

PLAINTIFF M68/2015

The Commonwealth executive's capacity to participate in detention in Nauru

Rayner Thwaites, Recent Cases Panel

1. Introduction and overview

Facts relating to the plaintiff

Context – administrative and legal architecture of arrangements on Nauru

Disposition of the case – the centrality of s 198AHA of the Migration Act (retrospective legislation enacted in June 2015 in response to the litigation) – The 6:1 split as to result covering significant differences between the four majority judgments.

2. The relevant principles on executive detention

Two 'interlocking' principles identified with *Chu Kheng Lim* (1992) ("*Lim*"), central to argument in the case (usage of *Lim* commonly overlooks 1st principle).

1. The Executive needs statutory authority to detain.
(Detention by the Commonwealth executive without judicial mandate will be lawful only to the extent that it is justified by positive authority conferred by valid statutory provision).
2. There are limits on *valid* statutory power to detain
(These limits go to the purpose and, with reference to purpose, duration of detention).

3. Two questions at the heart of the case:

1. Do the limits on the Commonwealth's capacity to detain identified in *Lim* apply to the Commonwealth's participation in executive detention in Nauru?
2. If they do, have those limits been complied with?

3.1 Do the principles on executive detention identified with *Lim* apply to the Commonwealth's participation in administrative detention in Nauru?

No – French CJ with Kiefel and Nettle JJ (Joint Judgment) and Keane J.
Lim only applies where the plaintiff is in *the custody of* the Commonwealth executive (Finding: plaintiff not in Commonwealth custody on Nauru).
(caveat – re-emergence of 'reasonably necessary' in these judgments)

Yes – Bell and Gageler JJ.

The relevant constitutional principles apply to the Commonwealth Executive whenever it has "de facto control over the liberty of the person who has been detained, in relation to which actual physical custody is sufficient but not essential." [*I'll argue in support of this proposition, drawing on Gageler J, see 3.1(B)**]

Yes – Gordon J

The Commonwealth was detaining the plaintiff on Nauru, *Lim* not limited to detention 'in custody'.

***3.1(B) - On the need for statutory authority for executive detention (ie the first principle associated with *Lim*)** - Gageler J's reasoning for "an inherent constitutional incapacity of the Executive Government of the Commonwealth to authorize or enforce a deprivation of liberty"

- Responsive to the defendants' (Commonwealth and Transfield) attempt to constrict the scope of the constitutional holding in *Lim*.
- Obiter given statutory response to litigation in June 2015.
- Nonetheless - addresses *Lim*'s application to the Commonwealth's participation and the nature of the nexus bw *Lim* and Commonwealth action (nexus - test for amenability to the writ of habeas corpus as governing application of the relevant constitutional principles on executive detention).
- The importance of "a vision of the structure and function of the Constitution" (Gageler, *AustBarRev*, 2009) - executive power to be understood in the light of constitutional history and the traditions of the common law; in particular the centrality of habeas corpus to our constitutional structure.
- Practical benefits of Gageler J's 'inherent constitutional incapacity' – ensuring legislative and judicial oversight of executive power; accommodation of constitutionalism and democracy.

This leaves the question of *statutory* executive power.

3.2 Were the constitutional limits on the Commonwealth's capacity to detain complied with?

No need to answer – Joint Judgment and Keane J.

The constitutional limits identified with *Lim* did not apply. Commonwealth's legal authority to participate in detention on Nauru supplied by s 198AHA

Yes - Bell and Gageler JJ

s 198AHA valid - detention for the purpose of regional processing meets requirements of *Lim*.

No – Gordon J (so in dissent as to the result)

s 198AHA constitutionally invalid - Cth detention of the plaintiff in Nauru did not fall within recognised exceptions to rule in *Lim*, nor form basis of new exception (ie detention in Nauru not for processing for Aus visa or removal from Australia).

[As between Bell & Gageler JJ, and Gordon J – levels of 'deference'?

All majority judgments rested result on the statutory amendments, with retrospective effect, enacted in response to the litigation (Migration Act 1958, s 198AHA).

4. Selected further issues

- (a) The 'management' of 'act of state' issues in the litigation.
- (b) The need for accountability for practices at the periphery of executive detention.
- (c) Suggestions of a purposive limit? Detention for the purpose of processing - the prospects.
- (d) Retrospective validation of detention?
- (e) Legal sovereignty as marketable asset?
- (f) The goal of the legal time and effort expended on the legal 'architecture' of regional processing?