SG No. 21 of 2011

IN THE MATTER OF THE IMPLICATIONS OF *PLAINTIFF M70/2011 V MINISTER FOR IMMIGRATION AND CITIZENSHIP* FOR OFFSHORE PROCESSING OF ASYLUM SEEKERS UNDER THE *MIGRATION ACT 1958* (CTH)

OPINION

Introduction

1. On 31 August 2011 the High Court delivered judgment in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 in which it held by majority (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting) that the sole source of power under the *Migration Act 1958* (Cth) to take asylum seekers from Australia to another country for determination of their refugee status is that conferred by s 198A and that the power conferred by s 198A cannot be validly exercised to take persons seeking asylum from Australia to Malaysia.

2. We are asked to advise on the implications of the High Court's judgment for the taking of asylum seekers from Australia to the Republic of Nauru (Nauru) or to Papua New Guinea (PNG) for determination of their refugee status. The material with which we have been briefed for this purpose is set out in the schedule to this Opinion.

3. Our short advice is as follows. In the light of *Plaintiff M70* we do not have reasonable confidence on the material with which we have been briefed that the power conferred by s 198A could currently be exercised to take asylum seekers from Australia to either Nauru or to PNG for determination of their refugee status. The accession of Nauru to the Convention Relating to the Status of Refugees (Refugees Convention) and the Protocol Relating to the Status of Refugees (Protocol) on 28 June 2011 nevertheless raises the possibility that the power conferred by s 198A would in the future be available to be exercised to take asylum seekers from Australia to Nauru for determination of their refugee status. We would have confidence that the power conferred by s 198A would be available to be exercised to take asylum seekers from Australia to Nauru only if it were able to be demonstrated to the satisfaction of an Australian court: first, that appropriate arrangements were in place to ensure practical compliance by Nauru with its obligations under the Convention and the Protocol; and, secondly, that Nauru in its treatment of asylum seekers and refugees complied in practice with human rights standards acceptable at least to the United Nations High Commissioner for Refugees. These are complex issues of fact and degree requiring detailed assessment and analysis. Even when that assessment and analysis was complete, the issues might well be the subject of contested evidence. In the absence of a detailed assessment and analysis of these issues, we are unable to form a view as to whether either of the two conditions we have identified would be capable of being demonstrated to the satisfaction of an Australian court.

Section 198A

4. Section 198A(1) of the Migration Act confers a power on an "officer" to "take" an "offshore entry person" to "a country in respect of which a declaration is in force under subsection (3)".

5. Section 198A(3) provides:

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

6. In *Plaintiff M70* it was the Minister's purported declaration in relation to Malaysia under s 198A(3)(a) that was held to be invalid.

7. Although the reasoning of the Justices who constituted the majority of the High Court differed between the joint judgment of Gummow, Hayne, Crennan and Bell JJ and the separate judgments of French CJ and Kiefel J, we consider *Plaintiff M70* to have established three propositions concerning s 198A(3)(a).

8. ***First***, each of the criteria set out in s 198A(3)(a)(i) to (iv) is a "jurisdictional fact". That is to say, the Minister has no power to declare a specified country unless that country satisfies each criterion as a matter of objective fact to the satisfaction of a court. That proposition is the necessary consequence of the rejection in the joint judgment (at [109])

of the submission "that sub-pars (i) to (iv) of s 198A(3)(a) are not jurisdictional facts", particularly when read in the light of the earlier description of s 198A(3)(a) in the joint judgment as conferring a power to "declare that a specified country *has* the relevant characteristics" (that is, to record an existing truth) rather than to declare that the Minister "*thinks* or *believes* or *is satisfied* that the country has those characteristics" (at [106], emphasis in original). The proposition is also reflected in conclusions stated in the joint judgment that, on the agreed facts about Malaysia, none of the first three criteria "was or could be met" (at [134]), and that the "jurisdictional facts necessary to making a valid declaration under s 198A(3)(a) were not and could not be established" (at [135]) as well as in the conclusion of Kiefel J (at [255]) that the "facts necessary for the making of a declaration under s 198A(3)(a) did not exist". That proposition is the main point of difference between the Justices who constituted the majority in that French CJ alone rejected it, stating (at [58]) that s 198A(3)(a) "should not be construed as conferring upon courts the power to substitute their judgment for that of the Minister by characterising the matters in sub-pars (i) to (iv) as jurisdictional facts".

