Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship [2011] HCA 32 (31 August 2011)

NAOMI HART*

I Introduction

On 25 July 2011, the Australian Government entered into an arrangement ('the Arrangement') with the Government of Malaysia. Under the Arrangement, Australia would transfer to Malaysia 800 asylum seekers who had arrived in Australia without visas. Their claims for refugee status would not be assessed prior to their transfer; rather, their claims would be processed in Malaysia by the United Nations High Commissioner for Refugees (UNHCR).[1] In exchange, Australia committed to resettling 4000 refugees currently residing in Malaysia over four years.[2] The Arrangement provided that all transferees would be treated 'with dignity and respect and in accordance with human rights standards', and that '[s]pecial procedures [would] be developed … to deal with the special needs of vulnerable cases including unaccompanied minors'. Transferees found to be refugees would 'be referred to resettlement countries pursuant to the UNHCR's normal processes and criteria', while those assessed as not entitled to refugee status may be forcibly returned to their countries of origin (though Malaysia would provide Australia with the opportunity to consider protection claims under human rights treaties other than the *Refugees Convention*[3]). The Arrangement represented a 'record of … intentions and political commitments' but was not legally binding on either party.[4]

On 7 August 2011, an officer of the Department of Immigration and Citizenship (DIAC) determined that the plaintiffs in this case, M70 and M106, should be taken to Malaysia pursuant to the Arrangement.[5] These plaintiffs were citizens of Afghanistan who, travelling by boat from Indonesia, arrived unlawfully at the Australian territory of Christmas Island on 4 August 2011. M70 was an adult who had travelled through Pakistan, Thailand, Malaysia and Indonesia. M106 was a minor who arrived in Australia unaccompanied by a parent or guardian, having travelled through Dubai, Thailand, Malaysia and Indonesia.[6] The only impediment to the removal of M106 was the

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* Naomi Hart graduated from the University of Sydney with a Bachelor of Arts (Hons I, Medal) and Bachelor of Laws (Hons I). She has completed internships at the Sydney Centre for International Law and Australian Human Rights Commission. She has recently returned from an internship with the Capital Post-Conviction Project of Louisiana in New Orleans, where she worked on defending inmates on death row.

1 *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011) [8] (French CJ), [71] (Gummow, Hayne, Crennan and Bell JJ) ('*Plaintiff M70*').

2 Ibid [19] (French CJ).

3 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugees Convention*').

4 Ibid [22] (French CJ), [101]–[103] (Gummow, Hayne, Crennan and Bell JJ).

5 Ibid [19] (French CJ), [70] (Gummow, Hayne, Crennan and Bell JJ).

6 Ibid [5] (French CJ), [70] (Gummow, Hayne, Crennan and Bell JJ).

establishment in Malaysia of relevant support services for unaccompanied minors, as required by the Arrangement.[7]

The plaintiffs commenced proceedings on 7 August 2011, seeking an injunction and prohibition restraining the Minister and the Commonwealth from taking any steps to remove them from Australia.[8] The following day, Hayne J granted such an interlocutory order and referred the matter to a hearing before the full High Court.[9]

Both plaintiffs claimed to be Shi'a Muslims.[10] Each of them also claimed to have a well-founded fear of persecution in Afghanistan on grounds that would render them refugees, activating Australia's protection obligations under the *Refugees Convention*.[11] One such obligation is that of *non-refoulement*, enshrined in article 33(1) of the *Refugees Convention*, under which a State may not '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 Court recognised that this article 'not only applies to refugees whether lawfully or unlawfully within the host territory, but also embraces all measures of return, including extradition, to a country where their lives or freedom would be threatened'.[12] Most obviously, States are prohibited from returning refugees to their country of origin. They are also prohibited from removing refugees to third countries where they may face the same persecution, or where that third country may return them to their home country. In this case, both plaintiffs claimed that they feared persecution on grounds of their religion in Malaysia.[13] However, a refugee may be removed to a 'safe third country' — a State in which there is no danger that the refugee might be sent from there to a territory where he or she will be at risk.[14]

As neither plaintiff held an Australian visa, they were 'unlawful non-citizens' under ss 5(1) and 14 of the *Migration Act 1958* (Cth). Following the passage of the *Migration Amendment (Excision from the Migration Zone) Act 2001* (Cth) ('*2001 Excision Act*'), Christmas Island is defined as an 'excised offshore place'.[15] Having entered Australia at an excised offshore place, the plaintiffs were 'offshore entry persons'.[16] Under s 189(3) of the *Migration Act 1958* (Cth), an officer of the Commonwealth who 'knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen … may detain the person'. Under this discretionary power, both plaintiffs were detained upon their arrival at Christmas Island.

