person or thing on, or in the vicinity of, the vessel; or with respect to any person who a maritime officer suspects was on or is intending to go on the vessel; or with respect to things which the maritime officer suspects were to be taken on board[185]. Such force may be used in the exercise of the powers against a person or thing as is necessary and reasonable in the circumstances[186]. However, a maritime officer must not subject a person to any greater indignity than is necessary and reasonable, or do anything likely to cause death or grievous bodily harm, save in the limited circumstances which are specified[187].

254 The maritime powers provided for in Pt 3 include powers of boarding and entry[188], and the power to require a vessel to stop or to manoeuvre[189], and to chase a vessel[190]. Section 69 provides that a maritime officer may detain a vessel

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181 *Maritime Powers Act* 2013, s 32(1)(a).

182 *Maritime Powers Act* 2013, ss 31, 32.

183 *Maritime Powers Act* 2013, s 8.

184 *Maritime Powers Act* 2013, s 33.

185 *Maritime Powers Act* 2013, s 34.

186 *Maritime Powers Act* 2013, s 37(1).

187 *Maritime Powers Act* 2013, s 37(2).

188 *Maritime Powers Act* 2013, ss 52, 53.

189 *Maritime Powers Act* 2013, s 54(1)(a).

190 *Maritime Powers Act* 2013, s 54(3)(a).

and take it to a port or other place, even if it is necessary to travel outside Australia to reach that port or that place.

255 Section 71 provides that a maritime officer exercising powers in relation to a vessel may place or keep a person in a particular place on the vessel. Because the Indian vessel was detained by maritime officers in order to prevent a contravention of Australian law, s 72 applied to the plaintiff as a person on a detained vessel[191]. A maritime officer may return such a person to the vessel[192] or require the person to remain on it[193]. Those options were not available in this case.

256 Section 72(4) is set out above and provides that a maritime officer may detain the person and take the person to a place in the migration zone or a place outside that zone and outside Australia. For the purpose of taking the person to another place, s 72(5) provides that a maritime officer may place the person on a vessel, restrain the person on a vessel or remove the person from a vessel.

257 Section 74 provides that a maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place. If a person is detained and taken to another place under s 72(4), s 97(1) provides that the detention ends at that place.

A non-statutory power of the Executive Government?

258 The Commonwealth defendants contend for the existence of a power for the expulsion and associated detention of an alien, which inheres in the Executive Government and does not require statutory authority. Such a power would not be subject to the conditions for the exercise of the s 72(4) power. Indeed, the Commonwealth defendants contend that the only limit upon the Commonwealth executive power is that of reasonable necessity arising from s 61 of the Constitution.

259 As mentioned above, s 61 is identified as the source of the Commonwealth executive power. It has been observed on many occasions that the terms of s 61 do not offer much assistance in resolving questions as to the scope of executive power. The Commonwealth defendants say that the scope of this power is informed by the prerogative powers of the Crown. The power contended for is characterised by the Commonwealth defendants as the power to exclude and expel an alien from Australia's territory and return the alien to the

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191 *Maritime Powers Act* 2013, s 72(1)(a).

192 *Maritime Powers Act* 2013, s 72(2).

193 *Maritime Powers Act* 2013, s 72(3).

country from which the alien entered. The power to expel is said to carry with it the power to do all things necessary to make the exercise of the power effective, including restraining the person outside Australia's territory.

260 As will be discussed, the executive power to which the Commonwealth defendants refer is one which resides in every nation State, as an aspect of its sovereignty. That being the case, it should not be confused with what has sometimes been described as the nationhood power, which arises under the Constitution and has been held capable of responding to events such as a national emergency[194]. This case does not involve such a power, nor those powers relevant to conditions of war or the protection of Australia as a nation.

261 The Commonwealth executive power for which the Commonwealth defendants contend is said to be that discussed by the Privy Council in *Attorney-General for Canada v Cain*[195]. The Commonwealth defendants rely upon the following statement by Lord Atkinson in *Cain*[196], and upon its acceptance by this Court, as supporting the existence of the power contended for:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien".

So much was apparently conceded in *Cain*. It necessarily followed, his Lordship said:

> "that the State has the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all".

The right therefore necessarily carried with it the right to detain, even on the high seas.

262 These statements need to be understood in the context of the issue in *Cain*. What was said in that case has little relevance to this matter. The issue in *Cain* was whether the "Alien Labour Act"[197], which provided that the Attorney-General of Canada could take an illegal immigrant into custody and return him to

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194 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; [2009] HCA 23.

195 [1906] AC 542.

196 [1906] AC 542 at 546.

197 Dominion statute 60 & 61 Vict, c 11, as amended by 1 Edw 7, c 13, s 13.

the country from which he came, was ultra vires the Dominion Parliament. The essential question was whether the delegation of the British Crown's powers to the Dominion Parliament by Imperial statute was sufficient authority for extra-territorial action.

263 Lord Atkinson reasoned that the Crown of Great Britain became possessed of all executive and legislative powers within Canada and its dependencies when the country was ceded to Great Britain in 1763. The supreme power in every State includes the right to expel aliens and that right necessarily carries with it the right to detain an alien outside the State's territories in order to effect expulsion. The Imperial Parliament had delegated those powers to the Dominion Parliament by statute. The Dominion Parliament was therefore clothed with all the necessary authority and the challenged provision of the Alien Labour Act was valid.

264 Lord Atkinson was speaking of a sovereign right of a nation State, which is recognised by international law. This is what was conceded in that case. It was in this sense that Griffith CJ, in *Robtelmes v Brenan*[198], referred to *Cain*. His Honour also referred[199] to the statement in *Nishimura Ekiu v United States*[200], that "[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty … to forbid the entrance of foreigners". In *Chu Kheng Lim v Minister for Immigration*[201], it was observed, by reference to the first passage from *Cain* set out above, that "[t]he power to exclude or expel even a friendly alien is recognized by international law as an incident of sovereignty over territory."

265 The judgment in *Cain* says nothing about the distribution of powers as between the arms of the Dominion Government. It says nothing about whether the Executive of the Dominion Government could exercise the power of detention and expulsion without statutory authority. There was no suggestion in *Cain* that the Alien Labour Act was unnecessary.

266 In so far as Lord Atkinson may be taken to have assumed that the prerogative to expel, deport and detain existed at the time of the decision in *Cain*, or that the Executive Government of the United Kingdom exercised it, there is a good body of case law and writings which suggests to the contrary, as the

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198 (1906) 4 CLR 395 at 400, 404-405; [1906] HCA 58; see also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 29-30; [1992] HCA 64.

199 *Robtelmes v Brenan* (1906) 4 CLR 395 at 402.

200 142 US 651 at 659 (1892).

201 (1992) 176 CLR 1 at 29-30.

detailed analysis undertaken by Black CJ in *Ruddock v Vadarlis*[202] demonstrates. Two decisions of Australian courts in 1888, to which his Honour refers, are particularly noteworthy.

267 In *Ex parte Lo Pak*[203], Darley CJ of the Supreme Court of New South Wales said that:

> "It may be that the Sovereign of England may have such power according to the principles laid down by writers on international law, but so far as I can understand, it has not been a power that has ever been exercised in England. On the contrary, even in times of war, where it has been necessary to exclude aliens from the realm, or to deal with aliens then present within the realm, it has been considered necessary to pass a statute for the express purpose of enabling that to be done."

268 In *Toy v Musgrove*[204], Holroyd J of the Supreme Court of Victoria pointed out that there is evidence of a practice of the Crown in this area before the end of the 16th century, but went on to say:

> "for nearly three centuries no British Sovereign has attempted to exercise the right of expelling aliens or of preventing their intrusion in time of peace by virtue of his prerogative; and no British Minister, not even the strongest advocate in theory for the plenitude of the Royal authority, has ventured in this matter to reduce his theory into practice."

Other texts and dicta referred to by Black CJ in *Ruddock v Vadarlis* are to similar effect.

269 In *Robtelmes*, Griffith CJ said that he did not understand the power of expulsion of which *Cain* spoke, in the context of nations, to be denied by "eminent statesmen and lawyers". What was denied, his Honour said, was "the right or power of the Executive Government, in the absence of any legislative provision, to exercise what was called the prerogative right of the Crown for that purpose."[205] His Honour later added[206]: "I doubt whether the Executive authority

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202 (2001) 110 FCR 491 at 495-501 [4]-[29].

203 (1888) 9 NSWR 221 at 237.

204 (1888) 14 VLR 349 at 423-425.

205 *Robtelmes v Brenan* (1906) 4 CLR 395 at 400-401.

206 *Robtelmes v Brenan* (1906) 4 CLR 395 at 403.

of Australia ... could deport an alien except under the conditions authorized by some Statute".

270 The common law of Australia has maintained a like approach to the suggestion that the Commonwealth Executive has an inherent power to deport[207] or extradite persons. Although a view persisted until the 19th century that there was a prerogative power to arrest and surrender aliens to foreign states, that view has long since been rejected[208]. In *Barton v The Commonwealth*[209], Barwick CJ said that:

> "In the common law countries, statutory authority is necessary for the surrender of a person to another country and to provide for custody and conveyance."

271 That the position of the Commonwealth Executive respecting the exercise of the powers here in question was generally regarded to be, at the least, doubtful may explain why the Commonwealth Parliament has legislated on these topics since Federation – from the *Immigration Restriction Act* 1901 (Cth) to the current *Migration Act* – and indeed why the MP Act contains such powers.

272 In the joint judgment in *Lim*[210], Brennan, Deane and Dawson JJ were able to say:

> "In this Court, it has been consistently recognized that the power of the Parliament to make laws with respect to aliens includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorizing the Executive to restrain an alien in custody to the extent necessary to make the deportation effective."

273 *Lim* stands for the proposition that the authority given by the *Migration Act* to the Commonwealth Executive to detain a person in custody, that authority being limited to the purpose of effectuating the person's expulsion and deportation, does not infringe Ch III of the Constitution, because it is neither

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207 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 79, 122, 139; [1925] HCA 53.

208 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 521 per Brennan J; [1987] HCA 12.

209 (1974) 131 CLR 477 at 483; [1974] HCA 20.

210 (1992) 176 CLR 1 at 30-31.

punitive nor part of the judicial power of the Commonwealth[211]. *Lim* also holds[212] that a statute is required to authorise and enforce the detention by the Commonwealth Executive of aliens for the purpose of expulsion. Where conferred by statute, the power of the Commonwealth Executive to detain takes its character from the legislative powers to exclude and deport aliens, of which it is an incident.

274 The Commonwealth defendants sought to derive assistance from another passage from *Cain* and what was said about it in *Lim*. Lord Atkinson had referred[213] to methods of delegation of the powers in question – by proclamation, Imperial statute or local statute to which the Crown assented – to the Governor or the Government of a Colony. His Lordship went on to say that if that delegation had taken place "the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers".

275 It was said in *Lim*[214] that the words just quoted indicate that the power to expel or deport an alien, and the associated power to confine under restraint, were seen as "prima facie executive in character". In the context of *Lim* and the issue concerning Ch III of the Constitution, the identification of the powers as executive in character served to distinguish the nature and purpose of those powers from the power of detention which is part of judicial power. It is apparent from the reasons of the joint judgment, and those of Mason CJ agreeing, that the character of the executive powers is derived from the statutory authority provided.

276 What was said in *Lim* is not limited to actions of the Commonwealth Executive within Australia. The actions of officers of the Commonwealth extra-territorially, on the high seas, remain subject to this Court's jurisdiction given by s 75(v) of the Constitution in the same way as Defence Force service tribunals, which are constituted by Commonwealth officers[215] and may be conducted outside Australia[216], are. The statements of Rich J in *R v Bevan; Ex parte Elias*

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211 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 32 per Brennan, Deane and Dawson JJ, see also at 10 per Mason CJ agreeing.

212 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 19, 63; see also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 604 [110] per Gummow J; [2004] HCA 37.

213 *Attorney-General for Canada v Cain* [1906] AC 542 at 546.

214 (1992) 176 CLR 1 at 30.

215 *Haskins v The Commonwealth* (2011) 244 CLR 22 at 44 [56]; [2011] HCA 28.

216 See for instance *Defence Force Discipline Act* 1982 (Cth), s 136(b).

and Gordon[217] imply that his Honour considered that navy personnel on naval vessels on the high seas would have been treated as Commonwealth officers, to whom s 75(v) applied, had they not been transferred with Commonwealth naval vessels to the King's naval forces.

277 Even if one assumes, for present purposes, that a Commonwealth executive power of the kind contended for existed at Federation, statutes have for a long time provided for powers of expulsion and detention. As a matter of principle any Commonwealth executive power may in those circumstances be considered lost or displaced.

278 In *Cain*, Lord Atkinson observed[218] that the Crown remained possessed of its powers "save so far as it has since parted with [them] by legislation, royal proclamation, or voluntary grant". And in *Barton*[219], Barwick CJ said that, where statutory authority exists, the Crown prerogative, "if it existed before such legislation, has clearly been superseded."

279 What was spoken of on each of these occasions was the constitutional principle that any prerogative power is to be regarded as displaced, or abrogated, where the Parliament has legislated on the same topic. When a matter is directly regulated by statute, the Executive Government derives its authority from the Parliament and can no longer rely on a prerogative power. Where the Executive Government exercises such authority, it is bound to observe the restrictions which the Parliament has imposed[220].

280 It is not necessary to survey each statute which has dealt with the powers of expulsion and detention of aliens since Federation. It is sufficient to observe, by reference to the discussion of the MP Act above, that the MP Act authorises the use of the coercive powers of expulsion and detention for which the Commonwealth defendants contend and provides for their exercise in a detailed way. The Commonwealth defendants do not point to any relevant deficiency in the MP Act. It would be difficult for them to do so.

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217 (1942) 66 CLR 452 at 462; [1942] HCA 12.

218 *Attorney-General for Canada v Cain* [1906] AC 542 at 545-546.

219 (1974) 131 CLR 477 at 484.

220 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 575 per Lord Parmoor; see also at 526 per Lord Dunedin, 539-540 per Lord Atkinson, 554 per Lord Moulton, 561 per Lord Sumner; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 69-70 [85]; [2005] HCA 50; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 58 [27]; [2008] HCA 29.

281 The Commonwealth defendants submit that s 5 of the MP Act makes plain a legislative intention that the Act is to operate in addition to, and not in derogation of, the claimed non-statutory executive power. Section 5 provides: "[t]his Act does not limit the executive power of the Commonwealth."

282 The relevant "intention" of a statute is that which is revealed to the court by ordinary processes of statutory construction[221]. Consistently with this observation, in *John Holland Pty Ltd v Victorian Workcover Authority*[222], this Court said, of a statement in a Commonwealth statute to the effect that the statute is intended to apply to the exclusion of laws of the States or Territories where they dealt with a particular subject matter and class of persons, that:

> "such a statement is only a statement of intention which informs the construction of the Act as a whole. It must be an intention which the substantive provisions of the Act are capable of supporting."

283 It can hardly be said that a statute such as the MP Act, which authorises a decision that the relevant powers be exercised in a particular way and details the manner and conditions of their exercise, and in respect of which the role of the Commonwealth Executive is discernible, supports an intention that the Commonwealth Executive is to retain a complete discretion as to how such powers are to be exercised. Section 5 is better understood as preserving such other Commonwealth executive powers as may be exercised conformably with the MP Act provisions. Such a construction would be consistent with s 3 of the MP Act, which provides that the Act binds the Crown in each of its capacities.

284 The result of the construction for which the Commonwealth defendants contend confirms that this construction is unlikely to have been intended. In *Attorney-General v De Keyser's Royal Hotel Ltd*[223], it was argued that the prerogative power was maintained despite a statute dealing with the same subject matter. Lord Dunedin described[224] as "unanswerable" the response of Swinfen Eady MR in the Court of Appeal[225]: "what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall

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221 *Momcilovic v The Queen* (2011) 245 CLR 1 at 74 [111]-[112], 133-134 [315], 141 [341], 235 [638]; [2011] HCA 34.