9. ***Secondly***, the "procedures" and "protection" that a country must "provide" to satisfy the criteria set out in s 198A(3)(a)(i) to (iii) "must be provided as a matter of legal obligation" and cannot be established by an "examination only of what has happened, is happening or may be expected to happen" in the country (at [116]). The provision of procedures and protection by the country as a matter of legal obligation may be *either* pursuant to "its domestic law" or pursuant to an "international obligation" (at [125]-[126]). This, in simple terms, is the reason why the Minister's declaration of Malaysia as a "declared country" was held to be invalid. Malaysia was, and is, not obliged under international law to provide protections of the kinds referred to in s 198A(3)(a)(i) to (iii) and its domestic law did not contain provisions recognising or affording rights to refugees.

10. ***Thirdly***, the "procedures" for determining refugee status that a country must provide to satisfy the criteria in s 198A(3)(a)(i) and the "protection" that the country must provide to satisfy the criteria in s 198A(3)(a)(ii) and (iii) are "access and protections of the kinds that Australia undertook to provide by signing the Refugees Convention and the Refugees Protocol" and the criteria in s 198A(3)(a)(i) to (iii) are, in that sense, "to be understood as a reflex of Australia's obligations" (at [118]). Satisfaction of the criterion in s 198A(3)(a)(iii) therefore requires "provision of *protections of all of the kinds* which parties to the Refugees Convention and the Refugees Protocol are bound to provide to such persons" (at [119], emphasis added) so that "[a] country does not provide protection to persons who are given refugee status ... unless the country in question provides to persons who have been given refugee status rights of the kind mentioned in the Refugees Convention" (at [126]). Those rights are noted to include "but ... by no means [to be] limited to, rights relating to education, the practice of religion, employment, housing and access to the courts" (at [119]). Precisely what is required for satisfaction of the criterion in s 198A(3)(a)(ii), however, is uncertain in that the extent to which obligations beyond the bare requirements of non-*refoulement* (and refraining from punishing refugees who arrive unlawfully) apply under the Refugees Convention to persons who claim to be refugees (but whose claims have not been assessed) is noted to be "a question about which opinions may differ" (at [117]). How the criterion could in those circumstances be met by provisions of a country's domestic law is far from clear. Probably the most that can be said is that a country which has undertaken the obligations of a signatory to the Refugees Convention and Protocol (whatever may be the precise content of those obligations) is likely to meet the criterion in s 198A(3)(a)(ii) in so far as that criterion turns on purely legal considerations. While the possibility is left open (at [128] and [135]) that a country which has undertaken equivalent obligations through a bilateral treaty may meet the criteria, as a practical matter, there must be some real doubt as to whether any country that is not a signatory to the Refugees Convention

and Protocol could be found, as a matter of international obligation or domestic law, to be bound to secure all of those rights to people who have been assessed as refugees.

11. While these three propositions appear to have been established, four significant issues concerning s 198A(3)(a) are not resolved by *Plaintiff M70*.

12. ***First***, the joint judgment expressly left open whether the criteria set out in s 198A(3)(a)(i) to (iii) require an assessment of whether the country in question adheres in practice to the "procedures" and "protection" that it must provide as a matter of legal obligation (at [112]-[113] and [124]). However, the affirmative position taken on this issue by French CJ (at [67]) would, we think, be adopted by the High Court if the issue arose for determination. We think it difficult to imagine that a declaration could validly be made in respect of a country which was a signatory to the Refugees Convention and Protocol but was known not to meet the obligations it had thereby undertaken.