The *2001 Excision Act* also introduced s 46A of the *Migration Act 1958* (Cth), which prohibits offshore entry persons from applying for a visa unless the Minister for

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7 Ibid [8] (French CJ).
8 Ibid [14] (French CJ).
9 Ibid [15] (French CJ).
10 Ibid [8] (French CJ).
11 Ibid [3] (French CJ).
12 Ibid [4] (French CJ), citing *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, 171 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).
13 *Plaintiff M70* [2011] HCA 32 (31 August 2011) [203] (Kiefel J).
14 Ibid [4] (French CJ).
15 *Migration Act 1958* (Cth) s 5(1).
16 *Migration Act 1958* (Cth) s 5(1).

Immigration and Citizenship decides that it is in the public interest to allow them to do so. The Minister is not duty-bound to consider whether to make such an allowance.[17]

The proposed transfers of asylum seekers — including the plaintiffs in this case — to Malaysia were to be carried out in purported reliance on certain provisions of the *Migration Act 1958* (Cth). Section 198(2) imposes a duty to remove from Australia as soon as reasonably possible an unlawful non-citizen who is in detention under s 189(3). Section 198A specifies to which countries asylum seekers may be removed. The High Court had previously found that this section reflects 'a legislative intention to adhere to that understanding of Australia's obligations under the Refugees Convention and the Refugees Protocol that informed other provisions made by the Act'.[18] A particular country becomes a permissible country for transfer if the Minister declares in writing that the country:

> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
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> (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
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> (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
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> (iv) meets relevant human rights standards in providing that protection.[19]

On 25 July 2011, the Minister had made such a declaration in relation to Malaysia. Soon after, he determined that the plaintiffs would be removed to Malaysia under the Arrangement.

II The decision

The Court decided by a 6:1 majority (Heydon J dissenting) that the planned removal of the plaintiffs — and any other asylum seekers — to Malaysia was unlawful under the *Migration Act 1958* (Cth). The judges considered, first, whether s 198A provided the only power under which the Minister could effect a removal, or whether he could also rely on the power of removal contained in s 198(2). Second, the Court assessed whether the Minister's declaration under s 198A had been valid, or had been tainted by jurisdictional error. For the majority, the case was decided on these two issues, but some judges addressed alternative arguments regarding the Minister's guardianship of M106, an unaccompanied minor.

A The power to effect a removal

The plaintiffs contended that s 198A provided the only source of power under which they could be removed to Malaysia. The result of this submission was that any removal was conditional on the Minister making a valid declaration under s 198A(3).[20]

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17 *Migration Act 1958* (Cth) s 46A(7).

18 *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69/2010 v Commonwealth of Australia* (2010) 272 ALR 14, 23. See also *Plaintiff M70* [2011] HCA 32 (31 August 2011) [212] (Kiefel J).

19 *Migration Act 1958* (Cth) s 198A(3).

20 *Plaintiff M70* [2011] HCA 32 (31 August 2011) [16], [41] (French CJ), [80] (Gummow, Hayne, Crennan and Bell JJ), [231] (Kiefel J).

In contrast, the Commonwealth submitted that, as an alternative to relying on s 198A, it had the power to remove the plaintiffs under s 198(2) of the same statute. The exercise of this power did not rely on any declaration that the country to which an unlawful non-citizen was being removed satisfied any criteria as to 'safety'.[21]

The majority accepted the plaintiffs' submission on this issue. The joint judgment (written by Gummow, Hayne, Crennan and Bell JJ) considered that the relevant question was whether ss 198(2) and 198A conferred only one power to take an action. If that question was answered affirmatively, then a power stated more generally must be limited by the restrictions placed on the same power in another section.[22]

These judges considered it crucial that both ss 198(2) and 198A(1) deal with powers of removal. Section 198(2) states this power broadly. Section 198A, however, provides more restrictions on a removal — that the country to which they are removed must have been the subject of a valid declaration under s 198A(3).[23] They found that s 198A was specifically designed to protect those to whom Australia had not yet determined whether it owed protection obligations. They decided that s 198(2) should not be read as a power to remove a person whose claim for protection has not yet been assessed to any country willing to receive that person, as such a reading 'would give s 198A(1) no separate work to do'.[24]

French CJ reached a similar conclusion. He found that 'the mandatory detention and removal scheme ... revolves, as counsel for the plaintiffs put it, around processing their claims through the visa system and removing those who are unsuccessful'.[25] Section 198 was designed to provide a mechanism for removing those whose claims to protection had failed.[26] On the other hand, the purpose of s 198A is to govern the removal of those whose protection claims are not to be assessed in Australia.[27] Thus, '[a]bsent the possibility of removal to a declared country, [a] person cannot be removed from Australia before there has been an assessment of his or her claim to be a refugee'.[28]

Similarly, Kiefel J found that a power stated generally is subject to restrictions placed on the same power defined elsewhere more narrowly.[29] Section 198A restricted the power of removal, where an assessment of refugee status had not occurred in Australia, to safe third countries where such an assessment could take place instead.[30] The general power to remove in s 198(2) was to be restricted in these circumstances.

