PLAINTIFF S195-2016 v MINISTER FOR IMMIGRATION AND BORDER PROTECTION

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Plaintiff S195-2016 v Minister for Immigration and Border Protection[1] (*Plaintiff S195*) is a very short decision by the High Court, but one which addresses an interesting question: does Commonwealth executive power extend to actions which breach the laws of a foreign country? In *Plaintiff S195* the relevant Commonwealth executive power was to enter into arrangements with Papua New Guinea (PNG) in relation to people who were 'unauthorised maritime arrivals' in Australia and transferred there but whose treatment was held by the PNG Supreme Court to be in breach of the right in the PNG Constitution not to be deprived of personal liberty. Iceberg-like, there are a number of interesting issues below the surface of this decision which are worth noting.

Executive power

Administrative law is full of cases concerning the exercise of highly prescribed statutory powers. Often less considered is the exercise of general executive power, at the Commonwealth level under s 61 of the *Australian Constitution*, where there is no, or little, legislative source.

The usual taxonomy of types of executive powers are set out in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*[2] (*Plaintiff M68*) concerning the arrangements with Nauru for people who were 'unauthorised maritime arrivals' in Australia and transferred there, which is in a sense a sibling to *Plaintiff S195*. There, Gageler J drew on the categorisation offered by Brennan J in *Davis v Commonwealth*[3] of:

(1) statutory (non-prerogative) power or capacity;
(2) prerogative (non-statutory) power or capacity, generally unique to the executive government; and
(3) capacity which is neither statutory nor prerogative, but a bare capacity or permission to engage in actions and transactions, and is typically shared with ordinary citizens subject to the same law that applies to those citizens.[4]

There are a number of issues about this terminology and, while there is not time to dwell on these, I mention one because it was the subject of discussion at the seminar at which this talk was given. The reference to prerogative non-statutory powers nonetheless needs to recognise that the source of these powers at the Commonwealth level is generally seen to be s 61 of the *Constitution*, but the source is not legislation made under the *Constitution*. Similarly, for the Australian Capital Territory, where the seminar was held, the source is s 37 of the *Australian Capital Territory (Self-Government) Act 1998* (Cth).

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In recent years, issues concerning non-statutory executive power have arisen in a number of cases — in particular, concerning what the prerogative non-statutory powers and capacities extend to, which executive acts require legislation, and how these powers and capacities relate to legislation. Although not sourced in legislation, these powers sit within a complex constitutional and legal landscape which can be relevant to them. These laws can be Commonwealth, state or territory, international or, the focus of this case, those of another country.

Some of the areas in which these issues have arisen are:

- Commonwealth spending and contracting, in *Williams v Commonwealth*[5] in 2012 and *Williams v Commonwealth [No 2]*[6] in 2014;
- withdrawing from treaties, in the decision concerning 'Brexit' in the United Kingdom in 2017;[7]
- Commonwealth actions in stopping people coming to Australia, and taking them elsewhere, in *Ruddock v Vardalis*[8] (Tampa case) in 2001 (concerning non-statutory power) and *CPCF v Minister for Immigration and Border Protection*[9] in 2015 (concerning principally statutory power); and
- the Commonwealth's involvement in regional processing centres overseas, in Nauru in *Plaintiff M68* (which began as the exercise of a non-statutory power but which was then supported by retrospective legislation), and in Manus, PNG, in *Plaintiff S195* — the case that is the subject of this article.

These cases concerned contentious political issues and underlying constitutional tensions. They, and the developments they consider, demonstrate a desire by executive governments to exercise non-statutory executive power quickly and without recourse to legislative processes. They also demonstrate some concern by the courts in relation to the exercise of such powers and, in particular, the articulation of a requirement for legislation in some cases. They also demonstrate a recognition by executive governments of these judicial concerns and requirements and of the difficulties in exercising such non-statutory powers arising from uncertainties as to their reach and the absence of a clear statutory framework.

Plaintiff S195 concerned the Commonwealth's role in removing people who were 'unauthorised maritime arrivals' in Australia to Manus Island in PNG and the treatment of those people there. As the High Court noted, this involved the exercise of both non-statutory and statutory executive powers by the Commonwealth:

- Non-statutory powers were involved in the entry by the Commonwealth into a Regional Resettlement Arrangement with PNG; a related memorandum of understanding in relation to the transfer of persons to PNG and their assessment and settlement in PNG; and a related administrative arrangements document.[10]
- Statutory powers were also involved under ss 198AB (designation of regional processing country) and 198AD (taking unauthorised maritime arrivals to a regional processing country) of the *Migration Act 1958* (Cth).[11]
- Some statutory powers were retrospectively conferred by s 198AHA of the Migration Act in relation to entry by the Commonwealth into the Broadspectrum contract. Section 198AHA was added to the Migration Act in 2015, with effect from August 2012, and was the primary basis of the consideration in *Plaintiff M68*, the case concerning arrangements in Nauru. It provided for the Commonwealth to take action in relation to regional processing functions, including exercising restraint over the liberty of a person.[12]

PNG Constitution

Plaintiff S195 began as a broad challenge to Australian Government activities in relation to the Manus regional processing facility but was narrowed to a consideration of the effect of the decision of the PNG Supreme Court in *Namah v Pato*[13] (*Namah*).