13. ***Secondly***, the joint judgment also expressly left open the nature and content of the inquiry posed by the criterion set out in s 198A(3)(a)(iv) which refers to a country meeting "relevant human rights standards" in providing the "protection" referred to in s 198A(3)(a)(ii) and (iii) (at [114] and [124]). Consistent with the position taken on this issue by French CJ (at [67]) and with a suggestion to similar effect in the joint judgment (at [112]), we do not regard the inquiry posed by the criterion as one limited to the existence or non-existence of international obligations or domestic laws. Rather, we think that the inquiry must turn on whether the country in question in fact "meets" the relevant standards. The task that remains is to identify "human rights standards" and to ascertain which of those standards are "relevant". That task is difficult but we do not think it to be judicially unmanageable. We understand "human rights" to refer primarily, although not exclusively, to the accepted notion of "human rights" expressed in international instruments such as the *Universal Declaration of Human Rights* and the

International Covenant on Civil and Political Rights. We also understand that the phrase "human rights standards" does not bear a technical international law meaning. It is capable of bearing an ambulatory meaning appropriate to the context of the instrument in which it is found. We think it unlikely that the "human rights standards" that are "relevant" to providing the "protection" referred to in s 198A(3)(a)(ii) and (iii) can be limited only to a subset of human rights of particular application to the case of asylum seekers or to the status of a refugee. Just how far they range is by no means certain. However, we think that, in practice, any assessment by a court as a matter of "jurisdictional fact" as to whether a country in fact meets "relevant human rights standards" would be likely to be influenced significantly by standards acknowledged from time to time by the United Nations High Commissioner for Refugees. We think it unlikely that adherence in fact to a standard acceptable to the United Nations High Commissioner for Refugees would be found as a "jurisdictional fact" to be wanting. Conversely, adherence in fact to a standard that is not acceptable to the United Nations High Commissioner for Refugees would run a high risk of being found as a "jurisdictional fact" not to meet "relevant human rights standards".

14. ***Thirdly***, no member of the majority found it necessary expressly to address what had been common ground between the parties in *Plaintiff M70*: that the criteria set out in s 198A(3)(a)(i) to (iv) are to be applied to the country in question in respect of all persons who may seek asylum and who may be given refugee status in that country - not simply to that country in respect of those persons who may be taken to it from Australia under s 198A(1). We are of the view that what had been common ground between the parties is correct. That is because we think French CJ to have been correct in emphasising (at [61]) that the criteria set out in s 198A(3)(a)(i) to (iv) must exist as a "present and continuing circumstance" at the time of the making of the declaration. If that view of the temporal operation of the criteria is correct then there could be no warrant for reading the criteria as applicable only to persons to be taken under s 198A(1)

given that a declaration under s 198A(3)(a) must be made before any such taking can occur. However, we note that the joint judgment expressly left open the temporal operation of s 198A(3)(a) (at [113]). In going on also expressly to leave open the possibility that the criteria might be satisfied by a bilateral arrangement between Australia and the country in question (at [128] and [135]), the joint judgment also leaves open the possibility that, contrary to what had been common ground between the parties, the criteria set out in s 198A(3)(a)(i) to (iv) might be applied to the country in question only in respect of those persons who, pursuant to that bilateral arrangement, may be taken to that country from Australia under s 198A(1).

15. **Fourthly**, *Plaintiff M70* said nothing about the period for which a declaration under s 198A(3)(a) might remain in force. We note that the original declaration of Nauru was expressed to have effect only for a specified period, and we do not doubt that it is open to the Minister to make a declaration in those terms. The more difficult question is whether a declaration which is not expressed to operate for a limited time may cease to be effective due to changes in circumstances. While the purpose for which s 198A(3) was enacted (the identification of countries where asylum seekers could be sent for assessment of their claims without breaching Australia's international obligations) might suggest that a declaration should not be regarded as providing the basis for taking a person to another country if that country in fact no longer meets the relevant criteria, we think it very difficult to construe s 198A(3) as providing for a declaration to have effect only for so long as the criteria were met. The terms of the section are strongly against such a construction: the Minister is empowered to declare that a country does meet the criteria, and, once that is done, the declaration itself (rather than the actual or presumed truth of what it says) provides the legal basis for action under s 198A(1). However, declarations are subject to revocation under s 198A(3)(b); and, at least ordinarily, a power to revoke an instrument would be understood to be exercisable, to borrow the words of s 33(3) of the *Acts Interpretation Act 1901* (Cth), in like manner and subject to like

conditions as the power to make the instrument. While such an approach to the construction of s 198A(3)(b) was contemplated in the dissenting judgment of Heydon J (at [168]), the joint judgment referred to the revocation power as "not bounded by particular criteria" (at [109]). Nevertheless, we think it is at least arguable that the Minister would be under an enforceable obligation to revoke the declaration of a country, or at least to consider revoking it, if material before him or her showed that the country no longer met the relevant criteria.