Heydon J, in dissent, argued that although the *Refugees Convention* may impose an international legal obligation on Australia to refrain from removing asylum seekers to third countries without their protection claims being assessed (unless that third country is considered 'safe'), such an obligation is not automatically binding on Australia

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21 Ibid [41] (French CJ), [81] (Gummow, Hayne, Crennan and Bell JJ), [232] (Kiefel J).

22 Ibid [84] (Gummow, Hayne, Crennan and Bell JJ), citing *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 589.

23 *Plaintiff M70* [2011] HCA 32 (31 August 2011) [88]–[89] (Gummow, Hayne, Crennan and Bell JJ).

24 Ibid [97], citing numerous cases including *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ), 419 (O'Connor J).

25 *Plaintiff M70* [2011] HCA 32 (31 August 2011) [44] (French CJ).

26 Ibid [43] (French CJ).

27 Ibid [52] (French CJ).

28 Ibid [54] (French CJ).

29 Ibid [236] (Kiefel J), citing *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7.

30 *Plaintiff M70* [2011] HCA 32 (31 August 2011) [237] (Kiefel J).

domestically.[31] This point was addressed by the majority. Certainly, for all of the majority judges, Australia's protection obligations under the *Refugees Convention* were an important consideration: they all believed that Australia would violate its international obligations by removing from Australia a person claiming to be a refugee without considering whether that person would face persecution in the country to which they were removed (or, from that country, be removed to a country where they may be persecuted).[32]

However, significantly, all these judges emphasised that they were not simply importing international obligations into domestic law — they argued that, rather, domestic law had already incorporated these obligations. They pointed to numerous cases finding that the Court assumes that the *Migration Act 1958* (Cth) intends to accommodate Australia's international obligations.[33] In particular, they pointed to the drafting history and text of s 198A, which seemed designed to facilitate the exact obligations outlined above.[34] In this case, the statutory construction which facilitated compliance with international obligations was also the construction that made 'obvious good sense', according to French CJ.[35]

In any event, all seven judges proceeded to consider whether the plaintiffs could be removed to Malaysia under the power contained in s 198A.

B The validity of the declaration under s 198A(3)

The parties agreed that a removal effected under s 198A(1) depended on a valid declaration under s 198A(3). Predictably, they differed on whether the Minister's declaration in relation to Malaysia was valid.

The plaintiffs contended that the Minister's declaration was invalid, either because the four criteria in s 198A(3)(i)–(iv) were jurisdictional facts that did not exist, or because the Minister misconstrued those facts before making a declaration, meaning that he was not properly 'satisfied' that the criteria were fulfilled.[36]

The defendants claimed that s 198A(3) required only that the Minister form, in good faith, an evaluative judgment that what he declares is true. They further claimed that the Minister had made such a judgment, taking into account the four criteria, so the declaration of Malaysia as a country to which asylum seekers could be removed was valid.[37]

The majority agreed that the declaration was invalid, but reasoned differently to reach that conclusion. Specifically, the majority was divided on whether the four criteria were jurisdictional facts, the existence of which the Court could independently assess. The joint judgment found that they were. Those judges highlighted that the text of s 198A(3) does not refer to the Minister 'being *satisfied* of the existence of those criteria or provide that the Minister's forming of an *opinion* about those matters is a condition for the exercise of the discretion to make a declaration'.[38] Instead, s 198A(3) grants the Minister a discretion to

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31 Ibid [150] (Heydon J).

32 Ibid [44] (French CJ), [94] (Gummow, Hayne, Crennan and Bell JJ), [233] (Kiefel J).

33 Ibid [44] (French CJ), [90] (Gummow, Hayne, Crennan and Bell JJ), citing *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69/2010 v Commonwealth of Australia* (2010) 85 ALJR 133, 139.

34 *Plaintiff M70 [2011] HCA 32* (31 August 2011) [95]–[96] (Gummow, Hayne, Crennan and Bell JJ), [234], [237] (Kiefel J).

35 Ibid [50] (French CJ).

36 Ibid [56] (French CJ).

37 Ibid [56] (French CJ), [81] (Gummow, Hayne, Crennan and Bell JJ), [158] (Heydon J).

38 [106] (Gummow, Hayne, Crennan and Bell JJ) (emphasis in original).

declare that a particular country '*has* the relevant characteristics'.[39] They found that an interpretation that s 198A is 'validly engaged whenever the Minister bona fide thought or believed that the relevant criteria were met' betrayed the text, context and purpose of the provision.[40] As explained below, the judges concluded that, objectively, the criteria for making a declaration under s 198A(3) had not been satisfied in relation to Malaysia.