Unlike the *Australian Constitution*, the PNG Constitution has an extensive 'bill of rights'. Section 42 provides that 'no person shall be deprived of his personal liberty' except in specified circumstances. In *Namah* the Court held that the Manus regional processing centre deprived people of their personal liberty.[14] Section 42 contains a range of exceptions. The most relevant was paragraph (g), which allows deprivation of liberty 'for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes'. The PNG Supreme Court held in *Namah* that people taken to PNG from Australia and detained there did not fall within this exception.[15]

A new exception, paragraph (ga), had purportedly been added recently to s 42 of the PNG Constitution. That paragraph allowed deprivation of liberty 'for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country … that the Minister … in his absolute discretion, approves'. This had passed through the general constitutional amendment process by Parliament (in ss 13 and 14 of the PNG Constitution). But it had not been made in accordance with the constitutional requirements for a law that qualified a 'qualified right', which included s 42 (in ss 38 and 39). The Court in *Namah* held that these additional requirements applied to a law to amend the PNG Constitution by adding a further exception to the right to personal liberty in s 42, resulting in a significant further entrenchment of this and other such rights' provisions in the Constitution, and the PNG Supreme Court held therefore that this amendment was invalid or not effective.[16]

It is interesting to note that the Court in *Namah* held that, even if paragraph (ga) of s 42 of the PNG Constitution had operated, it would not itself empower executive action. Rather, some statutory basis was needed. This seems to arise from the nature of s 42(ga), which simply sets out an allowable exception to the right, and perhaps from the general principle that support for such a coercive executive power requires legislation.[17]

The PNG Supreme Court in *Namah* ordered that both the Australian Government, which was not a party to the proceedings, and the Papua New Guinea Government 'shall forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention'.[18] Such actions were taken, requiring the movement of the relevant people to facilities which did not involve such detention.

It is interesting to note that, whilst the *Australian Constitution* does not have a 'bill of rights' or express provision protecting personal liberty, it contains principles which perform a similar function. Non-statutory executive power in times of peace does not support detention; there is a need for a head of power for any Commonwealth legislation doing so; and any such statutory power is limited by judicial power principles as discussed in in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[19] (*Lim*), which allowed laws providing for executive detention related to the expulsion and deportation of aliens. This principle is in similar, but not identical, terms to the s 42(g) exception in the PNG Constitution. Indeed, Higgins J in *Namah* referred to the Australian High Court decision of *S4/2014 v Minister for Immigration and Border Protection*[20] in discussing the migration-related exception to the right to personal liberty in s 42(g) of the PNG Constitution.[21] Despite their structural differences, both the PNG Constitution and the

Australian Constitution allow some form of detention for the purposes of preventing unlawful entry and effecting lawful removal of a person from the country, but, as the Court in *Namah* discussed, the treatment of persons considered there was for a different purpose.

Does the PNG Constitution limit Commonwealth executive power?

In a single judgment by Kiefel CJ and Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ, the High Court held in *Plaintiff S195* that none of the actions challenged were beyond Commonwealth executive power because of *Namah*. The Court noted that the plaintiff could marshal no authority to support its case that the actions were beyond Commonwealth power because of the PNG Supreme Court decision.[22]

And the Court noted that the plaintiff made no attempt to anchor its argument to the text or structure of the *Constitution*. The Court said that the course of authority 'leaves no room for doubt that neither the legislative nor executive power of the Commonwealth is constitutionally limited by any need to conform to the domestic law of another country'.[23] This puts such foreign laws in the same position as international law — indeed, the decision noted *AMS v AIF*,[24] where it was stated that the '*Constitution* and its provisions are not to be construed as subject to an implication said to be derived from international law'.[25]

Are Commonwealth activities in PNG otherwise regulated?

Notwithstanding the ease with which the High Court held that PNG law did not take Commonwealth government actions outside its non-statutory and statutory executive power, it is a different question whether the Commonwealth government is subject to the law of PNG when it is operating there. The High Court stated that whether action taken by a Commonwealth officer in another country complies with the domestic law of that country or with international law may have legal consequences.[26]

But the High Court noted that the arrangements entered into contained provisions specifically providing for their implementation to comply with PNG law.[27] Further, the definition of 'arrangement' in s 198AHA(3) of the Migration Act (see s 198AHA(5)) included something which is not legally binding, and s 198AHA(3) stated that the provision is intended to ensure that the Commonwealth has capacity and authority to take action, without otherwise affecting the lawfulness of that action.[28] That is, in neither the arrangements nor the legislative provisions concerning them was there any suggestion that they were not to be subject to the law of PNG, even if that was a possibility.

The decision in *Namah* assumed, not surprisingly, that the PNG Government was subject to PNG law and, in particular, s 42 of its Constitution. It also assumed that the Commonwealth government was subject to s 42 and participated in the detention, noting that the Commonwealth was not a party to the proceedings and there was no consideration by the PNG Supreme Court of foreign state immunity issues.