16. With these considerations in mind, we turn to consider the application of s 198A(3) first to Nauru and then to PNG.

Republic of Nauru

Original Declaration

17. As noted in *Plaintiff M70* (at [13], [128] and [169]), the first exercise, or purported exercise, of the power conferred by s 198A(3)(a) in relation to Nauru occurred on 2 October 2001 when the then Minister for Immigration and Multicultural Affairs signed the instrument of declaration bearing that date. The original declaration provided that it would remain in effect until 1 October 2002.

18. At the time of the making of the original declaration, Nauru: had not become a party to the Refugees Convention or Protocol; did not have domestic laws that entitled a person to protection from *refoulement* for persons seeking asylum pending determination of their refugee status; had an enactment that created a discretionary power (not an obligation) to grant a visa to a person whom the Principal Immigration Officer considered should be regarded as a "refugee" (an undefined term); did not have domestic laws that guaranteed to persons given refugee status all of the protections provided under the Refugees Convention and Protocol, pending their voluntary repatriation or resettlement; but may have had, as a matter of practical reality and fact, processes that provided the access and protection specified in s 198A(3)(a).

19. Prior to the making of the original declaration, on 10 September 2001, the then President of Nauru and the then Australian Minister for Defence had signed a document entitled "Statement of Principles". The Statement of Principles indicated that the principles enunciated "will provide the basis for joint cooperation in humanitarian endeavors relating to asylum seekers" and set out principles which included that "Nauru will accept persons for determination of their status, as jointly determined under administrative arrangements, from time to time…" and that "Australia will ensure that all persons taken by Nauru will have left within as short a time as is reasonably necessary to complete the humanitarian endeavors referred to in this Statement of Principles". Also on 10 September 2001, a document entitled "First Administrative Arrangement" was signed on behalf of Nauru and Australia. It provided that "Nauru will receive the persons currently on HMAS Manoora…" and that "Nauru may accept additional persons…".

20. The Statement of Principles was included within the agreed facts before the High Court in *Plaintiff M70*. The majority (at [13] and [128]) rejected an argument that the Statement of Principles informed the construction of s 198A by indicating the immediate object to which the enactment of s 198A was directed. However, the joint judgment (at [128]) added the following comment:

> [E]ven assuming them to be in some way relevant, the arrangements made with Nauru were very different from those that are now in issue. Not least is that so because Australia, not Nauru as the receiving country, was to provide or secure the provision of the assessment and other steps that had to be taken, as well as the maintenance in the meantime of those who claimed to be seeking protection. Thus it was Australia, not the receiving country, that was to provide the access and protections in question. Further, although the arrangement between Australia and Nauru was recorded in a very short document, the better view of that document may be that it created obligations between the signatory states.

21. That comment in the joint judgment is to be read fairly and in context. Having rejected the argument that the arrangements with Nauru informed the construction of s 198A, the joint judgment was in terms doing no more in that comment than pointing out a difference, and a possible difference, between those arrangements and the more recent arrangements with Malaysia. The difference as reflected in the comment was that it was Australia, not Nauru, who would undertake the assessment of refugee status and provide whatever access and protections were to be provided. The possible difference was that there may have been binding obligations between Australia and Nauru under the Statement of Principles whereas the arrangements with Malaysia were expressed not to be binding. The joint judgment was not assessing the significance of those differences (if any) for the application of the criteria set out in s 198A(3)(a)(i) to (iv) and was not addressing the validity of the original declaration. That is made clear by the statement immediately following in the joint judgment that "whether or not the arrangements with Nauru had the various features that have been identified" made no difference to the question of statutory construction raised by those criteria which was to be resolved in the manner already indicated in the joint judgment.

22. If we are correct in the view we prefer that the criteria set out in s 198A(3)(a)(i) to (iv) are to be applied to the country in question in respect of all persons who at the time of the declaration are seeking asylum and who are given refugee status in that country, rather than in respect only of those persons who may be taken to it from Australia under s 198A(1) once a declaration under s 198A(3) is in place, we do not see how the arrangement between Australia and Nauru could alone have satisfied those criteria.