Kiefel J did not explicitly address the question of whether the criteria were jurisdictional facts. She did, however, approach her analysis in the same way as the joint judgment, and concluded that '[t]he facts necessary for the making of a declaration under s 198A(3)(a) did not exist', suggesting that she, too, accepted that these criteria were jurisdictional facts.[41]

These judges found that, objectively, the criteria in s 198A(3)(i)–(iv) were not satisfied, placing the Minister's declaration regarding Malaysia beyond power. The joint judgment conceded that the Minister's declaration must consider a 'factual element': that is, the Minister must assess whether a country that is the subject of a declaration *in fact* complies with relevant international standards regarding refugee processing and treatment, and human rights.[42] However, they found that an assessment of compliance with the four criteria could not occur without reference to legal protections and obligations.[43] The criteria demand that a country is legally bound, among other obligations, to apply the provisions of the *Refugees Convention* without discrimination as to race, religion or country of origin; to accord refugees free access to courts of law; to accord refugees rights relating to religious practice, wage-earning employment and education; and to adhere to the principle of *non-refoulement*.[44] The country must have laws governing how it would assess the need for protection of persons seeking asylum, or, at the very least, must be legally obliged to allow some third party (such as UNHCR) to undertake such procedures itself.[45]

The judges found that these conditions did not exist in Malaysia: Malaysia was not a signatory to the *Refugees Convention*, did not provide legal status to persons seeking asylum, did not offer legal protections to those found to be refugees, and was not a party to major international human rights instruments.[46] The absence of any legal obligations binding Malaysia to accord asylum seekers and refugees fundamental rights meant that the criteria in s 198A(3) had not been satisfied.[47]

Kiefel J concurred almost entirely with the joint judgment, finding that the protections referred to in s 198A(3) required the status of law in a country that was the subject of a declaration.[48] A State's practice of complying with such obligations was an additional, not alternative, condition.[49] The absence of legal protections for asylum seekers and refugees in Malaysia — and the fact that the Arrangement stipulated political commitments, but not binding obligations — rendered the Minister's declaration in relation to it invalid.[50]

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39 Ibid (emphasis in original).
40 Ibid [109] (Gummow, Hayne, Crennan and Bell JJ).
41 Ibid [255] (Kiefel J).
42 Ibid [112] (Gummow, Hayne, Crennan and Bell JJ).
43 Ibid [116] (Gummow, Hayne, Crennan and Bell JJ).
44 Ibid [117], [119], [125]–[126] (Gummow, Hayne, Crennan and Bell JJ).
45 Ibid [125] (Gummow, Hayne, Crennan and Bell JJ).
46 Ibid [131] (Gummow, Hayne, Crennan and Bell JJ).
47 Ibid [134] (Gummow, Hayne, Crennan and Bell JJ).
48 Ibid [244] (Kiefel J).
49 Ibid [245] (Kiefel J).
50 Ibid [251] (Kiefel J).

French CJ departed from the other majority judges in his approach, finding that the criteria were jurisdictional 'tasks', rather than jurisdictional facts. He acknowledged several factors, highlighted by the plaintiffs, which mitigated in favour of considering the criteria jurisdictional facts, including: the absence of any reference to ministerial satisfaction or opinion; the use of the word 'declare' as 'an indication that Parliament intended the content of the declaration to be true as a matter of objective fact'; s 198A's 'evident purpose' as a mechanism for ensuring Australia's compliance with the *Refugees Convention*; the amenability of the Minister's task to judicial review; and the fundamental rights at stake, which should activate judicial review.[51] However, he found that when a statutory power relies on a decision-maker's assessment and value judgements, it is usually not rightly characterised as a jurisdictional fact.[52] The text of s 198A(3) called on the Minister to use his evaluative judgement, and, '[a]bsent clear words, the subsection should not be construed as conferring upon courts the power to substitute their judgment for that of the Minister'.[53]

However, French CJ denied that 'the mere fact that it is the Minister who makes the declaration is not enough to secure its validity'.[54] He found that the Court's proper role is to assess whether the Minister properly construed the task of identifying the conditions necessary to make a declaration. He stated, 'If the Minister were to proceed to make a declaration on the basis of a misconstrued criterion [such as by asking a wrong question or ignoring relevant material], he would be making a declaration not authorised by the Parliament'.[55]

Asking whether the Minister properly construed the criteria in s 198A(3) enabled French CJ to reach the same ultimate conclusion as the other majority judges: that the declaration in relation to Malaysia was not valid. Like the other majority judges, French CJ found that a declaration cannot be based upon 'a hope or belief or expectation that the specified country will meet the criteria at some time in the future even if that time be imminent'.[56] It was insufficient that Malaysia, according to the Minister, was 'keen to improve its treatment of refugees and asylum seekers' or had 'made a conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers'.[57] The Minister fell into jurisdictional error by inquiring into possible future circumstances, rather than an assessment of present circumstances.