222 (2009) 239 CLR 518 at 527 [20]; [2009] HCA 45.

223 [1920] AC 508.

224 *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 526.

225 *In re De Keyser's Royal Hotel Ltd; De Keyser's Royal Hotel Ltd v The King* [1919] 2 Ch 197 at 216.

back on prerogative?" An intention to this effect, on the part of the legislature, is not readily inferred.

285 The source of the relevant powers, of detention and removal of the plaintiff to a place outside Australia, is the MP Act and their exercise is subject to its conditions.

286 The answer to Question (3) is therefore "no". It is unnecessary to answer Question (5), since it is premised upon an affirmative answer to Question (3).

The exercise of power under s 72(4)

287 Section 72(4) applied to the plaintiff as a person who had been on a detained vessel in respect of which maritime officers had been authorised to exercise maritime powers.

The decision under s 72(4) – made by whom?

288 Whilst s 72(4) speaks of the actions of detaining and taking a person to a place, it necessarily authorises a decision as to where the person is to be taken. The decision to be made under s 72(4) involves a choice, as between a place in Australia's migration zone and a place outside that zone, including a place outside Australia.

289 If a person is taken to a place in the migration zone, procedures under the *Migration Act* may be available to the person. This choice of place may therefore be informed by Government policy, such as the policy applied in this case. The disembarkation of a person in a place outside Australia requires an arrangement or agreement to have been reached with the country in which that place is located, entered into after diplomatic negotiations. This choice of place would therefore be informed by the availability of such an arrangement or agreement.

290 A maritime officer cannot be expected to know of relevant Government policies or the details of arrangements or agreements with other countries. It cannot therefore be taken as intended that the maritime officer exercising the maritime powers would make the decision necessary for the exercise of the maritime powers under s 72(4). Nor does the language of s 72(4) suggest that the decision resides with the maritime officer.

291 The position of a maritime officer is the subject of an agreed fact in the Special Case. It is an agreed fact that:

> "The maritime officers on navy vessels and Australian customs vessels perform their duties and exercise their powers, including their powers under the Maritime Powers Act, in the context of a chain of command in

> which they are governed by orders and instructions from superior or senior officers."

Acceptance of this fact creates a difficulty for the plaintiff's argument that s 72(4) required the maritime officer to make the decision as to where the plaintiff should be taken and to make it independently of any other person. The plaintiff's further submission that s 72(4) does not contemplate a decision being made by the Executive Government, and the NSC in particular, ignores the role of the Minister in the scheme of the MP Act and the matters which are necessary to take into account in making the decision under s 72(4). It overlooks that the powers vested in the service chiefs of the Defence Force and in the Secretary of the Department of Defence and the Chief of the Defence Force, to whose command a maritime officer who is a member of the ADF is subject, are to be exercised subject to, and in accordance with, any direction of the Minister[226].

292 In *Bread Manufacturers of NSW v Evans*[227], consideration was given to the extent to which it might be expected that a public official, or a tribunal, could take into account, and act upon, the advice of the Government or a Minister. It was accepted that no universal answer could be given to such a question, but that account would need to be taken of the particular statutory function, the nature of the question to be decided, the character of the tribunal or official and the relationship between the tribunal or official and the responsible Minister.

293 The exercise of the power under s 72(4) will require a decision to be made by the Executive Government as to the place where persons such as the plaintiff should be taken. That decision will be passed down, through the chain of command, to the maritime officer who exercises the power. Question (1)(b) should therefore be answered "yes".

Non-refoulement and considerations of the plaintiff's safety

294 By contrast with s 72(4), s 74 is expressed in terms which require a maritime officer to be satisfied, himself or herself, as to the safety of the person in the place in which the person is to be put. If the maritime officer is not so satisfied, s 74 prohibits the person being put in that place. This provision implies that the maritime officer is capable of assessing the "place" in question. The "place" spoken of in s 74 is the particular place on a vessel where the maritime officer places the person.

295 This is apparent from the terms of ss 71 and 72, read with s 74. Section 71 permits a maritime officer to "place or keep a person in a particular

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226 *Defence Act* 1903 (Cth), s 8.

227 (1981) 180 CLR 404 at 429; [1981] HCA 69.

place on the vessel". Section 72(5)(a) likewise permits a maritime officer to place a person on a vessel, for the purposes of taking the person to another place. The place which is the subject of the prohibition in s 74, consistently with ss 71 and 72, is a place on a vessel. A maritime officer present on a vessel would be in a position to assess its features, in order to determine whether it is safe for the person to be in a particular place on the vessel.

296 An obligation, on the part of a maritime officer, to ensure that the point of disembarkation for a person is, in its immediate physical aspects, safe may be implied by reference to both s 72(4) and s 74. However, s 74 does not require a maritime officer to be satisfied that the place in the migration zone or outside Australia, to which the person may be taken, would be a place where the person would not face a real risk of harm more generally. Meeting such an obligation would involve wider considerations not appropriate to the role of a maritime officer under the MP Act. If the absence of a real risk of harm at the place to which the person is to be taken is a consideration necessary to a decision under s 72(4), it must have a different source.

297 Article 33(1) of the Refugees Convention obliges Contracting States, of which Australia is one, not to return ("refouler") a person to a country where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Article 33(1) permits removal to a safe third country. A country will only be a safe third country if there is no danger that a refugee might be sent from there to a country where he or she will be at risk of harm[228].

298 The Replacement Explanatory Memorandum to the Maritime Powers Bill 2012 acknowledges that s 72(4) may engage Australia's non-refoulement obligations[229]. It recognises that a person dealt with under the Bill may be eligible to apply for a protection visa under s 36(2)(aa) of the *Migration Act*, which reflects the complementary provisions of the ICCPR[230] and the CAT[231], and that the implied non-refoulement obligations under Arts 6 and 7 of the

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228 Lauterpacht and Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) 87 at 122.

229 Australia, Senate, Maritime Powers Bill 2012, Replacement Explanatory Memorandum at 6.

230 International Covenant on Civil and Political Rights (1966).

231 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

ICCPR and the Second Optional Protocol to the ICCPR may be engaged. It is said in the Replacement Explanatory Memorandum that, in such circumstances:

> "in order to ensure that a maritime officer who has detained a person aboard a vessel acts in accordance with Australia's non-refoulement obligations, procedures relating to the consideration of refoulement risks would need to be in place. The Bill does not inhibit or impose any restriction on a maritime officer acting in accordance with Australia's non-refoulement obligations."

The Bill was to take effect within 12 months of Royal Assent. This was considered to allow sufficient time for enforcement agencies to review the necessary operational practices and procedures for the exercise of maritime powers under the Bill.

299 The Special Case does not mention any procedures that were put in place by which a maritime officer could ascertain whether Australia's non-refoulement obligations were engaged with respect to a person detained, although the Replacement Explanatory Memorandum shows that it was clearly assumed that such a consideration was relevant to a decision under s 72(4).

300 The discussion in the Replacement Explanatory Memorandum may have its source in an understanding, and acceptance, of Australia's treaty obligations. The plaintiff argues that the MP Act, and s 72(4) in particular, should be construed in accordance with those treaty obligations. The question is whether it can be so construed.

301 Before embarking upon such an exercise it may be useful to analyse the enquiry which Question (1)(a) actually poses. Despite the parties having agreed to state the question in the terms set out above, the Commonwealth defendants spent some time in argument pointing to the difficulties in an answer being provided to it.

302 It must first be mentioned that the plaintiff does not claim to fear persecution in India – which, after all, was the country in which he was present prior to boarding the Indian vessel. Question (1)(a), clearly enough, is addressed to the prospect that, were the plaintiff taken to India, he might be sent from there to Sri Lanka. So understood, and despite some difficulty in the way in which the question is framed, Question (1)(a) enquires as to the state of Indian law. Shorn of the words preceding it, which create the difficulty, the essential question is: "would [the plaintiff] be entitled by the law applicable in India to the benefit of the non-refoulement obligations"?

303 India is not a signatory to the Refugees Convention, and has not ratified the CAT, Art 3 of which also contains a prohibition on refoulement. India is a party to the ICCPR, which does not contain an express provision to this effect.

However, Art 6 of the ICCPR provides a right to life, and Art 7 contains an obligation not to subject a person to torture or cruel, inhuman or degrading treatment or punishment. The United Nations Human Rights Committee has stated that signatories to the ICCPR are subject to a non-refoulement obligation in cases involving potential breaches of Arts 6 and 7 of that Convention[232].

304 This statement does not provide a sufficient basis for an answer to Question (1)(a). The Special Case states no fact as to Indian State practice or as to whether obligations of non-refoulement are accepted by the domestic law of India. The factual position in the Special Case regarding Question (1)(a) may be compared with that provided with respect to Question (1)(c): it is accepted that no agreement concerning the reception of the plaintiff in India existed between Australia and India prior to him being taken there. In the absence of necessary facts respecting the law of India, all that can be said about Question (1)(a) is that the Special Case does not permit an answer to it.

Procedural fairness

305 The plaintiff submits that the Commonwealth defendants were required, at least, to notify the plaintiff that consideration was being given to the possible exercise of the powers conferred by s 72(4) and to give him the opportunity to be heard as to that proposed exercise of power, as to his claims (if any) to be a person in respect of whom Australia owed non-refoulement obligations and as to whether being taken to a place other than Australia might threaten his safety.

306 The requirements of procedural fairness are essentially practical and depend upon the legislative framework and the circumstances of the particular case[233]. The operation of the MP Act does not admit of an opportunity to be

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232 See for instance Human Rights Committee, *Views: Communication No 470/1991*, 48th sess, UN Doc CCPR/C/48/D/470/1991 (30 July 1993) at [13.1]-[13.2] ("*Kindler v Canada*"); Human Rights Committee, *Views: Communication No 692/1996*, 60th sess, UN Doc CCPR/C/60/D/692/1996 (28 July 1997) at [6.9] ("*ARJ v Australia*"); Human Rights Committee, *Views: Communication No 1205/2003*, 92nd sess, UN Doc CCPR/C/92/D/1205/2003 (3 April 2008) at [6.3] ("*Bauetdinov v Uzbekistan*"); Human Rights Committee, *Decision: Communication No 1540/2007*, 94th sess, UN Doc CCPR/C/94/D/1540/2007 (30 October 2008) at [7.3] ("*MWN and LQ v Sweden*").

233 *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 513-514; [1977] HCA 39; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 109 [60]; [2000] HCA 57; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37], 16 [48]; [2003] HCA 6; *Applicant VEAL of 2002 v Minister for Immigration and*

(Footnote continues on next page)

given to the plaintiff to comment upon where he might be taken and whether he should be detained in that process. He was a person on a vessel which was detained in order to prevent the contravention of an Australian law. In a circumstance where the Indian vessel was unseaworthy, the only option available under the MP Act was to detain the plaintiff and take him to a place where he might be disembarked. The plaintiff could assert no right, interest or expectation in the outcome of the decision[234]. No opportunity for him to comment upon these matters could arise. Further, there would be good reason, having regard to the security of the 56 maritime officers and crew aboard the Australian vessel, not to advise the 157 persons placed on board that they were not to be taken to Australia and instead were to be taken to the place from which they had come.

307 The plaintiff's interest in his personal safety, in not being exposed to the risk of harm in Sri Lanka, stands in a different category. In this regard the plaintiff may be understood to claim that he should have been given the opportunity to answer enquiries about his life in Sri Lanka sufficient to identify that he feared persecution and harm. These enquiries could have informed the decision as to where he was to be taken.

308 It seems reasonable to infer that, from an early point after the Indian vessel was intercepted, it would have been evident to maritime officers on the Australian vessel that the plaintiff is a Tamil. There were persons on board who are said to have spoken Tamil and English and acted as interpreters for the plaintiff and others. The plaintiff gave personal and biographical details as requested. It is not suggested that these enquiries failed to elicit the plaintiff's ethnicity and nationality. The Special Case records particular questions that the plaintiff was not asked, which one infers the plaintiff considers should have been asked, such as "why he left Sri Lanka" and whether he claimed, in effect, to be a refugee.

309 The fact that the plaintiff is a Tamil would itself be sufficient to alert maritime officers to the likelihood that he may claim to fear persecution in Sri Lanka. There was therefore no need to ask him directly as to these matters and whether he claimed to be a person in respect of whom Australia owes protection obligations. The omission of the maritime officers to make further enquiries of the plaintiff, therefore, did not constitute a breach of procedural fairness.

310 The answer to Question (4) is therefore "no".

Multicultural and Indigenous Affairs (2005) 225 CLR 88 at 99 [25]; [2005] HCA 72.

234 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 121 [101].

An agreement with India?

311 The central question with respect to the exercise of power under s 72(4) is whether it authorised a decision to take the plaintiff and the others to India, without there being an agreement in place which would allow the plaintiff and the others to disembark there. Arrangements of this kind, between Australia and the Republic of Nauru, and Australia and the Independent State of Papua New Guinea, were in place at the relevant time. There was no such agreement between Australia and India on 1 July 2014, when the NSC made the decision that the persons from the Indian vessel be taken to India. Absent such an agreement, the prospect that the plaintiff and the others could disembark on arrival was clearly speculative. It may be inferred that such an agreement was not arrived at between 1 July and 23 July 2014, on or about which date the decision was made to take the plaintiff to the Cocos (Keeling) Islands.

312 The answer to this question does not lie merely in considerations of expedition. Unlike other provisions of the MP Act[235], s 72(4) does not require that a person is to be taken to another place as soon as practicable. Furthermore, the choice provided by s 72(4), between taking the plaintiff to a place within the migration zone or to a place outside Australia, forecloses the possibility that a requirement to that effect may be implied in s 72(4).

313 Where no time requirement is provided by a statute for the doing of an act, the law will imply a requirement that it be done as soon as reasonably practicable[236], at least where such an implication is possible. Section 72(4) does not admit of that possibility. It leaves open the choice that a person be taken to a place which may be further from the point of interception than other places. To comply with an obligation to take the plaintiff to a place and disembark him as soon as reasonably practicable would have likely required the plaintiff to be taken to Christmas Island, which was only some 16 nautical miles from the point of interception. Such an obligation would render nugatory the choice provided for in s 72(4).

314 That is not to say that the law will not imply any time requirement with respect to the exercise of the powers under s 72(4). The decision where to take a person such as the plaintiff would have to be made within a reasonable time and the time taken to reach the chosen destination would also have to be reasonable. The point is that the reasonableness of the time taken would be adjudged by

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235 See, for example, *Maritime Powers Act* 2013, s 98(1).

236 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 573-574; [1949] HCA 65; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847 at 853 [28], 854 [34]; 312 ALR 537 at 543, 544; [2014] HCA 34.

reference to that destination, but a requirement of time does not dictate the choice of destination.

315 It is no part of the Special Case that the exercise of the power under s 72(4), and the decision to take the plaintiff and the other persons to India, involved an improper purpose, one foreign to the MP Act. Although the plaintiff seeks to argue that the powers were exercised for the purpose of deterring other non-citizens from seeking to enter Australia by sea without a permit, in accordance with the Government's policy, the Commonwealth defendants' objection to that contention as being outside the terms of the Special Case is properly made and should be upheld.

316 The question with respect to s 72(4) is not whether it was reasonable, in a legal sense[237], for the decision-maker to have believed that the necessary agreement with the country in question would be achieved before the destination was reached and the person detained due to be disembarked. It is a question of legislative authority, which is answered by consideration of the terms of s 72(4) itself and other provisions of the MP Act relevant to it and to the detention of persons such as the plaintiff.

317 Section 72(4) requires that a person be taken to a "place" in or outside Australia. Section 97(1) provides that the detention ends at that place, which is to say, when that place is reached. When that place is reached, and the person's detention comes to an end, the person must be disembarked as soon as reasonably practicable. Section 72(5)(c) provides for the removal of the person at that place.