23. However, if we are incorrect in that view, and were it necessary to form a view, the validity of the original declaration would fall to be determined primarily by the application of the second and third of the propositions we have drawn from *Plaintiff M70*. One of the propositions is that the "procedures" and "protection" required to satisfy the criteria set out in s 198A(3)(a)(i) to (iii) are to be "provided" by the country in

question as a matter of legal obligation. The other is that what is necessary to satisfy the criteria in s 198A(3)(a)(i) to (iii) is "access and protections of the kinds that Australia undertook to provide by signing the Refugees Convention and the Refugees Protocol".

24. Applying those propositions, we would have no difficulty in accepting that the arrangement set out in the Statement of Principles - if it were to be read as obliging Nauru to allow Australia to provide or secure the provision of procedures for assessing their refugee status - would result in Nauru satisfying the criterion set out in s 198A(3)(a)(i) as explained in the joint judgment (at [125]): that Nauru would have had an international obligation to "allow some third party to undertake such procedures" rather than "to do so itself". However, we would strongly doubt the arrangement set out in the Statement of Principles would meet the criteria set out in s 198A(3)(a)(ii) and (iii), even if it could be interpreted as obliging Australia to provide in Nauru all of the rights mentioned in the Refugees Convention as explained in the joint judgment (at [126]); it would not have been Nauru that was "internationally obliged to provide the particular protections" and Nauru's obligations were necessarily the subject matter of the declaration.

25. Be that as it may, we cannot read the Statement of Principles as contemplating the provision by Australia in Nauru of all of the rights mentioned in the Refugees Convention. Nor, having regard to the totality of the Statement of Principles, do we consider the argument that it created binding obligations between the signatories to be strong: the fact that the document is a "statement" suggests that it communicated a position reached rather than the creation of new rights; it was signed, whereas treaties are generally "done"; it did not say that the signatories had "agreed" anything, but rather that they had "reached" certain "principles"; it used the word "will", reflecting an intention to act, rather than "shall" demonstrating an agreement to be bound as a matter of law; and it was not submitted to the United Nations in accordance with article 102 of the UN Charter.

26. For those reasons, were it necessary to form a view, giving great weight to the comments in the joint judgment (at [128]) we could not, in the light of *Plaintiff M70*, have confidence in the validity of the original declaration. It is, of course, not necessary to form a view given that the original declaration has expired.

Existing Declaration

27. On 25 November 2002, the then Minister for Immigration and Multicultural and Indigenous Affairs again declared Nauru to be a "declared country" under s 198A(3). On this occasion, the declaration had no end date.

28. At the time of the making of the existing declaration, as at the time of the making of the original declaration, Nauru: had not become a party to the Refugees Convention or Protocol; did not have domestic laws that entitled a person to protection from *refoulement* for persons seeking asylum pending determination of their refugee status; had an enactment that created a discretionary power (not an obligation) to grant a visa to a person whom the Principal Immigration Officer considered should be regarded as a "refugee" (an undefined term); did not have domestic laws that guaranteed to persons given refugee status all of the protections provided under the Refugees Convention and Protocol, pending their voluntary repatriation or resettlement; but may have had, as a matter of practical reality and fact, processes that provided the access and protection specified in s 198A(3)(a).

29. On 11 December 2001, and hence prior to the making of the existing declaration, representatives of Nauru and the Commonwealth of Australia had signed a Memorandum of Understanding (Nauru MOU). Nauru MOU, which replaced the Statement of Principles and First Administrative Arrangements, recorded that the parties wished to "co-operate bilaterally on an amicable, effective and mutually beneficial basis" in the administration of asylum seekers (subsequently referred to in Nauru MOU as "certain persons"), and in "[support of] regional efforts to combat people smuggling". The Nauru MOU included the following terms: that "… the Parties have mutually

decided to co-operate in the humanitarian endeavours of security, water, sanitation, power generation, health and medical services, and such other areas as may be mutually decided for the purpose of administering the humanitarian needs of certain persons whilst in Nauru"; that "Nauru will accept certain persons on behalf of Australia with the understanding that each individual will be processed within six months of their arrival in Nauru, or as short a time as is reasonably necessary for the implementation of this Memorandum"; that "Australia will ensure that all persons processed in Nauru will have departed Nauru within this … period…"; and that "Consistent with the timeframe provided for in this Memorandum, any asylum seekers awaiting determination of their status or those recognised as refugees, will not be returned by Nauru to a country in which they fear persecution, nor before a place of resettlement is identified". (Ultimately, this MOU was replaced by subsequent MOUs, the most recent of which expired on 30 June 2007).