As well, he found that when s 198A(3) used the word 'protection', it demanded that the Minister consider the *legal* protections Malaysia accorded asylum seekers and refugees.[58] French CJ wrote that the 'protections' that Malaysia offered could not be assessed 'without reference to the domestic laws of the specified country, including its Constitution and statute laws, and the international legal obligations to which it has bound itself'.[59] Particularly because the Arrangement between the Commonwealth and the Malaysian

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51 Ibid [56] (French CJ).
52 Ibid [57] (French CJ).
53 Ibid [58] (French CJ).
54 Ibid [59].
55 Ibid, citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351.
56 *Plaintiff M70* [2011] HCA 32 (31 August 2011) [62] (French CJ).
57 Ibid.
58 Ibid [65]–[66] (French CJ).
59 Ibid [66] (French CJ).

Government was non-binding and based purely on political commitments, the Minister could not be satisfied that the protections would be meaningful or enduring.[60] French CJ added that the Minister's decision could not be reached purely by reference to a country's laws and international obligations, if these were not reflected in the practice of the State, but that a relevant legal framework was, nonetheless, a question to which the Minister must turn his mind in order to make a valid declaration under s 198A(3).[61]

Heydon J's conclusions on the validity of the Minister's declaration were vastly different. Like French CJ, he found that it was not the Court's role to assess for itself whether the conditions in s 198A(3) were satisfied. He accepted that that section requires only that the Minister form, in good faith, an evaluative judgment that what he declares is true.[62] He based this finding on the fact that s 198A(3) does not refer to the need to prove the four conditions as a matter of fact, and so the process by which the Minister makes his declaration 'is a task for his personal assessment'.[63] Moreover, he stressed that a decision to make a declaration under s 198A(3) pertains to Australia's external affairs, a realm in which Australian courts have typically been unwilling to interfere with ministerial discretion.[64] Decisions of this kind are polycentric, rendering them not readily amenable to judicial review.[65]

Without conceding that it was necessary to do so (as French CJ believed that it was), Heydon J considered whether the Minister had 'ask[ed] the correct question'.[66] He addressed whether the Minister was required to inquire into not only 'conditions on the ground in Malaysia', but also the legal obligations by which Malaysia was bound.[67] He found that the text of s 198A(3) 'does not refer ... to legal obligations or courts of law', and that its 'references to providing access, securing protections, and meeting human rights standards, are more apt to suggest practical access, practical protections, and a meeting of standards in practice'.[68] He concluded that to find that s 198A(3) demands an inquiry into Malaysia's binding legal obligations would be 'to add a fifth wheel to the coach'.[69]

Heydon J based his finding, in part, on the historical context in which s 198A was inserted into the *Migration Act 1958* (Cth). He pointed out that the Australian Prime Minister introduced the relevant amendments on 10 September 2001 in order to facilitate the so-called 'Pacific Solution', a policy by which asylum seekers arriving in Australia would be transferred to Nauru for processing, similarly to under the 2011 Arrangement with Malaysia. He emphasised that at that time, Nauru was not a party to the *Refugees Convention* or several core international human rights treaties, and its domestic law did not provide any specific provisions or protections relating to persons who under international law would be classified as refugees or asylum seekers. He concluded that Parliament's intention in introducing this section could not have been that legal protections were a necessary

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60 Ibid.
61 Ibid [67] (French CJ).
62 Ibid [158] (Heydon J).
63 Ibid [161] (Heydon J).
64 Ibid [163] (Heydon J).
65 Ibid [49] (French CJ), [164] (Heydon J), citing *P1/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1029 (26 September 2003).
66 *Plaintiff M70* [2011] HCA 32 (31 August 2011) [158] (Heydon J).
67 Ibid [175] (Heydon J).
68 Ibid [162] (Heydon J).
69 Ibid.

condition for a valid declaration under s 198A(3).[70] The majority judges unanimously rejected the relevance of this historical context, explaining that a past invocation of a statutory provision cannot govern its current construction.[71]

C The position of M106 as an unaccompanied minor

A further submission was advanced on M106's behalf. Under s 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth) ('*IGOC Act*'), the Minister is 'the guardian ... of every non-citizen child who arrives in Australia'. M106 was a non-citizen child as he had not turned 18, entered Australia as a non-citizen, and intended to become a permanent resident of Australia.[72] M106 argued that, as his guardian, the Minister was obliged to consider exercising his powers under ss 46A and 195A of the *Migration Act 1958* (Cth) to allow M106 to apply for a visa. Moreover, M106 pointed to s 6A(1) of the *IGOC Act*, which provides that '[a] non-citizen child shall not leave Australia except with the consent in writing of the Minister'. M106 submitted that the Minister had not consented in writing to his removal to Malaysia.[73]