318 These factors point strongly to the need for certainty about the choice of place. They point to the decision under s 72(4) being limited to one place, which is identified at the time the decision is made as one where it is known that the detained person may be disembarked. Why would this not be so? After all, a person such as the plaintiff is detained for as long as is necessary to effect his or her removal to that place. Whilst the choice of place is not constrained by considerations of which is closest, as discussed above, it is quite another matter to suggest that the decision under s 72(4) may be provisional only, as is the case where disembarkation is dependent on the outcome of negotiations which are to take place with another country. This is the effect of the Commonwealth defendants' construction.

319 To construe s 72(4) to require certainty about disembarkation at the chosen destination could not create unforeseen difficulties for Australian vessels

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237 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18.

in circumstances such as the present. The problem of vessels entering Australia's migration zone with persons on board who have no right of entry is not a new one. The powers under s 72(4) may be taken as addressed to such a situation, as the Replacement Explanatory Memorandum confirms[238].

320 At the time the MP Act was passed it was known that, for disembarkation to be effective, arrangements must be in place with countries in the region. Some such arrangements had already been made. Section 40, which, it will be recalled, provides that the agreement of another country may be necessary for the exercise of any maritime powers in that country, confirms that this was understood. Section 40 serves to point up, if it were necessary to do so, the importance to the decision under s 72(4) of an agreement being in place.

321 It may also be taken as understood, as *Lim* holds, that detention by the Commonwealth Executive can only validly be for the limited purpose of effecting the expulsion of a person. That limited purpose cannot expand the scope of operation of s 72(4). It would not be consistent with that limited purpose for a person to be taken on a voyage on the high seas when the length of the person's detention was unknown[239]. Section 72(4) should be construed to provide the necessary certainty.

322 Section 97(2)(a) does not detract from this construction of s 72(4). Section 97(2)(a) provides that the requirement in s 97(1), that a person's detention ends at the place chosen under s 72(4), does not prevent the person being taken to different places where they are "on the way to the other place". Section 97(2)(a) is addressed to the need to account for the practicalities of a journey. It does not support a construction of s 72(4) by which detention could be prolonged by the need to make arrangements which would permit the disembarkation of persons detained.

323 In the absence of such an arrangement or agreement, the decision to take the plaintiff to India was not authorised by s 72(4). The answer to Question (1)(c) is "no". It follows that the detention of the plaintiff between 1 July 2014 and 27 July 2014 was unlawful.

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238 See, for example, Australia, Senate, Maritime Powers Bill 2012, Replacement Explanatory Memorandum at 1.

239 *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847 at 853 [29]; 312 ALR 537 at 543-544.

Damages?

324 Unlawful detention is a trespass and actionable as a tort regardless of whether the plaintiff has suffered harm[240]. In the present case, had the plaintiff not been detained on the Australian vessel for the period in question, he would have been detained in immigration detention. The circumstances of this case are similar to those pertaining in *R (Lumba) v Secretary of State for the Home Department*[241]. In that case, the claimants were falsely imprisoned, but the Supreme Court of the United Kingdom held that it was inevitable that they would have been detained in any event, had correct principles and lawful policies been applied. The claimants were held to have suffered no loss or damage as a result of the unlawful exercise of the power to detain and therefore nominal damages only could be awarded.

325 The plaintiff submits that this Court should leave the question as to the extent of any award of damages to be assessed on remitter. However, it seems to me that only one conclusion is possible and the terms of any remitter ought to be made clear. Damages could only be awarded for the infraction of the MP Act. In such circumstances, only nominal damages can be awarded[242].

Answers to questions

326 The Questions Stated should be answered as follows:

(1) (a) The Special Case does not permit an answer to this question.

(b) Yes.

(c) No.

(2) No.

(3) No.

(4) No.

(5) Unnecessary to answer.

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240 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at 274 [64], 303 [175], 304 [181], 309 [197], 313 [212], 324 [252], 352 [343].

241 [2012] 1 AC 245.

242 *Owners of Steamship "Mediana" v Owners, Master and Crew of Lightship "Comet"* (*The "Mediana"*) [1900] AC 113 at 116.

(6) Yes. The plaintiff was unlawfully detained from 1 July 2014 to 27 July 2014. He is entitled to nominal damages.

(7) The Commonwealth defendants should pay the plaintiff's costs.

(8) The matter should be remitted to the Federal Circuit Court of Australia for assessment of nominal damages.

GAGELER J.

Introduction

327 The plaintiff is a person of Tamil ethnicity and of Sri Lankan nationality. He claims to be a "refugee" within the meaning of the Refugees Convention[243], on the basis of having a well-founded fear of persecution in Sri Lanka. He claims also to be a person in respect of whom Australia has obligations, under the Torture Convention[244] and the International Covenant on Civil and Political Rights, not to return him directly or indirectly to Sri Lanka.

328 The plaintiff was one of 157 persons who were on board an Indian flagged vessel which left Pondicherry in the Republic of India in June 2014 and which was intercepted by an Australian border protection vessel approximately 16 nautical miles off the coast of the Territory of Christmas Island on 29 June 2014. The Indian flagged vessel was on that day boarded. None of the 157 persons on board were found to be Australian citizens and none were found to have any right to enter Australia. All were detained. They were transferred to the border protection vessel that same day after a fire in the engine room made the Indian flagged vessel unseaworthy.

329 The policy of the Australian Government was to the effect that anyone seeking to enter Australia by boat without a visa would be intercepted and removed from Australia. The National Security Committee of Cabinet confirmed that policy and decided on 1 July 2014 that all 157 persons then detained on the border protection vessel should be taken to India. The Australian Government at that time had no agreement or arrangement with the government of India for any of those persons to be taken to India.

330 In the implementation of that policy of the Australian Government, and specifically in the implementation of that decision of the National Security Committee of Cabinet, the border protection vessel on which the 157 persons continued to be detained started travelling towards India on 1 July 2014. It arrived near India on or about 10 July 2014. There it stood for about 12 days. During that period, diplomatic negotiations were conducted between Australia and India.

331 On or about 23 July 2014, the Minister for Immigration and Border Protection formed the view that it was not practicable to complete the process of

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

244 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

taking the 157 persons to India within a reasonable time. The border protection vessel on which the persons continued to be detained then started travelling towards the Territory of the Cocos (Keeling) Islands, where it arrived on 27 July 2014. There the persons were disembarked and were immediately detained under s 189 of the *Migration Act* 1958 (Cth).

332 The plaintiff commenced proceedings against the Minister and the Commonwealth of Australia in the original jurisdiction of the High Court soon after he was detained. What the plaintiff now claims in these proceedings is that his detention between 1 July and 27 July 2014 was unlawful. He claims damages in tort for wrongful imprisonment.

333 The Minister and the Commonwealth say in their defence that, during the whole of the period between the time of his initial detention in waters off the coast of Christmas Island on 29 June 2014 and the time of his arrival at the Cocos (Keeling) Islands on 27 July 2014, the plaintiff was lawfully detained under s 72(4) of the *Maritime Powers Act* 2013 (Cth) ("the Act"). They say, further or alternatively, that the non-statutory executive power of the Commonwealth was sufficient authority for his lawful detention throughout the whole of that period without need for statutory supplementation. They go on to say that the plaintiff would not be entitled to substantial damages even if his detention between 1 July and 27 July 2014 had been unlawful. That is because the plaintiff would have been kept in detention during that period in any event. Had he been taken directly to Christmas Island, or to the Cocos (Keeling) Islands or to some other part of Australia, following his detention on 29 June 2014, he would have been detained there under s 189 of the *Migration Act*.

334 The parties have agreed on a special case, which asks six substantive questions of the Full Court. Three of those substantive questions are about s 72(4) of the Act. Each of them is framed to reflect one or more of a larger number of arguments which are put on behalf of the plaintiff as to why that provision had no application. Two of the other substantive questions are about the non-statutory executive power of the Commonwealth. The last is about damages.

335 As has only recently been affirmed[245]:

> "It is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to

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245 *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 372 [148]; [2013] HCA 53, quoting *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

decide such a question in order to do justice in the given case and to determine the rights of the parties."

336 If the proper conclusion is that the plaintiff was lawfully detained under s 72(4) of the Act at all times between 29 June and 27 July 2014, that conclusion is a complete answer to the plaintiff's claim and the other substantive questions, in particular the constitutional questions, need not be answered. It is therefore appropriate to turn immediately to consider the questions which the special case asks about s 72(4) of the Act.

337 Consideration of those questions is conveniently undertaken in stages. The first stage is to locate that provision within the scheme of the Act. The next stage is to relate the scheme of the Act to the events which occurred to the extent its application is uncontroversial. The arguments put on behalf of the plaintiff as to the non-application of s 72(4) can then be identified and considered thematically.

The Act

338 The Act was enacted to provide a single comprehensive framework for enforcing Australian law at sea[246]. The scheme of the Act, in broad terms, is to provide for "maritime officers" to be able to exercise "maritime powers", for specified purposes and subject to specified geographical limitations, if and for so long as there is in force an authorisation by an "authorising officer" for the exercise of maritime powers. The scheme is designed to ensure "flexibility" in the exercise of maritime powers and "to assist maritime officers to deal with quickly changing circumstances and often difficult and dangerous situations"[247].

339 Maritime officers comprise members of the Australian Defence Force, officers of Customs, members and special members of the Australian Federal Police and persons appointed as maritime officers by the Minister[248]. In exercising maritime powers under the Act, "a maritime officer may use such force against a person or thing as is necessary and reasonable in the

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246 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 May 2012 at 6224.

247 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 May 2012 at 6225.

248 Section 104 of the Act.

circumstances"[249], provided always that the person is not subjected to cruel, inhuman or degrading treatment[250].

340 Maritime powers include those expressed in terms that a maritime officer "may": board a vessel[251]; require a person to answer questions or produce records or documents[252]; conduct a search[253]; examine a thing[254]; secure a weapon[255]; seize a weapon[256]; seize any thing that the officer suspects, on reasonable grounds, may afford evidence of a contravention of an Australian law (being any law of the Commonwealth or a State or Territory other than one prescribed by regulation[257])[258]; and seize any thing that the officer suspects, on reasonable grounds, is a border controlled drug or a border controlled plant within the meaning of the serious drug offences provisions of the *Criminal Code* (Cth)[259] or is owned by the Commonwealth or a State or Territory[260].

341 Of central relevance to the present case is that maritime powers include those expressed in terms that a maritime officer "may detain a vessel"[261], that a maritime officer may take the vessel so detained to a port or other place that the officer considers appropriate[262], and, under s 71, that "[a] maritime officer

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249 Section 37(1) of the Act.

250 Section 95 of the Act.

251 Section 52(1) of the Act.

252 Section 57(1) of the Act.

253 Section 59(1) of the Act.

254 Section 63(1) of the Act.

255 Section 66(1) of the Act.

256 Section 67(1)(a) of the Act.

257 Section 8 of the Act ("Australian law").

258 Section 67(1)(b)(i) read with s 8 of the Act ("evidential material").

259 Section 67(1)(b)(ii) of the Act.

260 Section 67(1)(b)(iii) of the Act.

261 Section 69(1) of the Act.

262 Section 69(2)(a) of the Act.

exercising powers in relation to a vessel ... may place ... a person in a particular place on the vessel ... or land".

342 The maritime powers in s 72 apply specifically in relation to a person on a "detained vessel"[263] or "whom a maritime officer reasonably suspects was on a vessel … when it was detained"[264]. Those maritime powers include that a maritime officer "may return the person to the vessel"[265] and "may require the person to remain on the vessel" until it is taken to a port or other place[266].

343 Section 72(4), the focus of present attention, is expressed in terms that a maritime officer:

> "may detain the person and take the person, or cause the person to be taken:
>
> (a) to a place in the migration zone; or
>
> (b) to a place outside the migration zone, including a place outside Australia."

The expression "migration zone" has the same meaning as in the *Migration Act*[267], being the area consisting of the States, the Territories, Australian resource installations and Australian sea installations[268].

344 Section 72(5) expands on the content of s 72(4), providing:

> "For the purposes of taking the person to another place, a maritime officer may within or outside Australia:
>
> (a) place the person on a vessel or aircraft; or
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> (b) restrain the person on a vessel or aircraft; or
>
> (c) remove the person from a vessel or aircraft."

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263 Section 72(1)(a) of the Act.

264 Section 72(1)(b) of the Act.

265 Section 72(2) of the Act.

266 Section 72(3)(a) of the Act.

267 Section 8 of the Act ("migration zone").

268 Section 5(1) of the *Migration Act* ("migration zone").

345 Section 74, the relationship of which with s 72(4) will require further examination, provides:

> "A maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place."

346 If a person is detained and taken to another place under s 72(4), the detention ends at that place[269]. In the meantime, any restraint on the liberty of the person which results from the operation of s 72(4) is not unlawful[270].

347 Authorising officers, who are given capacity to authorise the exercise of maritime powers in relation to a vessel, comprise any of: the most senior maritime officer, or member or special member of the Australian Federal Police, who is in a position to exercise any of the maritime powers in person[271]; the most senior maritime officer on duty in a duly established operations room[272]; the person in command of a Commonwealth ship or Commonwealth aircraft from which the exercise of powers is to be directed or coordinated[273]; and a person appointed as an authorising officer by the Minister[274].

348 The Act provides that an authorising officer "may authorise the exercise of maritime powers in relation to a vessel" in specified circumstances. One of those circumstances is expressed as being "if the officer suspects, on reasonable grounds, that the vessel ... is involved in a contravention of an Australian law"[275]. A vessel is sufficiently "involved in a contravention of a law" for that purpose if "there is some … connection between the vessel … and a contravention, or intended contravention, of the law"[276]. Another circumstance in which an authorising officer may authorise the exercise of maritime powers in relation to a vessel is expressed as being "for the purposes of administering or ensuring

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269 Section 97(1) of the Act.

270 Section 75(1) of the Act.

271 Section 16(1)(a) and (b) of the Act.

272 Section 16(1)(c) of the Act.

273 Section 16(1)(d) of the Act.

274 Section 16(1)(e) of the Act.

275 Section 17(1) of the Act.

276 Section 9(1)(b) of the Act.

compliance with a monitoring law"[277]. A monitoring law is any of a number of specified Commonwealth laws, which include the *Migration Act*, the *Customs Act* 1901 (Cth), the explosives import-export[278] and drug trafficking[279] offence provisions of the *Criminal Code*, the *Fisheries Management Act* 1991 (Cth) and the *Torres Strait Fisheries Act* 1984 (Cth)[280].

349 An authorisation lapses if powers have not been exercised under it within 72 hours after it is given[281]. Otherwise, an authorisation remains in force until the continuous exercise of powers under it ends[282].

350 According to the scheme of the Act, where there is in force in relation to a vessel an authorisation given on the basis of an authorising officer suspecting on reasonable grounds that the vessel is involved in a contravention of an Australian law, a maritime officer may exercise maritime powers in relation to the vessel to "investigate the contravention"[283]. Similarly, where there is in force in relation to a vessel an authorisation given for the purpose of administering or ensuring compliance with a monitoring law, a maritime officer may exercise maritime powers in relation to the vessel to "administer or ensure compliance with the monitoring law"[284].

351 The maritime officer is not, however, limited to exercising maritime powers for those purposes. In either case, the maritime officer may also exercise maritime powers for other specified purposes which include: "to investigate or prevent any contravention of an Australian law that the officer suspects, on reasonable grounds, the vessel ... to be involved in"[285], and "to administer or

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277 Section 18 of the Act.

278 Section 72.13 of the *Criminal Code.*

279 Division 302 of the *Criminal Code.*

280 Section 8 of the Act ("monitoring law").

281 Section 23(1)(b) and (3) of the Act.

282 Section 23(1)(a) and (2) of the Act.

283 Section 31(a) of the Act.

284 Section 31(b) of the Act.

285 Section 32(1)(a) of the Act.

ensure compliance with any monitoring law"[286]. The Explanatory Memorandum accompanying the Bill for the Act in that respect explained[287]:

> "This provision will provide maritime officers acting under an authorisation operational flexibility in the maritime environment. The benefits of maritime officers being able to operate flexibly and quickly in the maritime environment, particularly in circumstances of urgency, outweigh the reduced oversight of maritime officers resulting from not obtaining further authorisations."