It is also a different question whether the Commonwealth government is subject to the *Australian Constitution* and Australian laws when operating in PNG. Leaving aside the executive power issue, there was no broad challenge on this basis in *Plaintiff S195* but significant consideration in *Plaintiff M68* — the case concerning the Nauru arrangements. There it was held that any statutory power — relevantly, s 198AHA of the Migration Act — needed to be within Commonwealth constitutional power and the judicial power principles set out in *Lim*. The majority of the Court held that it was — in particular, because s 198AHA was supported by the aliens power[29] and detention in Nauru was under the laws of Nauru administered by the executive government of Nauru, to which the *Lim* principle concerning custody by the Commonwealth did not apply.[30] In *Plaintiff S195* the Court noted this earlier

finding upholding the constitutional validity of s 198AHA, and the even earlier finding upholding ss 198AB and 198AD,[31] and did not reconsider these decisions.[32]

In relation to non-statutory executive power, only Gageler J in the majority in *Plaintiff M68* dealt with this in any detail. He held that procurement by the Commonwealth of detention on Nauru, which is how he characterised the situation, was beyond Commonwealth executive power unless authorised by legislation.[33]

Justice Gageler in *Plaintiff M68* also addressed related questions in more detail and held that the lawfulness of actions under Australian law does not determine whether the action falls within executive power but that the existence of executive power has no effect on the civil or criminal liability of the government under Australian law.[34] In *Plaintiff S195* the Court also noted that whether action taken by a Commonwealth officer in another country complies with Australian law applying extra-territorially may have legal consequences and that, in particular, some express or implied limitation imposed by a law enacted by Parliament may have a bearing on 'statutory authority or executive capacity'.[35]

Working out the effect of Australian laws on the exercise of Commonwealth executive power can raise a range of issues. If it is a Commonwealth law, it is necessary to assess the law's operation and relationship to the relevant executive power, including whether the law intends to bind the Commonwealth government, whether it affects or extinguishes the relevant executive power, and whether it intends to operate overseas. If it is a state law then, in addition to assessing the law's operation and whether it intends to bind the Commonwealth government and to operate overseas, it is also necessary to consider the operation of s 109 of the *Constitution* and principles of intergovernmental immunity.

Therefore, whilst it is now clear that a foreign law does not of itself limit Commonwealth executive power, it is these related issues as to the operation of foreign, Commonwealth and state law on the exercise of Commonwealth executive power which are often difficult to resolve.

Endnotes

1 [2017] HCA 31 (17 August 2017).
2 (2016) 257 CLR 42, [132], within a discussion at [129]–[136].
3 (1988) 166 CLR 79, 108.
4 *Plaintiff M68* (2016) 257 CLR 42, [132], [135].
5 (2012) 248 CLR 156.
6 (2014) 252 CLR 416.
7 *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; (2017) 2 WLR 583.
8 *Ruddock v Vardalis* (2001) 110 FCR 491.
9 (2015) 255 CLR 514.
10 [2017] HCA 31, [14].
11 Ibid [15].
12 Ibid [16].
13 (2016) SC 149. The *Namah* decision includes a judgment by Higgins J (at [75]–[119]); a judgment by Kandakasi J (at [3] and [5]–[74]), which agrees with the judgment of Higgins J but expresses full reasoning; and judgments by Salika DCJ (at [1]), Sakora J (at [2]) and Sawong J (at [4]), which all agree with the reasons of Kandakasi J and Higgins J.
14 Ibid [74] (Kandakasi J), [80] (Higgins J).
15 Ibid [39], [74] (Kandakasi J), [80] (Higgins J).
16 Ibid [54], [74] (Kandakasi J), [97], [119] (Higgins J).
17 Ibid [56] (Kandakasi J), [98] (Higgins J).
18 Ibid [74] (Kandakasi J).
19 (1992) 176 CLR 1.
20 (2014) 253 CLR 219.
21 (2016) SC 149, [80]–[81].

22 [2017] HCA 31, [20]. A comment by Murphy J in *A v Hayden* (1984) 156 CLR 532, 562 was not referred to by the Court.
23 Ibid.
24 (1999) 199 CLR 160, [50].
25 It has been accepted that a statute of the Commonwealth or of a state is to be interpreted and applied, so far as its language permits, so that it is in conformity and not in conflict with established rules of international law: see *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363.
26 [2017] HCA 31, [20].
27 [2017] HCA 31, [7], [8], [9], [10], [25]. The High Court also stated that the PNG Supreme Court did not hold that the entry by PNG into the arrangements was beyond its power, noting that the arrangements provided for compliance with PNG law ([25]).
28 Ibid [26].
29 (2016) 257 CLR 42, [42] (French CJ, Kiefel and Nettle JJ).
30 Ibid [34]–[41] (French CJ, Kiefel and Nettle JJ).
31 *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28.
32 [2017] HCA 31, [2].
33 (2016) 257 CLR 42, [175].
34 Ibid [181].
35 [2017] HCA 31, [20]–[21].