The joint judgment (with which French CJ and Kiefel J agreed)[74] found that the Minister had not given consent in writing for the plaintiff to leave Australia.[75] It found that a mere determination by the Minister that an unaccompanied minor should be taken from Australia to a country declared under s 198A(3) of the *Migration Act 1958* (Cth) did not qualify as the written consent demanded by the *IGOC Act*.[76]

They also considered s 6A(4) of the *IGOC Act*, which provides that the requirement for written consent 'shall not affect the operation of any other law regulating the departure of persons from Australia'. They found that an exercise of power to take an offshore entry person to another country pursuant to s 198A(1) would not fall under this provision. They held that the power of compulsory removal under s 198A(1) could not be described as 'regulating' departure from Australia, stating:

> Just as it may often be necessary to distinguish between regulating and prohibiting, it is necessary in the present case to recognise the distinction between a law regulating the departure of persons from Australia and a law which gives power to remove persons from Australia.[77]

Parenthetically, the majority found that a decision to grant written consent for the removal of a non-citizen child would be a decision under an enactment and would, therefore, engage the *Administrative Decisions (Judicial Review) Act 1977* (Cth), including the requirements that a decision-maker provide reasons and that the decision be reviewable.[78] However, given that the Minister had not provided the relevant written consent anyway,

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[70] Ibid [165] (Heydon J).
[71] Ibid [13] (French CJ), [128] (Gummow, Hayne, Crennan and Bell JJ), 225 (Kiefel J).
[72] These requirements are enumerated in s 4AAA(1) of the *IGOC Act*.
[73] *Plaintiff M70* [2011] HCA 32 (31 August 2011) [17] (French CJ).
[74] Ibid [69] (French CJ), [257] (Kiefel J).
[75] Ibid [142] (Gummow, Hayne, Crennan and Bell JJ).
[76] Ibid [143] (Gummow, Hayne, Crennan and Bell JJ).
[77] Ibid [144] (Gummow, Hayne, Crennan and Bell JJ) [citations omitted].
[78] Ibid [146] (Gummow, Hayne, Crennan and Bell JJ).

the majority refrained from making any further observations on the content or application of the Minister's duty as a guardian over M106.[79]

Heydon J's conclusions differed substantially. He reasoned that '[a]lthough the defendants did not identify any free-standing written consent by the Minister relating specifically to the second plaintiff, the Minister had shown by his conduct that he consents to the taking of the second plaintiff from Australia'.[80] He found that the Minister had 'signed pieces of paper', such as affidavits, that could constitute the written consent required of the *IGOC Act*.[81] He also found that s 6A(4) of the *IGOC Act* specifically precluded s 6A from interfering with the operation of the *Migration Act 1958* (Cth). In contrast to the majority, he found that '[t]he category of laws "regulating" departure from Australia is not restricted to laws imposing limits on departure or procedures for voluntary departure' and that a law 'may be said to regulate departure whether it places conditions on it, forbids it, permits it, or requires it'.[82]

III Analysis: The 'Malaysia Solution' in context

A The Senate Committee and Australia's international legal obligations

The High Court has not been alone in its determination of the illegality of the so-called 'Malaysia Solution'. On 17 August 2011, the Australian Senate referred the Arrangement to the Legal and Constitutional Affairs References Committee ('the Senate Committee'), inviting the Committee to report on the consistency of the Arrangement with Australia's international legal obligations, especially in relation to human rights.[83]

The Senate Committee's commentary is an invaluable companion to the High Court's decision in the *Plaintiff M70* case. As Heydon J painstakingly emphasised in his judgment (and the majority accepted), Australia's international legal obligations do not automatically create new laws or restrict exercises of power within Australia.[84] The Court was required to assess the Arrangement's legality under the framework of the *Migration Act 1958* (Cth), considering international instruments only where the Parliament had clearly incorporated those obligations into the domestic statute. The Committee, however, had far broader scope to consider the suite of human rights instruments to which Australia is a party and their compatibility with the Arrangement.

After receiving 37 submissions and hearing from numerous witnesses, the Committee urged the Australian Government not to proceed with the Arrangement, which it found was replete with 'obvious flaws and defects'.[85] Like the High Court majority, the Senate Committee recognised the insufficiency of political guarantees by third countries that they would comply with human rights standards. The Committee referred to numerous submissions to its inquiry that expressed concern at the 'almost aspirational' nature of the

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79 Ibid [147] (Gummow, Hayne, Crennan and Bell JJ).
80 Ibid [196] (Heydon J).
81 Ibid.
82 Ibid [198] (Heydon J).
83 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) [1.1].
84 *Plaintiff M70* [2011] HCA 32 (31 August 2011) [150] (Heydon J).
85 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) [4.27].