352 The Act contains the introductory explanation that "[i]n accordance with international law, the exercise of powers is limited in places outside Australia"[288]. Section 41 imposes particular geographical limitations on the exercise of powers in relation to a foreign vessel which are framed to reflect Australia's rights and obligations under the Law of the Sea Convention[289]. Section 41(1)(c) is specifically framed to reflect Art 33(1) of the Law of the Sea Convention. It provides:

> "This Act does not authorise the exercise of powers in relation to a foreign vessel at a place between Australia and another country unless the powers are exercised:
>
> ...
>
> (c) in the contiguous zone of Australia to:
>
> (i) investigate a contravention of a customs, fiscal, immigration or sanitary law prescribed by the regulations that occurred in Australia; or
>
> (ii) prevent a contravention of such a law occurring in Australia; or
>
> ..."

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286 Section 32(1)(b) of the Act.

287 Australia, Senate, Maritime Powers Bill 2012, Replacement Explanatory Memorandum at 34.

288 Section 7 of the Act.

289 United Nations Convention on the Law of the Sea (1982).

The expression "contiguous zone" as used in the Act has the same meaning as that given by Art 33(2) of the Law of the Sea Convention[290], being a maritime zone that may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. The contiguous zone for Australia is declared by, and its limits are proclaimed under, the *Seas and Submerged Lands Act* 1973 (Cth). The *Migration Act* is amongst the laws which have been prescribed by regulations made under the Act for the purpose of s 41(1)(c)(i) of the Act[291].

Application of the Act

353 The special case records that 35 maritime officers were on board the border protection vessel at the time of interception of the Indian flagged vessel. It was those maritime officers who first boarded the Indian flagged vessel, who then detained the Indian flagged vessel, who went on to detain the plaintiff and other persons on the Indian flagged vessel, who then transferred them to the border protection vessel, and who later kept them in detention on the border protection vessel while attempting to take them to India in the implementation of the policy of the Australian Government and of the decision of the National Security Committee of Cabinet.

354 The special case also records that those events were preceded by the person in command of the border protection vessel, being an authorising officer, authorising the exercise of maritime powers in relation to the Indian flagged vessel on the basis that he suspected, on reasonable grounds, that the vessel was involved in a contravention of the *Migration Act.* It is not in dispute that the suspected contravention was an intended contravention of s 42(1) of the *Migration Act*, which provides that "a non-citizen must not travel to Australia without a visa that is in effect".

355 The special case also records that the place approximately 16 nautical miles off the coast of Christmas Island where the Indian flagged vessel was intercepted and boarded, and where the plaintiff and other persons were initially detained, was within Australia's contiguous zone.

356 The plaintiff does not dispute that maritime officers acted in the lawful exercise of maritime powers in boarding and detaining the vessel. Nor does the plaintiff dispute that maritime officers acted in the lawful exercise of the particular maritime power conferred by s 72(4) of the Act when they initially detained him and when they transferred him to the border protection vessel on 29 June 2014. What is said on the plaintiff's behalf is that the maritime power

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290 Section 8 of the Act ("contiguous zone").

291 Section 8 of the Maritime Powers Regulation 2014 (Cth).

conferred by that provision ceased to authorise his detention at the time the maritime officers commenced their attempt to take him to India on 1 July 2014.

357 The arguments made on the plaintiff's behalf as to why the maritime power conferred by s 72(4) of the Act ceased to authorise his detention at the time the maritime officers commenced their attempt to take him to India divide broadly into two categories. There are those which rely in varying degrees on reading s 72(4) as a decision-making power, which is said to have been invalidly exercised by the maritime officers concerned. There are those which involve reading s 72(4) as subject to an implied limitation, which is said to arise by reference to the international context in which it operates. The arguments are conveniently addressed in that order.

A decision-making power?

358 The word "power" is often used in a statutory setting to connote the conferral of legal authority to act in derogation or alteration of legal rights. The legal authority is often conferred on the express or implied condition that, before so acting, the repository of power must form a particular state of mind or must undertake a particular process of reasoning. Hence, it is common to think of an exercise of statutory power as the product of a statutory decision.

359 The maritime powers conferred on maritime officers under the Act do not fit that standard pattern in all respects. The maritime powers are conferrals of legal authority on maritime officers to do specified acts in derogation of legal rights to liberty and property. Their conferral is on conditions, some of which are express and some of which are implied.

360 It may be accepted to be an implied condition of each maritime power that the maritime officer must act in good faith and that the maritime officer cannot be motivated by considerations which can be judged to be "definitely extraneous to any objects the legislature could have had in view"[292]. The Act also provides for circumstances in which the exercise of one or more maritime powers is subjected to a further express condition that a maritime officer must form a particular state of mind before acting. Section 74 is an example.

361 Otherwise, maritime powers are not subject to any express or implied condition that a maritime officer must form any particular state of mind or must undertake any particular process of reasoning. They are rather powers available to be exercised, where the precondition of authorisation is met, in the implementation by maritime officers of decisions made by others within a chain of command. That chain of command extends ultimately to the Governor-

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292 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1947] HCA 21.

General, by whom the non-statutory executive power of the Commonwealth is formally exercisable by s 61 of the Constitution and who is made titular commander in chief of the navy and military forces by s 68 of the Constitution. That ultimate command is in practice exercised by Ministers appointed by the Governor-General under s 64 of the Constitution and in particular, in accordance with contemporary practice, exercised by those Ministers who collectively form the National Security Committee of Cabinet.

362 The specified purposes for which the Act allows maritime officers to exercise maritime powers are not to be equated with the subjective purposes of the particular maritime officers who exercise particular powers. They are objective purposes, discernible by reference to the totality of the circumstances in which the particular powers are exercised where a particular authorisation is in force.

363 That understanding of the nature of maritime powers is not contrary to the general intention of the Commonwealth Parliament appearing in s 33(2A) of the *Acts Interpretation Act* 1901 (Cth), that the word "may" in a statute which it enacts connotes the conferral of a discretion to do an act or thing. The distinction to which s 33(2A) speaks is between a power and a duty, between what can be done and what must be done. The provision does not speak to the conditions which must exist for a power to be exercised.

364 That understanding of the nature of maritime powers is a complete answer to arguments made on the plaintiff's behalf to the effect that the maritime officers on the border protection vessel, in attempting to take him to India, impermissibly acted under the dictation of the National Security Committee of Cabinet and impermissibly fettered a discretion (to take him to a place in the migration zone) conferred by s 72(4)(a) by implementing that part of the policy of the Australian Government which was to the effect that anyone seeking to enter Australia by boat without a visa would be removed from Australia. For a maritime officer to act on the command of the National Security Committee of Cabinet, and in the implementation of a policy of the Australian Government, is permissible in the exercise by that maritime officer of the maritime power conferred by s 72(4).

365 To the extent that it is argued on behalf of the plaintiff that the policy of the Australian Government was objectively inconsistent with the purposes for which maritime powers were capable of being exercised under the Act in the circumstances of the authorisation, based as it was on the Indian flagged vessel being involved in a suspected contravention of s 42(1) of the *Migration Act*, that argument must be rejected. The *Migration Act*, as has been noted, is both a monitoring law and a law prescribed by the regulations for the purpose of s 41(1)(c)(i) of the Act. A policy to the effect that anyone seeking to enter Australia by boat without a visa in contravention of s 42(1) of the *Migration Act* will be intercepted and removed from Australia is objectively consistent with the permitted purpose of ensuring compliance with s 42(1) of the *Migration Act*. It is

a means to that end. In its application to the exercise of maritime powers in relation to a foreign vessel at a place in the contiguous zone of Australia, the policy is also consistent with the purpose of preventing a contravention of s 42(1) of the *Migration Act* from occurring in Australia. On that basis, it is within s 41(1)(c)(ii) of the Act. The wisdom of the policy is not for a court to judge.

366 That understanding of the nature of maritime powers is also an answer to the primary way in which it is argued on behalf of the plaintiff that the attempt to take him to India breached what is argued to be an implied condition of s 72(4) that he be afforded procedural fairness. According to that argument, an exercise of the maritime power conferred by s 72(4) necessarily involves a maritime officer making two decisions. The first is a decision to detain a person. The second is a separate decision to take that person to a place. The argument accepts that the first of those putative decisions is not conditional on the maritime officer affording the person procedural fairness. The argument nevertheless goes on to posit that nothing in the nature of the power or the context of the Act excludes the implication of procedural fairness as a condition of the valid making of the second putative decision to take the person to a place; procedural fairness not being excluded, the person must be given an opportunity to explain and justify why he or she should or should not be taken to a particular place. The argument breaks down at the first hurdle if no part of the exercise of the maritime power conferred by s 72(4) necessarily involves a maritime officer making any decision.

367 Whilst the conclusion that no part of the exercise of the maritime power conferred by s 72(4) necessarily involves a maritime officer making a decision is sufficient to reject the primary way in which it is argued on behalf of the plaintiff that the validity of the exercise of the maritime power is impliedly conditioned on the observance of procedural fairness, it is not alone sufficient to exclude the implication of procedural fairness. The implication of procedural fairness is the product of a strong common law presumption applicable to any statutory power the exercise of which is capable of having an adverse effect on legally recognised rights or interests[293]. Forcibly taking a person to a place to which the person does not want to go has an obvious immediate adverse effect on that person's right to liberty and may have longer term adverse effects on other rights and interests of the person depending on conditions which exist in the place to which the person is forcibly taken. Procedural fairness as implied in some contexts can have a flexible, chameleon-like, content capable of varying according to the exigencies of the exercise of power between nothingness at one extreme and a full-blown trial at the other[294]. To imply procedural fairness as a condition of the lawful

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293 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 666 [97]; [2012] HCA 31.

294 *Kioa v West* (1985) 159 CLR 550 at 615; [1985] HCA 81.

exercise of a statutory power is therefore not necessarily to require a hearing in every case in which the power might be exercised. Ordinarily, procedural fairness does not require providing a person whose interests are likely to be affected by an exercise of statutory power any greater opportunity to be heard than is reasonable in all the circumstances[295].

368 There are, however, two other factors which tell against the implication of procedural fairness as conditioning the exercise of the power conferred by s 72(4) to any degree and in any circumstances. One is the very nature of a maritime power, conferred as it is exclusively on maritime officers. To pick up on the earlier quoted language of the Explanatory Memorandum, maritime powers are powers which maritime officers must be able to exercise flexibly and quickly in the maritime environment, particularly in circumstances of urgency. Just as it has been recognised that it might conflict with the exercise of statutory responsibilities for the common law to impose a duty of care in the exercise of a statutory power of investigation[296], and that it would be "opposed alike to reason and to policy" for the common law to impose a duty of care in the conduct by military personnel of warlike operations[297], so too it would be incongruous for the common law to imply a duty on a maritime officer to afford procedural fairness as a condition of the exercise of a maritime power. The implication would be tantamount to imposing an obligation on a maritime officer to afford a detained person an opportunity to present a case as to where the person should or should not be taken whenever the circumstances are such that a court might later judge that it would be reasonable for the person to be afforded that opportunity. Taking a person to a place in breach of that obligation (because it would result in a withdrawal of the authority conferred by the power) would result in the maritime officer acting unlawfully and being liable to the person in tort for false imprisonment. The implication would go beyond "supply[ing] the omission of the legislature"[298], to the point of impairing the operation of the legislation.

369 The other factor which tells against the implication of procedural fairness as a condition of the exercise of the maritime power conferred by s 72(4) is the presence of s 74. The prohibition in that section, against a maritime officer placing a person in a place "unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place", has application (amongst other

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295 *Kioa v West* (1985) 159 CLR 550 at 627.

296 *Sullivan v Moody* (2001) 207 CLR 562 at 582 [60]; [2001] HCA 59.

297 *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344 at 361; [1940] HCA 40.

298 *Kioa v West* (1985) 159 CLR 550 at 609, quoting *Cooper v Wandsworth Board of Works* (1863) 14 CB(NS) 180 at 194 [143 ER 414 at 420].

circumstances) to the placing of a person on land by a maritime officer exercising the maritime power conferred by s 71 after the person has been taken to a place in the exercise of the power conferred by s 72(4).

370 The presence of that prohibition in s 74 bears on the content of the maritime power conferred by s 72(4) in a number of cumulative respects. Most importantly, it is s 74 which expressly addresses what will inevitably be a crucial practical issue arising from the forcible taking of a person to a place under s 72(4): the safety of the person in the place to which the person is taken. There is no reason to read its reference to safety narrowly or technically. A person cannot be safe in a place if the person is exposed there to a real risk of harm for any reason, including but not limited to a reason which would give that harm the character of persecution within the meaning of the Refugees Convention.

371 Section 74 addresses that issue of the safety of a person in the place to which the person is forcibly taken at a particular point in time and in a particular way. The point in time is the point of disembarkation at a place, after a person has been taken to that place under s 72(4) and after detention under that provision has come to an end. If the person is not willing to disembark voluntarily at that place, the person can only be made to disembark by the maritime officer exercising the separate maritime power conferred by s 71 forcibly to place the person on land there. Section 74 makes the ability of the maritime officer there and then to place the person on land turn on the maritime officer's satisfaction, on reasonable grounds, as to the safety of a person in that place. To be able to form that prerequisite satisfaction on reasonable grounds, a maritime officer might well need to give personal consideration to the individual circumstances of the person. But that will not necessarily be so in every case. Satisfaction might well be formed on reasonable grounds as a result of the maritime officer obtaining information in other ways, including through reasonable reliance on the opinion or assurance of other persons with apparent knowledge and authority.

372 What the combination of those aspects of the operation of s 74 demonstrates is that the Act operates through the express terms of that section to provide protection to a detained person from risk of harm at the place to which the person is taken under s 72(4). The Act does so by imposing a conditional prohibition on the exercise by a maritime officer of the separate maritime power conferred by s 71 of the Act which (in its relevant operation) applies at the point of exercise of the separate maritime power forcibly to place that person on land at that place. The Act does not do so by impliedly adopting the indirect and preliminary alternative or additional approach of imposing a condition of procedural fairness on the exercise of the maritime power involved in forcibly taking the person to that place under s 72(4).

The international context

373 Three main arguments are put on behalf of the plaintiff concerning limitations said to arise by implication by reference to the international context within which the maritime power conferred by s 72(4) of the Act necessarily falls to be exercised. One relies on that context as giving rise to a general limitation as to the place to which a person can be taken under the provision: it must be a place that the person at the time of taking has a right or permission to enter. The other two rely on limitations drawn indirectly from obligations under international law.

374 The first of those arguments starts with the proposition, deriving from Ch III of the Constitution, that a Commonwealth statute which authorises executive detention must limit the duration of that detention to what is reasonably capable of being seen to be necessary to effectuate an identified statutory purpose which is reasonably capable of being achieved. That proposition is supported by authority[299]. I accept it.

375 From that it is argued to follow that s 72(4) of the Act cannot be read as authorising a maritime officer to detain a person for the purpose of taking that person to a place outside Australia (if the person has no right to enter that place) unless there exists at the time of taking an agreement or arrangement between the Australian Government and the government of that place for that person to be received on arrival. I am unable to see why that should be so.

376 The maritime power conferred by s 72(4) of the Act is expressed to be a composite power to detain a person and to take that person to a place. Detention of a person under the provision triggers a concomitant duty to take the detained person to a place. For continuing detention of the person to fall within the authority conferred by the provision, it must therefore be able to be said at any given time during the period of detention that a maritime officer is at that time performing that duty of taking the person to a place. Like any other statutory duty for which no time for performance is specified, the duty to take, once triggered by detention, must be completed within a reasonable time[300].

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299 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33; [1992] HCA 64; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369-370 [138]-[140]; *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847 at 852-853 [25]-[29]; 312 ALR 537 at 542-544; [2014] HCA 34.

300 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 574; [1949] HCA 65.

377 Section 72(4) makes explicit that the place to which the detained person must be taken in the performance of that duty may be any place, whether inside Australia or outside Australia. The place must be objectively identifiable at the time of taking. But the place need not be a place which is proximate to the place of detention, and it need not be a place with which the detained person has any existing connection.

378 The choice of place from within that range of possible places is left to be made within the chain of command. The choice so made must be consistent with the legislatively identified purposes for which the maritime power conferred by the provision is available to be exercised having regard to the particular authorisation that is in force. The choice so made must also be consistent with any applicable geographical limitation on the exercise of the maritime power. Here the applicable geographical limitation is spelt out in s 41(1)(c) of the Act. Those are significant limitations which arise from the express terms of the Act.

379 To impose by implication a limitation that there be some pre-existing right or permission for the person to enter the chosen place (and for that purpose that an agreement or arrangement between the Australian Government and the government of that place already exist) would be to introduce an additional limitation which finds no anchor in the text of the Act and which is not consonant with the scheme of the Act. Having regard to the myriad circumstances in which, and myriad geographical locations at which, the maritime power to detain and to take might fall to be exercised, it would amount to a significant constraint on operational flexibility.

380 To impose by implication a further limitation that the choice of place could be made only once would be to introduce an even more artificial limitation. It is not a reason for saying that a person is not being taken to a place that the person was previously being taken to another place. To treat choice of place as an irrevocable election would have the potential to frustrate the legislatively identified purposes for which the maritime power is available to be exercised where an authorisation is in force, and would also have the potential to extend the period of detention. Were it to become apparent that (for any reason) the person might not be able to be safely disembarked at an initially chosen place, or were it to become apparent that taking the person to that initially chosen place would be likely to take longer than appeared reasonable, the maritime power would be unworkable were a maritime officer not able to take the person to another place. The duty to take the person to a place would remain. That duty must remain capable of performance. The detained person could not be detained indefinitely and could not be left to drift.

381 Were the duty to take a detained person to a place within a reasonable time to be breached, the limits of the authority conferred by s 72(4) to continue to detain the person would be transgressed. That would be so were the time involved in taking the person to a place to extend beyond a reasonable period. It

would not be so simply by reason of there being no existing right or permission for the person to enter the place to which the person is, or was first, in the process of being taken.

382 The absence of an existing agreement or arrangement between the Australian Government and the government of India for the plaintiff to be received on arrival was not an impediment to maritime officers, having detained the plaintiff with the authority conferred by s 72(4), continuing validly to exercise the authority conferred by that provision in attempting to take the plaintiff to India during that period. The special case discloses no basis for concluding that the attempt initially to take the plaintiff and 156 other persons to India resulted in the overall period of the plaintiff's detention being unreasonable. It could not be said that there was no prospect of the plaintiff being safely disembarked in India. That is where the Indian flagged vessel had come from. Diplomatic negotiations were being conducted between Australia and India. There is no suggestion that they were not being conducted in good faith.

383 The second argument put on behalf of the plaintiff starts with the uncontroversial proposition that the exercise of maritime powers over persons on board a foreign vessel in the Australian contiguous zone is subject to international law. The argument is that the law of India afforded the plaintiff no protection against being returned from India to Sri Lanka and that, in the absence of agreement between the Australian Government and the government of India that he would not be returned to Sri Lanka, his return by Australia to India would have contravened an implied limitation on the maritime power conferred by s 72(4) of the Act because it would have been in breach of Australia's obligations under each of the Refugees Convention, the International Covenant on Civil and Political Rights and the Torture Convention. The Minister and the Commonwealth join issue both as to the content of the law of India and as to the content of Australia's obligations under each of those international instruments.

384 The unbridgeable gap in the argument is the inability to demonstrate how the statutory duty to take a detained person to a place in the exercise of the maritime power conferred by s 72(4) is conditioned on observance of Australia's obligations under any of the Refugees Convention, the International Covenant on Civil and Political Rights, or the Torture Convention.

385 The principle that "a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law"[301] does not assist. Application of that principle to a statute conferring power on an executive officer to take action

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301 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; [1995] HCA 20.

outside Australia requires the language of that statute to be read so far as possible as empowering the officer to act in conformity with applicable international law norms, as understood within the international community[302]. The principle gives rise to no presumption that the statute is to be read as legislatively constraining the officer to act in conformity with international law norms as those norms might be ascertained, interpreted and then enforced by a domestic court[303].

386 Nor does the plaintiff derive assistance from the explanatory statement in the Act that "[i]n accordance with international law, the exercise of powers is limited in places outside Australia". The statement is neither a self-executing statutory limitation nor a statement of unbridled generality. It points in context to the specific geographical limitations which the Act goes on to impose on the exercise of maritime powers and which are designed to reflect Australia's rights and obligations under the Law of the Sea Convention.

387 Nothing in the scheme of the Act supports an affirmative implication of another and more general limitation on the scope of the maritime powers which would make the validity of their exercise conditional on the observance of all applicable international law norms. The international context points rather to wider issues associated with the assertion of Australia's international law rights and compliance with Australia's international law obligations being left to be addressed by the Australian Government from time to time as the exigencies of the occasion might require. It is the Australian Government, more precisely the executive government of the Commonwealth, which is in ultimate command of the exercise of maritime powers (subject to the express and implied limitations which the Act imposes on the maritime officers who must exercise those powers) and it is the Australian Government which is responsible to other nation states in international law for their exercise.

388 The Explanatory Memorandum accompanying the Bill for the Act, although called in aid on behalf of the plaintiff, confirmed the design of the Act as being to empower, as distinct from disable, a maritime officer exercising a maritime power to act in conformity with applicable international law norms. Referring specifically to the Torture Convention and the International Covenant on Civil and Political Rights, the Explanatory Memorandum acknowledged that circumstances might arise in which, "in order to ensure that a maritime officer who has detained a person aboard a vessel acts in accordance with Australia's

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302 Cf *Queensland v The Commonwealth* (1989) 167 CLR 232 at 239-240; [1989] HCA 36.

303 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 [101]; [2003] HCA 6. See also *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189 at 217-218 [56].

non-refoulement obligations, procedures relating to the consideration of refoulement risks would need to be in place"[304]. That reference was to the need to develop operational procedures which would ensure that a maritime officer exercising a maritime power under the Act would act in accordance with obligations imposed on Australia by the identified international instruments. The Explanatory Memorandum contained no suggestion that compliance with those obligations was to be made a condition of a maritime officer validly exercising a maritime power under the Act. The Explanatory Memorandum went on to explain that the Bill for the Act did "not inhibit or impose any restriction on a maritime officer acting in accordance with Australia's non-refoulement obligations"[305].

389 The third of the arguments put on behalf of the plaintiff is a variation of the second. The argument appeals to legislative history to support the proposition that s 72(4) of the Act is conditioned on observance of Australia's obligations at least under the Refugees Convention. The argument starts with the observation that s 72(4) confers a maritime power on maritime officers in substantially identical terms with a power which had previously been conferred on migration officers by a provision of the *Migration Act*[306]. The argument is that, in that earlier incarnation, the power to detain and take was implicitly conditioned on observance of Australia's obligations under the Refugees Convention. That implicit limitation, it is then said, was implicitly carried over when the power was reproduced in s 72(4) of the Act and is confirmed by references in the Act to the *Migration Act* which show that the two are to work together as an integrated scheme.

390 In support of so much of that argument as posits that the earlier incarnation of the power in the *Migration Act* was conditioned on observance of Australia's obligations under the Refugees Convention, reliance is placed by way of analogy on *Plaintiff M61/2010E v The Commonwealth*[307] and *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[308]. It is sufficient to note that at the forefront of the reasoning in both of those cases was the overarching

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304 Australia, Senate, Maritime Powers Bill 2012, Replacement Explanatory Memorandum at 6.

305 Australia, Senate, Maritime Powers Bill 2012, Replacement Explanatory Memorandum at 6.

306 Section 245F(9), which was amended by items 37-39 of Sched 4 to the *Maritime Powers (Consequential Amendments) Act* 2013 (Cth).

307 (2010) 243 CLR 319; [2010] HCA 41.

308 (2011) 244 CLR 144; [2011] HCA 32.

contextual observation that the *Migration Act*, as it then existed, proceeded on the assumption that Australia owed obligations to individuals under the Refugees Convention[309]. That assumption had earlier been described in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*[310] as "false but legislatively required". The textual basis for that assumption was removed by an amendment to s 36 of the *Migration Act* in 2012[311], before the enactment of the Act and the simultaneous consequential amendment of the provision of the *Migration Act* which was the precursor to s 72(4)[312]. There is no basis for considering that the erroneous statutory assumption, having been corrected in the *Migration Act*, was implicitly picked up and carried over to the Act.

391 The result is that the exercise of the maritime power conferred by s 72(4) is not conditioned on observance of Australia's obligations under the Refugees Convention, the International Covenant on Civil and Political Rights or the Torture Convention. That result makes it unnecessary to form a view either as to the content of Indian law or as to the content of the obligations imposed on Australia under those international instruments.

Conclusion

392 At all times between 29 June and 27 July 2014, the plaintiff was lawfully detained under s 72(4) of the Act. The detention of the plaintiff having been so authorised by statute, the plaintiff's claim for damages for wrongful imprisonment cannot succeed.

393 The questions reserved are set out in the reasons for judgment of other members of the Court and need not be repeated. As to those questions, I would answer each of them in the manner proposed by French CJ.

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309 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at 339 [27]; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 189 [90].

310 (2005) 222 CLR 161 at 172 [27]; [2005] HCA 6.

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

312 Items 37-39 of Sched 4 to the *Maritime Powers (Consequential Amendments) Act* 2013 (Cth).

394 KEANE J. The plaintiff is a Sri Lankan national of Tamil ethnicity. While he was a passenger on a vessel travelling from India to Australia, that vessel ("the Indian vessel") was intercepted by an Australian border protection vessel ("the Commonwealth ship") in Australia's contiguous zone[313].

395 The plaintiff did not hold a visa entitling him to enter Australia. Had the plaintiff reached Australia, he would thereby have contravened s 42(1) of the *Migration Act* 1958 (Cth) ("the Migration Act"), which provides that "a non-citizen must not travel to Australia without a visa that is in effect."

396 The Indian vessel was detained by officers of the Commonwealth. While it was detained, it became unseaworthy; and the plaintiff was transferred, along with the other passengers on the Indian vessel, to the Commonwealth ship.

397 The Commonwealth ship sailed towards India pursuant to a decision made by the National Security Committee of Cabinet ("the NSC"), which included the Minister for Immigration and Border Protection ("the Minister"). At this time no assurance was available from India that the plaintiff would be permitted to disembark there. When the Commonwealth ship was near India, the NSC decided that it was not practicable to discharge the plaintiff and his companions in India within a reasonable time. The Commonwealth ship was then instructed to sail to the Australian Territory of the Cocos (Keeling) Islands. Upon the plaintiff's arrival, he was taken into immigration detention.

398 The plaintiff claims to be a refugee within the meaning of Art 1 of the Refugees Convention[314] ("the Convention") on the basis that he has a well-founded fear of persecution in Sri Lanka. He also claims that he is a person in respect of whom Australia owes non-refoulement obligations under Art 33(1) of the Convention, Art 7 of the International Covenant on Civil and Political Rights[315] ("the ICCPR") and Art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[316].

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313 Section 8 of the *Maritime Powers Act* 2013 (Cth) provides that "contiguous zone" has the same meaning as in the United Nations Convention on the Law of the Sea (1982); [1994] ATS 31, namely, a "zone [not extending] beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured" (Art 33).

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

315 [1980] ATS 23.

316 [1989] ATS 21.

399 The plaintiff has brought proceedings in the original jurisdiction of this Court claiming that his detention on the Commonwealth ship while being taken to India was unlawful. He seeks declarations that the defendants acted unlawfully in causing him to be detained and taken to a place or places other than Australia. He also claims damages for false imprisonment. The plaintiff's claim and the defences raised by the defendants assume that the governing law is Australian law.

400 The tort of false imprisonment is committed when a person's freedom of bodily movement is restrained without lawful justification. The person who actually imposes the restraint and the person who directs the other to do so may be liable for the tort[317]. At issue in the present case is whether the defendants' direction to restrain the plaintiff was lawfully justified.

401 The plaintiff contended that his detention aboard the Commonwealth ship while on the voyage to India was unlawful. In this regard, he advanced a number of arguments. First, he argued that, when the decision was made to take him to India, no arrangement had been made with India to receive him. Because he was not being taken to a place where he could be safely disembarked, so he argued, he was not being "taken to a place" within the meaning of s 72(4) of the *Maritime Powers Act* 2013 (Cth) ("the Act").

402 The plaintiff also argued that the defendants, in attempting to take him to India, failed to have proper regard to his claim to refugee status, so that the decision to detain him for the purposes of that voyage was not an exercise of the power conferred by s 72(4) of the Act.

403 It was also said that the maritime officers responsible for detaining him and taking him towards India made their decision to do so at the dictation of the NSC and without exercising an independent discretion as to where he should be taken.

404 Finally, the plaintiff argued that what he called the "taking decision" was void because the maritime officers on the Commonwealth ship failed to afford him procedural fairness in taking him towards India without asking him about his circumstances or wishes.

405 Pursuant to r 27.08.1 of the High Court Rules 2004 (Cth), the parties agreed in stating questions of law for the opinion of the Full Court. The determination of these questions of law depends, in large part, on the effect of s 72 of the Act. It is convenient, therefore, to summarise the material provisions of the Act at this stage. The facts of the case may then be set out in greater detail

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317 *Dickenson v Waters Ltd* (1931) 31 SR (NSW) 593.

in order to facilitate an understanding of the discussion of the arguments agitated by the plaintiff.

The Act

406 Section 3 of the Act provides that it binds the Crown.

407 Section 5 of the Act provides that the "Act does not limit the executive power of the Commonwealth."

408 Section 7 of the Act summarises the statutory scheme relevantly as follows:

> "This Act provides a broad set of enforcement powers for use in, and in relation to, maritime areas. Most of these powers are set out in Part 3.
>
> The powers can be used by maritime officers to give effect to Australian laws and international agreements and decisions.
>
> The following are maritime officers:
>
> (a) Customs officers;
>
> (b) members of the Australian Defence Force;
>
> (c) members of the Australian Federal Police;
>
> (d) other persons appointed by the Minister.
>
> An authorisation is necessary to begin the exercise of powers in relation to a vessel ... The only exceptions are the exercise of ... powers to ensure the safety of persons.
>
> Once an authorisation is in force, maritime officers can exercise powers for a range of purposes.
>
> In accordance with international law, the exercise of powers is limited in places outside Australia."

409 Section 104(1) of the Act defines the expression "maritime officer" to include officers of Customs, members of the Australian Defence Force ("the ADF") and members of the Australian Federal Police ("the AFP").

410 Part 2 of the Act deals with the authorisation of the exercise of so-called "maritime powers". In that regard, s 16(1) of the Act provides, relevantly:

"For the purposes of authorising the exercise of maritime powers in relation to a vessel ... each of the following is an ***authorising officer***:

(a) the most senior maritime officer who is in a position to exercise any of the maritime powers in person;

(b) the most senior member or special member of the Australian Federal Police who is in a position to exercise any of the maritime powers in person;

(c) the most senior maritime officer on duty in a duly established operations room;

(d) the person in command of a Commonwealth ship or Commonwealth aircraft from which the exercise of powers is to be directed or coordinated;

(e) a person appointed in writing by the Minister."

411 It is common ground that the officer who authorised the exercise of maritime powers in relation to the Indian vessel was the commander of the Commonwealth ship and was an "authorising officer" within the meaning of s 16(1)(d) of the Act.

412 Section 18 of the Act provides, relevantly:

"An authorising officer may authorise the exercise of maritime powers in relation to a vessel ... for the purposes of administering or ensuring compliance with a monitoring law."