Arrangement, which relied on political commitments rather than binding legal obligations.[86] The Committee observed that the Australian Government would be 'powerless' if it found that Malaysia had not complied with the Arrangement.[87] It was 'simply not adequate' for the Australian Government to assert that the Arrangement was entered into in good faith, or to rely on the clause providing for 'the resolution of differences', which required only that the parties consult with one another in the case of disagreement.[88]

The Senate Committee devoted a significant amount of attention to Australia's *non-refoulement* obligations.[89] It expressed grave concern that in concluding the Arrangement, the Australian Government 'completely ignored that Malaysia is not a party to the Refugee Convention',[90] in violation of Australia's own obligations under that instrument and other treaties prohibiting *refoulement* such as the *Convention Against Torture* and the *Convention on the Rights of the Child*.[91] There was a risk that Malaysia would return the transferees to a country where they had a well-founded fear of persecution: despite the prohibition of *refoulement* being part of customary international law, Malaysia has a history of non-compliance.[92]

The Senate Committee was concerned not only with the possibility of Malaysia removing asylum seekers to another country that was unsafe, but also with the possible mistreatment of asylum seekers within Malaysia itself. The Committee found that conditions for refugees and asylum seekers in Malaysia 'are nothing short of appalling with harassment and violence part of the refugee community's daily experience, and the threat of arrest a constant'.[93] It observed that refugees and asylum seekers 'are vulnerable to abuse and violence in their homes, in public and at their places of work because they have no rights'.[94] It paid particular attention to the risk of asylum seekers and refugees being caned in Malaysia, either because they had breached immigration laws or because they had committed other crimes; either way, the Committee stated that exposing asylum seekers to that risk constituted an unacceptable abrogation of Australia's human rights obligations.[95]

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[86] See, eg, Human Rights Watch, Submission 2 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) [2], cited at Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) [3.4].

[87] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) [4.3].

[88] Ibid [4.4].

[89] Ibid [3.31], citing numerous submissions.

[90] Ibid [4.5].

[91] Ibid [3.34], [3.36] (citing numerous submissions to the inquiry); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[92] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) [3.36], [3.38].

[93] Ibid [4.13].

[94] Ibid [3.42], referring to Amnesty International, Submission 13 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) [4]–[5].

[95] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) [4.17], [4.18].

The Committee also emphasised that the Arrangement's provisions in relation to unaccompanied children were 'completely unacceptable'.[96] The Arrangement did not stipulate an alternative guardian for children once they were no longer under the Minister's guardianship.[97] There were also no provisions made for ensuring that the special educational and medical needs of children were met in Malaysia, violating both the *Refugees Convention* and the *Convention on the Rights of the Child*.[98]

As highlighted by the Government's attempts to remove judicial review over 'safe third country declarations' (explored in the followed section), asylum seekers are vulnerable to changes in domestic law that compromise their rights to protection and place executive exercises of power beyond the reach of the courts, potentially rendering the precedential value of *Plaintiff M70* virtually nil. The Senate Committee's report fortifies those rights by expressing a political commitment to Australia's international obligations to asylum seekers.

B The history — and future — of Australia's third country processing practices

The Malaysia Solution is steeped in a historical context of Australia seeking to process asylum seekers in nearby countries. As explored in the summary of the judgments, Heydon J constructed s 198A in light of the circumstances of its introduction: as a means of facilitating the Pacific Solution, which involved processing in Nauru asylum seekers who had come to Australia.[99] The majority judges found that the reliance on this section as the justification for the Pacific Solution did not determine how it should be constructed in relation to Malaysia.[100]

The arrangement with Nauru, which served as the foundation for the Pacific Solution, was, in many regards, similar to the Arrangement in question in *Plaintiff M70*. In 2001, Nauru was not a signatory to the *Refugees Convention* and lacked many of the legal protections that the High Court considered would be crucial to the validity of the Minister's declaration in relation to Malaysia.

This context raises the question of why the Pacific Solution was never challenged as a valid invocation of s 198A. Part of the answer may be simply pragmatic: those removed to Nauru enjoyed no access to lawyers. In the case of *Ruddock v Vadarlis*,[101] the Full Federal Court of Australia famously held that a Victorian lawyer had standing to bring a *habeas corpus* claim on behalf of asylum seekers by whom he had not been retained and with whom he had no contact. Perhaps the inability to receive instructions from asylum seekers made a claim like *Plaintiff M70* impossible in 2001.