413 Section 8 of the Act provides that the Migration Act is a "monitoring law". Section 42(1) of the Migration Act provides, subject to exceptions which are not presently relevant, that "a non-citizen must not travel to Australia without a visa that is in effect." It follows that, if the plaintiff had succeeded in travelling to Australia, he would have contravened s 42(1) of the Migration Act. On that basis, the authorisation of the exercise of maritime powers in relation to the Indian vessel was valid under s 18 of the Act.

414 Division 4 of Pt 2 of the Act identifies the purposes for which maritime powers may be exercised. Under s 31, a maritime officer "may exercise maritime powers … in accordance with the authorisation" to "investigate the contravention" of an Australian law or "administer or ensure compliance with the monitoring law". Section 32 empowers a maritime officer to exercise maritime powers to "prevent any contravention of an Australian law that the officer suspects, on reasonable grounds, the vessel … to be involved in", and to "ensure compliance with any monitoring law".

415 Division 5 of Pt 2 of the Act deals with the geographical limits upon the exercise of maritime powers under the Act. Section 41(1) of the Act provides, relevantly:

> "This Act does not authorise the exercise of powers in relation to a foreign vessel at a place between Australia and another country unless the powers are exercised:
>
> ...
>
> (c) in the contiguous zone of Australia to:
>
> (i) investigate a contravention of [an] ... immigration ... law prescribed by the regulations that occurred in Australia; or
>
> (ii) prevent a contravention of such a law occurring in Australia; or
>
> (d) to administer or ensure compliance with a monitoring law that applies to foreign vessels, or persons on foreign vessels, in that place".

416 The Indian vessel was a "foreign vessel" within the meaning of s 41(1).

417 Part 3 of the Act sets out the "maritime powers" that are conferred by the Act. In that regard, s 69 of the Act provides, relevantly:

> "(1) A maritime officer may detain a vessel …
>
> ...
>
> (4) A vessel detained under subsection (1) is a ***detained vessel***."

418 Section 71 provides that a "maritime officer exercising powers in relation to a vessel … may place or keep a person in a particular place on the vessel".

419 The powers that may be exercised in respect of persons on a detained vessel are set out in s 72 of the Act, which provides, in relation to a person who "a maritime officer reasonably suspects was on a vessel … when it was detained":

> "(4) A maritime officer may detain the person and take the person, or cause the person to be taken:
>
> (a) to a place in the migration zone; or

(b) to a place outside the migration zone, including a place outside Australia.

(5) For the purposes of taking the person to another place, a maritime officer may within or outside Australia:

(a) place the person on a vessel ...; or

(b) restrain the person on a vessel ...; or

(c) remove the person from a vessel".

420 Four observations may be made here about the terms of s 72(4). As will be seen, the arguments advanced by the plaintiff proceed upon a different view of the operation of s 72(4).

421 First, s 72(4) confers a power to "detain and take" a person to a place: it does not confer a power to detain which must invariably be exercised separately from, and as a precondition to the exercise of, the power to take the person to a place. The purposes for which the compound power is conferred by s 72(4) are not identified in that provision; they are to be found in ss 31 and 32. To read s 72(4) so that the power to detain must be exercised separately from the removal of a person to a place is to lose sight of the point that the power conferred by s 72(4) is to effect the compulsory movement of a person for the purposes of the Act, including for the purpose of ensuring compliance with the Migration Act.

422 Secondly, the power which s 72(4) confers on a maritime officer operates in relation to a person reasonably suspected of having been on a vessel when it was detained pursuant to s 69(1). The action which s 72(4) authorises is necessarily apt to be contrary to the wishes and interests of the person affected by it. In these circumstances, the principle of statutory construction that a statute said to authorise interference with common law rights must state that intention expressly or by words of necessary intendment[318] is of little assistance. Section 72(4) expressly authorises the detention and movement of a person who was reasonably suspected of having been on a detained vessel. The legislature has directed its attention squarely to the question whether the liberty of such a person should be invaded in those circumstances, and has determined that such a person may be moved against his or her wishes. As was said by this Court in *Australian Securities and Investments Commission v DB Management Pty Ltd*[319]:

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318 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 202-203 [3], 264-265 [171]-[173], 307-311 [307]-[314]; [2013] HCA 39.

319 (2000) 199 CLR 321 at 340 [43]; [2000] HCA 7.

> "It is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve."

423 Thirdly, the authorising officers described in s 16 and maritime officers in ss 7 and 31, respectively, are officers in a chain of command within the Executive government of the Commonwealth. While authorising officers may authorise the exercise of maritime powers, they themselves must act, as it is agreed they acted in this case, under the ultimate direction of the civilian Executive government of the Commonwealth. In contrast with s 69(2) (and s 74), s 72(4) does not condition the exercise of the power which it confers on a maritime officer upon the beliefs or opinions of the maritime officer. Moreover, s 72(4) does not require or authorise a maritime officer to make a decision which, by taking account of any claim by a detainee, is contrary to a direction from a superior in the chain of command. The Executive government of the Commonwealth derives its authority from ss 61 and 64 of the Constitution. The provisions of s 72 of the Act assume the existence of that authority and facilitate its effective exercise; they do not purport to supplant it. Section 72(4) does not deprive the Executive government of its power to give directions to subordinate officers within the chain of command in accordance with its view of the public interest. That said, any constraints upon the exercise of the power conferred by s 72(4) of the Act must be observed in the implementation of a decision by the Executive government, where the facility provided by s 72(4) is the instrument by which that decision is implemented.

424 Fourthly, the authority conferred on a maritime officer by s 72(4) is to "detain the person and take the person, or cause the person to be taken" to a place in the migration zone or outside the migration zone including a place outside Australia. Section 72(4) authorises the compulsory movement of a detainee to one of the places described in s 72(4)(a) and (b). The compulsory movement thus contemplated is from the place of first detention to another place. That other place must be identified for the purpose of moving the detainee: no one suggests that a detainee may be detained on an aimless and indefinite voyage. But the language of s 72(4) does not suggest that the compulsory movement of the detainee to an identified place may begin only if safe disembarkation at that place is assured at the time of the commencement of the voyage. In this regard, it is significant that s 74 expressly contemplates that safe disembarkation may not be possible at the completion of the voyage.

425 Section 74 provides:

> "A maritime officer must not place or keep a person in a place, unless the officer is satisfied, on reasonable grounds, that it is safe for the person to be in that place."

426 Four observations may be made here about the terms of s 74. First, the obligation imposed on a maritime officer by s 74 is in terms which make it clear that the maritime officer must personally satisfy himself or herself that a detained person is disembarked in a place where the detainee will be safe. Whatever the maritime officer's orders from his or her superiors in the Executive government may be, the maritime officer is obliged to satisfy himself or herself, on reasonable grounds, that it is safe for the detained person to disembark at that place. The contrast in this regard between s 72(4) and s 74 tells against the contention that s 72(4) requires a maritime officer to satisfy himself or herself that obedience to superior orders for the taking of a detainee to a place is appropriate before acting upon those orders.

427 Secondly, the temporal aspect to the operation of s 74 is important in that it expressly contemplates that a compulsory movement of a detainee has taken place whereby the detainee has been brought to a place of possible disembarkation. It is at that point in time that the personal obligation of the maritime officer to be satisfied as to the safety of the disembarkation of the detained person arises.

428 Thirdly, the circumstance that s 74 is directed to a time after a compulsory movement of a detainee has occurred indicates that a "taking decision" is not an irreversible decision to be made once and for all. If it is not practicable to land a detainee safely at a place to which the detainee has been moved, another destination must *then* be chosen. That this should be so is hardly surprising given the unpredictability of the circumstances of such voyages.

429 Fourthly, ss 72(4) and 74 observe a distinction between compulsorily moving a detainee to a place and placing the detainee at that place. As already noted, s 74 expressly contemplates that a detainee may have been taken to a place where safe disembarkation is not then practicable. The express provision made by s 74 in relation to the circumstances in which the compulsory movement of a detainee may not be concluded by disembarkation tells against a reading of s 72(4) whereby the power conferred by it is conditioned upon the satisfaction of the maritime officer – or his or her superiors – that a safe disembarkation of the detainee at the initially preferred destination is assured at the beginning of the voyage. If assurance of this kind is not necessary, then, if it is accepted that the power conferred by s 72(4) must be exercised reasonably, the question is whether the belief that safe disembarkation would be possible was reasonably held when the movement commenced. And what is reasonable in this regard is necessarily a question of fact having regard to all the circumstances of the case.

Factual background

430 The parties agreed upon a number of facts to enable the Court to determine the questions of law referred for its determination. The statement of the factual background which follows is taken from those facts.

431 In June 2014, the plaintiff and 156 other persons departed from India on board an Indian flagged vessel (the Indian vessel) that was headed to Australia. Neither the plaintiff, nor any other person on board the Indian vessel, had any legal right to enter Australia.

432 On 29 June 2014, the Indian vessel was intercepted by the Commonwealth ship in Australia's contiguous zone, approximately 16 nautical miles from Christmas Island.

433 The officer in command of the Commonwealth ship formed a reasonable suspicion that the Indian vessel was involved in a contravention of the Migration Act and authorised the exercise of maritime powers in relation to the Indian vessel under the Act. A maritime officer from the Commonwealth ship detained all the persons on board the Indian vessel. The Indian vessel became unseaworthy by reason of a mechanical failure. As a result, all persons from the Indian vessel were transferred to the Commonwealth ship, where they remained under detention.

434 On 1 July 2014, the NSC decided that all persons from the Indian vessel should be taken to India. At the time that decision was made, no agreement or arrangement existed between Australia and India allowing the plaintiff or the other persons from the Indian vessel to be taken to India.

435 The decision of the NSC was made in accordance with a general policy of the Australian government to intercept and remove from Australian waters any person without a visa seeking to enter Australia by boat. The decision was not made on the basis of any adverse information personal to the plaintiff or any other persons from the Indian vessel.

436 The plaintiff was asked questions concerning his personal and biographical details by the maritime officers on the Commonwealth ship; but he was not asked why he left Sri Lanka, why he left India, whether he had claims to be a person in respect of whom Australia owes non-refoulement obligations, or where he wanted to go. The maritime officers on the Commonwealth ship were aware of the policy of the Executive government that anyone seeking to enter Australia by boat without a visa will be intercepted and removed from Australian waters. The plaintiff was not informed of any matter concerning his detention or movement and he was not provided with an opportunity to be heard on any matter concerning his detention or movement.

437 Between 1 July 2014 and about 23 July 2014, maritime officers on the Commonwealth ship implemented the decision of the NSC. In particular, between 1 July 2014 and about 10 July 2014, the Commonwealth ship travelled toward India; and between about 10 July 2014 and about 22 July 2014, the Commonwealth ship waited near India. The duration of the wait was influenced by weather conditions which did not favour disembarkation, the time required to

conduct diplomatic negotiations (including at a ministerial level) between India and Australia to facilitate the disembarkation of the plaintiff and his companions in India, and the steps taken to re-provision the Commonwealth ship.

438 On or about 23 July 2014, the Minister decided that it would not be practicable to complete the process of taking the plaintiff and the other persons from the Indian vessel to India within a reasonable period of time. The reasons for that decision are unexplained in the materials before this Court.

439 The Minister decided that the plaintiff and his companions should be taken to the Territory of the Cocos (Keeling) Islands, within Australia's migration zone.

440 The Commonwealth ship arrived at the Cocos (Keeling) Islands on 27 July 2014. From that point, the plaintiff and the other persons from the Indian vessel were detained pursuant to s 189(3) of the Migration Act.

441 There is no suggestion that the plaintiff had any reason to fear persecution if he had disembarked in India. India is not a party to the Convention. It is, however, a party to the ICCPR. There is no suggestion that the plaintiff was at risk of being returned to Sri Lanka by Indian authorities had he disembarked in India. It is also common ground that at no time did the defendants seek to cause the plaintiff to be taken to Sri Lanka.

The questions for determination

442 Questions 1, 2 and 3 of the Special Case involve several arguments advanced by the plaintiff which may conveniently be considered together under the rubric of whether the plaintiff's detention and taking to India was authorised by law as an exercise of either s 72(4) of the Act or the non-statutory executive power of the Commonwealth.

443 Questions 4 and 5 raise a number of arguments which may be considered together under the rubric of whether the failure to afford the plaintiff an opportunity to be heard in relation to the exercise of power under either s 72(4) of the Act or the non-statutory executive power of the Commonwealth made the decision to take him to India unlawful.

444 Question 6 is concerned with the plaintiff's asserted entitlement to recover damages if the earlier issues are resolved in his favour.

Was the plaintiff's detention authorised under s 72(4) of the Act or the non-statutory executive power of the Commonwealth for the purpose of taking the plaintiff to India?

Detention under the Act

445 The plaintiff argued that it was unlawful for him to be detained for the purpose of being taken to India. The plaintiff's argument was that what he described as the "taking decision" was invalid. That was said to be so for three broad reasons: there was no assurance that the plaintiff would be allowed to disembark in India; there was no legal guarantee of non-refoulement by India; and the maritime officer in command of the Commonwealth ship did not exercise an independent discretion to take the plaintiff to India. These arguments may now be considered in turn.

No assurance of disembarkation in India

446 The plaintiff contended that s 72(4) could not be construed as authorising detention for the purpose of taking a person to a particular place unless permission to discharge the person at that place had first been obtained from the authorities at that place. It was said that because at the time of the decision to take the plaintiff to India it was not certain that it would be practicable to effect his disembarkation there, the "taking decision" was not authorised by s 72(4) of the Act. Because the taking decision was invalid, his detention consequent upon that decision was said to be unlawful. That an attempt was made to obtain India's permission to discharge the plaintiff in India *after* the NSC had decided he should be taken there was said to be beside the point.

447 The plaintiff argued that s 72(4) contemplates that a particular place to which the person is to be taken must be chosen by the maritime officer at the time of making the decision to take. The plaintiff analysed s 72(4) as providing for a two-step process of decision-making on the part of the maritime officer: first, there must be a decision "to detain", and then there must be a decision "to take". On the plaintiff's analysis of s 72(4), the decision "to take" a detainee to a designated destination is one which can only be made once and for all: after a "taking decision" is made, the place chosen by the maritime officer cannot be varied at the officer's discretion.

448 It will be apparent that the understanding of s 72(4) on which the plaintiff's argument depends is substantially at odds with the analysis of s 72(4) set out above. The plaintiff's argument proceeds on the basis that s 72(4) is concerned with "a taking decision" by a maritime officer; but this reasoning is unsound in at least two respects. First, s 72(4) does not confer a power to detain to be exercised independently of the power to take: rather, s 72(4) confers a power compulsorily to move a person who was on a detained vessel from the place of detention to another place. Secondly, the exercise of that power does not

necessarily depend upon a decision by the maritime officer as to whether or not the power should be exercised: the power may be exercised in compliance with an order from a superior.

449 As noted earlier, the parties agreed in the Special Case that the decision that the plaintiff should be taken to India was made by the Minister in consultation with the other members of the NSC, not by the maritime officers on board the Commonwealth ship. The maritime officers who gave effect to the decision in this case were acting within the chain of command on which ss 7 and 16 of the Act are predicated.

450 The decision that the plaintiff should be taken to India was not made under s 72(4); and, just as s 72(4) was not a source of the decision-making power exercised by the Executive government, so it was not a source of constraint on the power of the Executive government by the NSC to decide to give effect to the general policy of the Australian government to intercept and remove from Australian waters any person without a visa seeking to enter Australia by sea. Of course, the implementation of that decision by means of the facility afforded by s 72(4) was subject to such constraints as are expressed by, or necessarily implicit in, s 72(4); but the power conferred by s 72(4) was exercisable for the purposes of ensuring compliance with the Migration Act. Action to prevent a contravention of s 42 of the Migration Act was within the scope of that purpose. The general policy given effect by the decision of the NSC was not at odds with that purpose.

451 The defendants accepted that detention and taking under s 72(4) for the purposes identified in ss 31 and 32 of the Act must be effected within a reasonable time. That concession was rightly made, consistently with the principle of interpretation that ordinarily applies in cases where no period is specified in a statute for doing an act authorised or required by the statute[320].

452 As Dixon J said in *Koon Wing Lau v Calwell*[321]: "What is a reasonable time will depend upon all the facts". The plaintiff's argument is, in effect, that the question of what is a reasonable time for the completion of the compulsory movement of a detainee under s 72(4) is determined in his favour by only two facts: first, that his disembarkation in India was not assured when the decision was made to take him there; and, second, a voyage to Australian territory offered the shortest route to a safe place of disembarkation.

453 To read s 72(4) as requiring that a detainee may only be taken to a place decided upon, once and for all, at the outset of the voyage is to adopt an

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320 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 573-574, 590; [1949] HCA 65.

321 (1949) 80 CLR 533 at 574.

interpretation which not only strains the language in which s 72(4) is cast, and ignores the significance of s 74; it also insists upon a level of inflexibility in the practical exercise of the power which one would be slow to attribute to the legislation. Further, it is not necessary to adopt that interpretation to avoid the unpalatable conclusion that s 72(4) permits indefinite detention. That conclusion is avoided by an appreciation that the power is exercisable for the purposes stated in ss 31 and 32 of the Act, and by the application of the ordinary rule that a power must be exercised within a reasonable time having regard to the purpose for which it was conferred and the circumstances in which it falls to be exercised.

454 What is a reasonable time within which the exercise of the power conferred by s 72(4) is to be completed is not to be determined simply by the adoption of the destination best suited to minimise the duration of the detained person's detention. In particular, s 72(4) does not require that the power to detain and take must be exercised to discharge a detained person at the closest point of land. That would produce the absurd result that the Executive government would have been obliged, through its maritime officers, to facilitate the completion of the plaintiff's travel to Australia – in contravention of s 42 of the Migration Act – merely because that was the shortest distance to land.

455 Once it is accepted that the decision as to the plaintiff's destination was not required to be determined by the location of the nearest point of land, then it can be seen that time spent in attempting to identify another place where the plaintiff might be safely discharged is not necessarily time wasted unreasonably. Moreover, a decision to proceed to India, in the expectation that the plaintiff could safely be discharged there, could be said to be a reasonable attempt to avoid an unnecessary prolongation of time spent by the plaintiff in detention at sea. While an assurance from the Indian authorities had not been given that the plaintiff would be allowed to disembark, there is no suggestion that the NSC had been informed by the Indian authorities that the plaintiff would not be allowed to disembark.

456 It might, in some circumstances, reasonably be thought that the movement of a detainee to a safe place should not be delayed until some form of binding confirmation was provided by the receiving country that the detainee will be accepted by it. It is obviously undesirable that persons should remain at sea for longer than necessary while waiting for confirmation to be forthcoming.

457 In addition, the circumstance that a person comes from a country where the person is unlikely to be persecuted is another consideration that might reasonably warrant exploring the possibility of landing the person in that country in preference to taking the person to Australia. In such circumstances, a reasonable course might involve taking a person toward a place of expected disembarkation while negotiations with the authorities at that place are underway, regardless of the uncertainty as to whether the receiving country will

accept the person. Whether the level of uncertainty is such as to make that course unreasonable may itself raise questions of fact and degree.

458 In these circumstances, the facts agreed in the Special Case do not warrant the conclusion that the period of the plaintiff's detention at sea was unreasonably extended by the decision of the NSC to attempt to place him in India so as to vitiate the lawful authority of the defendants to detain him.

Non-refoulement

459 The plaintiff contended that s 72(4) should be construed to preclude the taking of a person to a place that is not legally obliged to protect the person from persecution on the grounds set out in Art 1 of the Convention. The plaintiff's case was focused upon Art 33(1) of the Convention, by which Australia is obliged not to:

> "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

460 The plaintiff argued that his being taken to India was contrary to Australia's non-refoulement obligations, in that India was not a party to the Convention.

461 Judicial authority in Australia, the United Kingdom and the United States of America suggests that a state's obligations under the Convention arise only with respect to persons who are within that state's territory[322]. The plaintiff does not accept that this body of authority is correct, but it is unnecessary to come to a conclusion on that point. Whatever the true effect of the Convention may be, the terms of the Migration Act are clear.

462 Australian courts are bound to apply Australian statute law "even if that law should violate a rule of international law"[323]. International law does not form

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322 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 15 [42]; [2002] HCA 14; *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1 at 29-31 [15]-[18]; *Sale v Haitian Centers Council Inc* 509 US 155 at 183, 187 (1993).

323 *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, 74, 75, 78, 79, 81; [1945] HCA 3; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204; [1982] HCA 27; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97]; [1998] HCA 22.

part of Australian law until it has been enacted in legislation[324]. In construing an Australian statute, our courts will read "general words … subject to the established rules of international law" unless a contrary intention appears from the statute[325]. In this case, there is no occasion to invoke this principle of statutory construction. The terms of the Act are specific. They leave no doubt as to its operation.

463 The power conferred by s 72(4) is not subject to observance of Art 33(1) of the Convention. As a matter of municipal law, the power to "detain and take" a person to a place is simply not limited in the way for which the plaintiff argues.

464 The plaintiff sought to rely upon the decision of this Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (*Malaysian Declaration Case*)[326]. The *Malaysian Declaration Case* was concerned with the interpretation of the provisions of the Migration Act which authorised officers of the Executive government to take non-citizens who had entered Australia unlawfully to a country in respect of which a declaration had been made by the Minister under s 198A(3) of the Migration Act. A declaration was made in respect of Malaysia, which was not a party to the Convention. The Court's conclusion that Malaysia was not a country capable of being declared resolved a question as to the proper construction of s 198A(3) of the Migration Act.

465 No such question arises in this case. The plaintiff's argument appears to involve the notion that the benefits of the Migration Act, which are available to a non-citizen within Australia, are also available to a non-citizen outside Australia. The terms of the Migration Act do not support that notion[327]. In addition, as will be explained, the power of the Executive under the common law to prevent the entry into Australia of a non-citizen without a visa who is outside Australia, which is the power under which the relevant decision was made in this case, is not abrogated by the Migration Act. That is so, notwithstanding that the non-citizen might wish to make a claim for refugee status under the Migration Act.

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324 *Dietrich v The Queen* (1992) 177 CLR 292 at 305, 360; [1992] HCA 57; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287; [1995] HCA 20; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 480; [1996] HCA 56.

325 *Polites v The Commonwealth* (1945) 70 CLR 60 at 77, 79; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; [1992] HCA 64.

326 (2011) 244 CLR 144; [2011] HCA 32.

327 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 101-102 [260]-[261], 184-187 [506]-[514]; [2012] HCA 46.

466 The plaintiff also placed reliance on this Court's decision in *Plaintiff M61/2010E v The Commonwealth* ("*Plaintiff M61*")[328]. This decision does not assist his argument.

467 *Plaintiff M61* was concerned with the operation of provisions of the Migration Act in respect of non-citizens who were in Australia, albeit unlawfully. This Court held that the exercise of power under s 46A or s 195A of the Migration Act must be procedurally fair and in conformity with the law.

468 As French CJ and Kiefel J observed in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[329], the decision in *Plaintiff M61* applied only to non-citizens within Australia who were able to invoke the provisions of s 46A(2) of the Migration Act. In the present case, what the plaintiff refers to as the "taking decision" was not made under the Migration Act. Whether it was within the executive power of the Commonwealth is a different question.

469 In any event, the circumstance that India is not a party to the Convention does not mean that the plaintiff was at risk of refoulement to Sri Lanka. The issue is a practical one. Australia's non-refoulement obligations under the Convention are satisfied if the country that the plaintiff is taken to offers effective protection as a matter of fact, whether or not that country is party to the same treaties as Australia. In *Patto v Minister for Immigration and Multicultural Affairs*, French J (as his Honour then was) explained[330] the scope of the non-refoulement obligation in the Convention thus:

> "Return of the person to a third country will not contravene Art 33 notwithstanding that the person has no right of residence in that country and that the country is not a party to the Convention, provided that it can be expected, nevertheless, to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason."

470 As noted above, it was not suggested that the plaintiff was at a practical risk of refoulement by India to Sri Lanka.

Acting under dictation?

471 The plaintiff's third contention under this rubric was that his being taken towards India was unlawful because the maritime officers who took him there

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328 (2010) 243 CLR 319; [2010] HCA 41.

329 (2012) 246 CLR 636 at 652 [42]; [2012] HCA 31.

330 *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119 at 131 [37].

were acting pursuant to an unlawful policy or, alternatively, under the dictation of the NSC.

472 The plaintiff argued that the maritime officers who took the plaintiff towards India acted under the dictation of the NSC in that they failed to determine themselves whether taking the plaintiff to India was appropriate. The plaintiff argued that a repository of a power must turn his or her own mind to the exercise of power, rather than act at the direction or behest of another. It was said that the maritime officers who took the plaintiff towards India failed to do that in this case, in that they simply implemented the decision of the NSC without independently considering whether it was appropriate to do so.

473 Once again, the plaintiff's argument is founded upon a misunderstanding of the operation of s 72(4) of the Act. As explained above, a maritime officer who acts in accordance with superior orders is not acting contrary to the requirements of s 72(4). There may be cases where a maritime officer will have no alternative but to make the choice of destination for himself or herself; but that possibility may be put to one side in this case because the maritime officer who had detained the plaintiff was obliged to obey the orders of the Executive government which were communicated through the chain of command. As noted above, in such circumstances the terms of s 72(4), in contrast to the terms of s 74, do not suggest that a maritime officer given such an order is obliged, or even permitted, to exercise an independent discretion in such a case; rather, the terms of s 72(4) facilitate the execution by the maritime officer of orders received through the chain of command.

474 The chain of command in Australia's naval and military forces ensures those forces remain under civilian control. Only the clearest language could require military officers to exercise powers independently of superior civilian orders. Section 72(4) does not exhibit any such intention. As noted above, it contemplates that maritime officers will exercise their powers according to the exigencies of the existing command structure within which maritime officers operate. The observation by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Haskins v The Commonwealth*[331] in relation to members of the ADF is equally applicable to Customs officers and members of the AFP: "Obedience to lawful command is at the heart of a disciplined and effective defence force."

475 For the sake of completeness, it should be noted that the plaintiff advanced an argument in his written submissions that the defendants purported to exercise the powers conferred by s 72(4) for the improper purpose of generally deterring other non-citizens from seeking to enter Australia without a visa. The defendants objected to this argument being entertained by the Court on the basis

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331 (2011) 244 CLR 22 at 47 [67]; [2011] HCA 28.

that it was outside the terms of the Special Case. That objection should be upheld. There is no foundation in the agreed facts for such an argument. In particular, there is no foundation for an inference that the plaintiff was being singled out for harsh treatment to make a point to others.

Detention pursuant to non-statutory executive power

476 Because of the view I have taken in relation to the scope of authority conferred on a maritime officer by s 72(4) of the Act, it is strictly unnecessary to decide the questions raised in relation to the scope of the non-statutory power of the Commonwealth. Nevertheless, it is desirable to note the deficiencies in the plaintiff's arguments on Question 3.

477 The plaintiff advanced three arguments with respect to the exercise of non-statutory executive power to prevent non-citizens from entering Australia. He argued, first, that such a power does not exist; secondly, that if it does, it was abrogated by the Act; and thirdly, that even if it were not abrogated, the power did not permit the plaintiff to be detained for the purpose of being taken to India. These arguments may now be addressed in turn.

A want of executive power

478 The plaintiff contended that the Commonwealth lacks non-statutory executive power to prevent non-citizens entering Australia and to detain them for that purpose. This contention cannot be accepted.

479 It is well-settled that the power of the Executive government under the common law to deny entry into Australia of a non-citizen such as the plaintiff, including by compulsion, is an incident of Australia's sovereign power as a nation. Shortly after the creation of the Commonwealth, in *Robtelmes v Brenan*, Griffith CJ said[332] that "there can be no doubt" as to the correctness of the following observations of the Judicial Committee of the Privy Council in *Attorney-General for Canada v Cain*[333]:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport

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332 *Robtelmes v Brenan* (1906) 4 CLR 395 at 400; [1906] HCA 58. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 170 [21]; [2002] HCA 48; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 154 [402].

333 [1906] AC 542 at 546. See also *Ah Yin v Christie* (1907) 4 CLR 1428 at 1431; [1907] HCA 25.

> from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests".

480 In *Robtelmes v Brenan*, O'Connor J concluded[334] that the Commonwealth Parliament, having the power to exclude aliens, may "leave the question of the mode or place of deportation to the discretion of the government."

481 That the observations of the Privy Council in *Attorney-General for Canada v Cain* remained an authoritative statement of the law was recognised in the judgment of Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration*[335].

482 More recently, in *Ruddock v Vadarlis* French J (as his Honour then was) said[336]:

> "the Executive power of the Commonwealth, absent statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect such exclusion. This does not involve any conclusion about whether the Executive would, in the absence of statutory authority, have a power to expel non-citizens other than as an incident of the power to exclude. The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the *Constitution*, the ability to prevent people not part of the Australia community, from entering."

483 That power was "sufficient to authorise the barring of entry by preventing a vessel from docking at an Australian port and adopting the means necessary to achieve that result."[337] That power necessarily includes the power to do all things necessary to exercise the power, including physically restraining non-citizens from entering Australia[338]. That the position is different in relation to non-citizens who are actually within Australia, as stated in *Chu Kheng Lim v*

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334 *Robtelmes v Brenan* (1906) 4 CLR 395 at 422.

335 (1992) 176 CLR 1 at 29-30.

336 *Ruddock v Vadarlis* (2001) 110 FCR 491 at 543 [193].

337 *Ruddock v Vadarlis* (2001) 110 FCR 491 at 544 [197].

338 *Attorney-General for Canada v Cain* [1906] AC 542 at 546; *Ruddock v Vadarlis* (2001) 110 FCR 491 at 544 [197].

Minister for Immigration[339], does not suggest that *Ruddock v Vadarlis* was wrongly decided.

484 It is settled that the executive power referred to in s 61 of the Constitution includes powers necessary or incidental to the execution and maintenance of the laws of the Commonwealth[340]. Moreover, it is not in doubt that the executive power referred to in s 61 of the Constitution extends to the making of war and peace and the acceptance of obligations between nations even though these matters may involve extra-territorial action by Australian forces[341]. Given that it is clear that the executive power extends thus far, recognition that it extends to the compulsory removal from Australia's contiguous zone of non-citizens who would otherwise enter Australia contrary to the Migration Act can hardly be controversial[342].

485 It is also to be noted that the power exercised by the Executive to instruct maritime officers to take the plaintiff to India was not exercised in respect of a vessel going about its lawful occasions, but in respect of a vessel in Australia's contiguous zone carrying non-citizens who were, as a matter of undisputed fact, seeking to enter Australia contrary to s 42 of the Migration Act. If the Indian vessel had completed its voyage, those operating it would have contravened the provisions of s 229 of the Migration Act (which proscribes the carriage to Australia of non-citizens without visas), and s 233A or s 233C (which proscribe forms of people smuggling). The power of the Executive government was exercised in the pursuit of a policy which accords with the purposes of ss 31 and 32 of the Act to ensure compliance with Australian law by preventing a contravention of s 42 of the Migration Act.

486 It may be accepted, for the sake of argument, that the exercise of executive power to prevent the entry into Australia of a non-citizen without a visa was subject to constraints under public law principles which ensure that

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339 (1992) 176 CLR 1 at 19.

340 *R v Kidman* (1915) 20 CLR 425 at 440-441; [1915] HCA 58; *Barton v The Commonwealth* (1974) 131 CLR 477 at 498; [1974] HCA 20; *Davis v The Commonwealth* (1988) 166 CLR 79 at 109-110; [1988] HCA 63; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 464; [1997] HCA 36; *Williams v The Commonwealth* (2012) 248 CLR 156 at 184 [22], 190 [31]; [2012] HCA 23.

341 *Barton v The Commonwealth* (1974) 131 CLR 477 at 505; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 61-63 [130]-[131], 89 [233]; [2009] HCA 23.