Another possible answer is that the grounds for contesting the legality of the Pacific Solution were not as strong as those against its recent Malaysia counterpart. Most importantly, under the Memorandum of Understanding concluded between the governments of Australia and Nauru on 11 December 2001, the processing of asylum seekers transferred to Nauru would be conducted by Australian immigration officials in concert with UNHCR and the International Organization for Migration, and those whose

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96 Ibid [4.24].
97 Ibid [4.26].
98 Ibid [3.58].
99 *Plaintiff M70* [2011] HCA 32 (31 August 2011) [165] (Heydon J).
100 Ibid [13] (French CJ), [128] (Gummow, Hayne, Crennan and Bell JJ), 225 (Kiefel J).
101 [2001] FCA 1329.

claims succeeded would be returned to Australia.[102] Australia was not relying on a third country to allow the processing of claims with minimal oversight, and certified refugees had a guaranteed destination country which would not return them to a country where they had a well-founded fear of persecution, reducing the risk of *non-refoulement*.

The legal protections accorded to asylum seekers in Nauru has resurged as a controversy since Opposition Leader Tony Abbott announced that he would reintroduce transfers to Nauru if he were Prime Minister. He has emphasised Nauru's recent accession to the *Refugees Convention* as evidence of their respect for human rights.[103] Under the High Court's ruling in *Plaintiff M70*, however, a country adopting binding legal obligations (such as by signing the *Refugees Convention*) is a necessary but insufficient ground for declaring them a safe third country under s 198A(3). A country must also offer *effective* protection by implementing in fact the obligations it has assumed.[104] The Australian Government would need to conduct a rigorous assessment of the on-the-ground situation before concluding any fresh agreement with Nauru.

A third possible reason for the absence of any legal challenge before *Plaintiff M70* was the remoteness of the chance that the High Court would deem a Minister's declaration under s 198A(3) invalid, or even reviewable. Several cases in the early 2000s illuminated the Court's considerable deference to the executive on issues such as mandatory detention and immigration policy.[105] Indeed, the defendants' submissions in *Plaintiff M70* indicated that the Government, for one, believed that a declaration under s 198A(3) could not be subject to judicial review.[106]

Consistently with this view, since the *Plaintiff M70* decision, the Australian Government has sought to amend the *Migration Act 1958* (Cth) in order to insulate such declarations from review by courts entirely. On 19 September 2011, in response to the High Court's decision, the Government proposed a raft of changes to the *Migration Act*, which it says would remove any current legal barriers to the implementation of the Malaysia deal. The changes not only undo many of the *Migration Act*'s current protections for asylum seekers, but may also prevent the High Court's effective 'reading in' to domestic legislation of Australia international obligations. In particular, a new s 198AB(1) would provide that the Minister may, in writing, designate that a country is an 'offshore processing country'. According to the proposed s 198AB(2), the only condition for the exercise of this power is that the Minister thinks that it is in the 'national interest' to make such a designation.[107]

A new s 198AB(3) would provide that the only factors that the Minister must consider in determining whether a designation is in the 'national interest' are: any assurances provided

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[102] Angus Francis, 'Bringing Protection Home: Healing the Schism Between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20 *International Journal of Refugee Law* 273; Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2008) 102.

[103] Tony Abbott, 'Nauru begins refugee convention ratification process' (Media Release, 17 June 2011) <http://www.tonyabbott.com.au/LatestNews/PressReleases/tabid/86/articleType/ArticleView/articleId/8141/Joint-Press-Release-with-Scott-Morrison--Nauru-begins-refugee-convention-ratification-process.aspx>.

[104] *Plaintiff M70* [2011] HCA 32 (31 August 2011) [67] (French CJ) [111] (Gummow, Hayne, Crennan and Bell JJ), [258] (Kiefel J).

[105] Notable examples include *Ruddock v Vadarlis* [2001] FCA 1329 and *Al-Kateb v Godwin* (2004) 219 CLR 562, both dealing with the mandatory detention of asylum seekers.

[106] *Plaintiff M70* [2011] HCA 32 (31 August 2011) [56] (French CJ).

[107] Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011, Revised Exposure Draft (19 September 2011).

by the third country that it will respect the principle of *non-refoulement*; and any assurances provided by the third country that it will make an assessment, or will permit an assessment to be made, of whether or not a transferee meets the criteria for protection under the *Refugees Convention*.[108] Dr David Bennet AC QC, former Commonwealth Solicitor-General, believed that this change would give the Minister 'a virtually unfettered discretion as to what countries he declares' as safe destinations for asylum seekers.[109] There is no requirement that the Minister considers Australia's obligations under the *Refugees Convention*.[110]

108 Ibid.

109 David Bennett, *Advice to Senator the Hon George Brandis on behalf of the Coalition in relation to proposed amendments to the Migration Act* (2011) [1], cited at Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) [2.45].

110 David Bennett, *Advice to Senator the Hon George Brandis on behalf of the Coalition in relation to proposed amendments to the Migration Act* (2011) [1]–[2], cited at Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Arrangement with Malaysia in Relation to Asylum Seekers* (2011) [2.45]–[2.46].