342 Moore, *Act of State in English Law*, (1906) at 93-95.

administrative action is lawful. In particular, it may be accepted that, even though the plaintiff had no right to enter Australia, a decision to exercise a greater level of compulsion than was necessary to prevent his entry into Australia would be unlawful at common law. However, as noted above, the facts agreed in the Special Case do not support the conclusion that the movement of the plaintiff towards India involved the use of force in excess of what was necessary to ensure that the plaintiff did not complete his travel to Australia.

487 The plaintiff had come from India, where there was no suggestion that he was unsafe. No other destination, other than Australia, is identified in the Special Case as a place to which the plaintiff might safely be taken. There was no suggestion that the decision that the plaintiff should be taken to India was made with a view to prolonging his detention beyond that necessary to return him safely to a place other than Australia. There was no suggestion that any attempt to negotiate an agreement with the Indian authorities to permit the plaintiff to disembark in India was so devoid of prospects as to be a waste of time. To decide, in these circumstances, that the best way to shorten the duration of the plaintiff's detention, other than by bringing him directly to Australia, was to take him to India and to seek to negotiate an agreement that he be received at that destination cannot be said to involve use of the power of the Executive government in excess of what was necessary to prevent the plaintiff's entry into Australia.

Has the power been abrogated?

488 The plaintiff contended that, if the Court were to hold that a non-statutory executive power to prevent persons from entering Australia does exist, then that power was abrogated by the Act and the Migration Act, both of which were said to operate as part of a single statutory scheme, displacing any non-statutory executive power with respect to the exercise of power concerning immigration into Australia.

489 In *Ruddock v Vadarlis*, the Full Court of the Federal Court of Australia held[343], by majority, that the Migration Act did not abrogate executive power in this regard. The plaintiff argued that that case was wrongly decided. That argument should be rejected.

490 Powers exercisable by the Executive government under the common law are not limited by international law obligations *not* incorporated into domestic

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343 (2001) 110 FCR 491 at 514 [94], 545 [202].

law[344]. The provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by an Act of the Commonwealth Parliament[345]. In point of constitutional principle, an international treaty made by the Executive government can operate as a source of rights and obligations under our municipal law only if, and to the extent that, it has been enacted by the Parliament. It is only the Parliament that may make and alter our municipal law[346].

491 In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[347], McHugh and Gummow JJ observed that:

> "in the case law a line has been drawn which limits the normative effect of what are unenacted international obligations upon discretionary decision-making under powers conferred by statute and without specification of those obligations … [S]uch obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error."

492 Under the Migration Act, the protection obligations imposed on the Executive government are afforded to non-citizens who are within Australian territory. The authorities suggest that this limitation is consistent with the circumstance that the protection obligations imposed by the Convention concern rights to be afforded to persons within the territory of Contracting States[348].

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344 *R (Bancoult) v Foreign Secretary (No 2)* [2009] AC 453 at 490 [66], 507 [116]; *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337 at 493-494; [1975] HCA 58.

345 *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; [1948] HCA 37; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; [1973] HCA 34; *Simsek v Macphee* (1982) 148 CLR 636 at 641-642; [1982] HCA 7; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 211-212, 224-225; *Kioa v West* (1985) 159 CLR 550 at 570; [1985] HCA 81; *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287, 298, 303-304, 315; *J H Rayner Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500.

346 *Simsek v Macphee* (1982) 148 CLR 636 at 641-642.

347 (2003) 214 CLR 1 at 33 [101]; [2003] HCA 6.

348 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 15 [42]; *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1 at 29-31 [15]-[18]; *Sale v Haitian Centers Council Inc* 509 US 155 at 183, 187 (1993).

However that may be, neither the Act nor the Migration Act limits the power of the Executive government to prevent the entry into Australia of non-citizens without visas who claim to be refugees, and the consequent engagement of the Migration Act. The continued existence of the power of the Executive under the common law to use compulsion to prevent the unauthorised entry into Australia of non-citizens outside Australia is consistent with the provisions of the Migration Act, in particular, s 42.

The power did not permit detention

493 The plaintiff's third contention was that any non-statutory executive power to prevent persons from entering Australia which may still exist does not extend to detaining the plaintiff and taking him to India since the power is subject to the same constraints as apply to the exercise of power under s 72(4) of the Act, and those constraints were infringed.

494 For the reasons already given in relation to s 72(4) of the Act, this contention should be rejected.

495 Finally under this rubric, it should be noted that the sooner the plaintiff was brought into Australia, the sooner he would have been lawfully detained by reason of the operation of s 189 of the Migration Act. On no view of the facts would the plaintiff have been at liberty during the period in which he claims to have been falsely imprisoned. It may well be that the circumstances of the plaintiff's detention at sea were a greater hardship than they would have been had he been detained on land in Australia; yet the fact remains that the plaintiff could not have been at liberty on land in Australia at any time material to his case. The extent to which this difficulty affects the plaintiff's case will be considered in the discussion of Question 6.

Was the plaintiff's detention subject to an obligation to afford the plaintiff procedural fairness?

496 The plaintiff contended that the maritime officers aboard the Commonwealth ship were obliged to give the plaintiff an opportunity to be heard in respect of the exercise of any statutory or (if it exists) non-statutory power to take the plaintiff to a place outside Australia.

Procedural fairness in the exercise of power under the Act

497 The plaintiff's argument under this heading took as its starting point the proposition that the exercise of power under s 72(4) of the Act had the capacity to prejudice his right to liberty. The exercise of that power was said, therefore, to be subject to the provision of procedural fairness. The plaintiff cited the decision

of this Court in *Saeed v Minister for Immigration and Citizenship*, in which French CJ, Gummow, Hayne, Crennan and Kiefel JJ said[349]:

> "In *Annetts v McCann*[350] it was said that it could now be taken as settled that when a statute confers power to destroy or prejudice a person's rights or interests, principles of natural justice regulate the exercise of that power[351]. Brennan J in *Kioa v West*[352] explained that all statutes are construed against a background of common law notions of justice and fairness. His Honour said:
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> > '[W]hen the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that "the justice of the common law will supply the omission of the legislature". The true intention of the legislation is thus ascertained.'"

498 The plaintiff argued that the Act did not express an intention to dispense with the observance of procedural fairness as a condition of the exercise of power under s 72(4). Indeed, the plaintiff asserted that provisions of the Act indicate that observance of procedural fairness was required. The plaintiff submitted that prior to the making of any decision under s 72(4) as to where the plaintiff was to be taken, the defendants were required, at a minimum, to:

(a) notify him that consideration was being given to the possible exercise of power under s 72(4); and

(b) give him an opportunity to be heard as to that proposed exercise of power, including whether he was a person in respect of whom Australia owes non-refoulement obligations and whether his safety might be threatened if taken to a particular place.

499 The plaintiff relied here upon s 74, which, as noted above, requires a maritime officer not to "place" or "keep" a person in a particular place unless he or she is satisfied on reasonable grounds that it is "safe for the person to be in that place". That provision was said to contemplate that maritime officers would allow persons under their control to comment on whether it would be safe to

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349 (2010) 241 CLR 252 at 258 [11]; [2010] HCA 23.

350 (1990) 170 CLR 596; [1990] HCA 57.

351 *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

352 (1985) 159 CLR 550 at 609 (citation omitted).

keep them in a particular place. The position was said to be the same with respect to the exercise of power under s 72(4), which was said to contemplate that maritime officers would allow persons to comment on whether it would be safe to take them to a particular place.

500 The short answer to the plaintiff's arguments under this rubric is that they proceed upon an erroneous understanding of the operation of s 72(4) of the Act in the circumstances of this case. Here, there was no occasion under the statute for a maritime officer to consult with the plaintiff as to the destination to which he was to be compulsorily removed.

501 Once again, the plaintiff's contentions depend upon a misplaced focus on s 72(4) as the source of the decision to take him to India. Section 72(4) confers a power upon maritime officers to be exercised within the context of the chain of command. Even if it might be the case that in some circumstances a maritime officer would be obliged to make a choice under s 72(4) on his or her own initiative, it does not contemplate that such officers may decide whether or not to comply with superior orders, which pre-empt any such initiative.

502 Accordingly, the maritime officers came under no obligation to afford the plaintiff an opportunity to be heard as to his preferred destination. The maritime officers on the Commonwealth ship had no decision-making function in the circumstances of this case, and, even if they did, they had no authority to disobey the orders they had been given. Hence, there was no occasion for them to question the plaintiff about the matters referred to in the Special Case.

503 The plaintiff's argument fails to recognise the significance of the differences between s 72(4) and s 74 adverted to earlier in these reasons. It may be that if the maritime officers on the Commonwealth ship were minded to place the plaintiff on Indian soil, observance of s 74 of the Act would have obliged them to make inquiry of the plaintiff as to whether he would be "safe" in India. But that occasion did not arise.

504 The foregoing is sufficient to dispose of this aspect of the plaintiff's case, but two further difficulties with the plaintiff's argument may be noted briefly. First, a decision to take a detained person to a particular country is likely to involve difficult issues of international relations. It is hardly to be supposed that such a decision would be left to a maritime officer upon hearing where a detainee would like to be taken. Secondly, the plaintiff had no right under Australian law to enter Australia. Section 72(4) operated indifferently to any preference on the part of the plaintiff to come to Australia rather than to some other place.

Procedural fairness in the exercise of non-statutory executive power

505 Once again, because of the view I have taken in relation to the sufficiency of the authority conferred on the maritime officers who dealt with the plaintiff

under s 72(4) of the Act, it is strictly unnecessary to answer Question 5, which raises this issue. It is, however, desirable to note some of the difficulties in the plaintiff's arguments.

506 The plaintiff contended that the exercise of non-statutory executive power was, at least, capable of being conditioned by procedural fairness. The plaintiff argued that the key question therefore was whether there was any reason to conclude that procedural fairness did not apply to the exercise of non-statutory executive power in this case. The plaintiff argued that there was not.

507 The defendants submitted that, if it were accepted that the exercise of prerogative power was amenable to judicial review[353], the power to exclude non-citizens from entering the territory of Australia is unsuited to examination by the courts. This is because it involves consideration of sensitive political and public policy considerations involving matters of defence, border protection and international relations.

508 The exercise of the executive power to prevent entry into Australia is not limited by an implied obligation to afford persons procedural fairness for the same reasons that s 72(4) of the Act is not so limited. As a matter of municipal law, the Commonwealth may exercise its sovereign power to prevent a person who has no right to enter Australia from doing so.

509 The plaintiff, as a non-citizen, had no common law right to enter Australia[354]. Nor was the plaintiff entitled to be brought to Australia given the provisions of s 42 of the Migration Act. These considerations, together with the absence of an occasion for the maritime officers on the Commonwealth ship to give independent consideration to the plaintiff's wishes in relation to his destination, lead to the conclusion that the plaintiff was not denied any common law entitlement to have his wishes considered as a condition of the exercise of the power of the Executive government to order that he be taken to India with a view to his disembarkation there.

Question 6: the entitlement to damages

510 Given that the plaintiff's contentions on the other issues have been rejected, the answer to Question 6 must be "No". It is, therefore, strictly unnecessary to determine the issues raised by Question 6 because the issues of

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353 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 65 [69]; [2005] HCA 50.

354 *Ruddock v Vadarlis* (2001) 110 FCR 491 at 519-521 [109]-[125]; Zines, "The Inherent Executive Power of the Commonwealth", (2005) 16 *Public Law Review* 279 at 293.

liability on which they depend should be resolved against the plaintiff. But since those issues were argued by both sides, and because it is undesirable that the difficulties which confront a claim of this kind should be overlooked, it is desirable to note those difficulties.

511 In *R (Lumba) v Secretary of State for the Home Department*[355] ("*Lumba's Case*"), the Supreme Court of the United Kingdom held, by majority, that where a claimant had been directly and intentionally imprisoned by a public authority empowered to detain the claimant, the public authority bore the burden of showing lawful justification for the imprisonment. The discharge of that burden required the public authority to prove that the power to detain was exercised lawfully; and a failure in that regard meant that, by reason of the breach of principles of public law in relation to the exercise of the power to detain, an action at common law for damages for false imprisonment would be made out[356]. A differently constituted majority held, however, that if the power to detain had been exercised lawfully in accordance with public law principles, it was inevitable that the claimant would have been detained, and the claimant would therefore be entitled to recover only nominal damages[357].

512 In the present case, the issue is as to the duration of lawful detention. If the plaintiff had been brought directly to Australia, he would have been detained immediately under s 189 of the Migration Act. In those circumstances, the plaintiff would have been in lawful detention at all material times, whether the authority for that detention derived from s 72(4) of the Act or s 189 of the Migration Act. In this scenario, there would be no need for a lawfully made executive decision to justify the plaintiff's ongoing detention. The present case differs from *Lumba's Case* in this respect. This difference might well leave the plaintiff in a worse position than the claimant in *Lumba's Case*, so far as a claim for damages for unlawful imprisonment is concerned, in that even nominal damages would not be recoverable.

The questions for determination

513 The questions stated by the parties for determination by the Court should be answered as follows:

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355 [2012] 1 AC 245.

356 *Lumba's Case* [2012] 1 AC 245 at 274-276 [64]-[72], 280 [88]-[89], 303 [175], 308 [195], 312 [207]-[208], 321 [239], 321-322 [242]-[243], 324 [251].

357 *Lumba's Case* [2012] 1 AC 245 at 281-284 [95]-[101], 301 [169], 316 [222], 319 [233], 320 [236], 324-325 [253]-[256], 351 [335], 352 [342], 359-360 [361].

1. Did s 72(4) of the *Maritime Powers Act* authorise a maritime officer to detain the plaintiff for the purpose of taking him, or causing him to be taken, to a place outside Australia, being India:

    (a) whether or not the plaintiff would be entitled by the law applicable in India to the benefit of the non-refoulement obligations;

    (b) in implementation of a decision by the Australian Government that the plaintiff (and others on the Indian vessel) should be taken to India without independent consideration by the maritime officer of whether that should be so;

    (c) whether or not, prior to the commencement of the taking of the plaintiff to India, an agreement or arrangement existed between Australia and India concerning the reception of the plaintiff in India?

    Answer: (a) Section 72(4) of the *Maritime Powers Act* 2013 (Cth) authorised the plaintiff's detention at all times from 1 July 2014 to 27 July 2014. This question is not otherwise answered.

    (b) Yes.

    (c) Yes.

2. Did s 72(4) of the *Maritime Powers Act* authorise a maritime officer to:

    (a) take the steps set out in paragraph 20 in implementing the decision to take the plaintiff to India;

    (b) detain the plaintiff for the purposes of taking the plaintiff to India?

    Answer: (a) Yes.

    (b) Yes.

3. Did the non-statutory executive power of the Commonwealth authorise an officer of the Commonwealth to:

    (a) take the steps set out in paragraph 20 for the purpose of preventing the plaintiff from entering Australia;

    (b) detain the plaintiff for the purposes of taking the plaintiff to India?

    Answer: (a) Unnecessary to answer.

(b) Unnecessary to answer.

4. Was the power under s 72(4) of the *Maritime Powers Act* to take the plaintiff to a place outside Australia, being India, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

   Answer: No.

5. Was any non-statutory executive power of the Commonwealth to take the plaintiff to a place outside Australia, being India, for the purpose of preventing the plaintiff from entering Australia, subject to an obligation to give the plaintiff an opportunity to be heard about the exercise of that power and, if so, was that obligation breached?

   Answer: Unnecessary to answer.

6. Was the detention of the plaintiff unlawful at any, and if so what period, from 1 July 2014 to 27 July 2014 and if so [is he] entitled to claim damages in respect of that detention?

   Answer: No.

7. Who should pay the costs of this Special Case?

   Answer: The plaintiff.

8. What if any order should be made to dispose of the proceeding or for the conduct of the balance (if any) of the proceeding?

   Answer: The proceeding should be dismissed with consequential orders to be determined by a single Justice of this Court.