30. Save for the making of the Nauru MOU, there had been no material changes since the making of the original declaration (the validity of which we have doubted above). At the time of the making of the existing declaration, there were still no domestic laws that fulfilled the criteria in s 198A(3)(a)(i) to (iii). Nor, as at this stage, had Nauru become a party to the Refugees Convention and Protocol.

31. In terms of the principal analysis of the majority in *Plaintiff M70*, the relevant criteria specified in s 198A(3)(a) could be met only if the Nauru MOU gave rise to binding obligations *upon Nauru* to provide the access to effective procedures and protection specified in the criteria. Even if the Nauru MOU gave rise to binding obligations between its parties, the obligations on Nauru do not extend beyond a non-*refoulement* obligation (clause 30) to all the other measures of protection specified in the Refugees Convention for a person determined to be a refugee (see the joint judgment at [119]). In any event, we do not consider that there is much force in any argument that the Nauru MOU gave rise to binding obligations. Its language indicated that the parties had

reached an "understanding", not an agreement. Overwhelmingly, the Nauru MOU used "will" and "decided" rather than "shall" and "agreed". It referred to "commitments" rather than obligations or duties. The clause providing for the resolution of "difficulties" (rather than "disputes") did so by means of consultation between the parties (rather than arbitration or other binding method of determination).

32. For these reasons, we are not at all confident in the light of *Plaintiff M70* that the existing declaration for Nauru is valid under s 198A(3)(a) so as to be able to be relied upon as a basis to take offshore entry persons to Nauru under s 198A(1) of the Act. That is quite apart from issues that might be argued to arise from the passage of time and the change of circumstances since the existing declaration was made.

A Future Declaration

33. Recently, Nauru acceded to the Refugees Convention and Protocol. The Refugees Convention will enter into force for Nauru on the 90th day following the date of deposit of its instrument of accession (hence, 26 September 2011). The Protocol (which is the critical instrument because it covers persons who became refugees after 1 January 1951) came into force for Nauru on the date that it deposited its instrument of accession (28 June 2011).

34. There has, therefore, been a material change in position of Nauru since the making of the existing declaration. This raises the question whether a valid declaration could be made now.

35. The coming into force of the Refugees Protocol in Nauru has subjected it to obligations under international law, obligations which provide at least the elements found to be missing by the majority in *Plaintiff M70* in relation to Malaysia.

36. While the High Court has determined that this is necessary for the making of a declaration under s 198A(3), we do not consider that it is sufficient. First, as noted above at [12], we consider that the criteria in s 198A(3)(a)(i) to (iii) are likely to be held to

have an element of practical adherence as well as legal obligation. Before a declaration could be safely relied upon, it is likely to be necessary to establish more than the fact that Nauru is subject to these obligations; it may need to be established that the access that has to be provided is "effective" and that the requisite "protection" is in fact afforded. There is also a question as to whether Nauru meets relevant human rights standards in providing the protection under the Convention so as to satisfy s 198A(3)(a)(iv). As noted in [13] above, that criterion is unlikely to be satisfied unless it could be demonstrated by appropriate evidence that Nauru in its treatment of asylum seekers and refugees complied in practice with standards of human rights acceptable at least to the United Nations High Commissioner for Refugees.

37. Accordingly, we could be confident that Nauru would satisfy those criteria only if there were material that we were able to assess as capable of demonstrating to the satisfaction of an Australian court first: that appropriate arrangements were in place to ensure practical compliance by Nauru with its obligations under the Convention and the Protocol; and, secondly, that Nauru in its treatment of asylum seekers and refugees complied in practice with human rights standards acceptable at least to the United Nations High Commissioner for Refugees. That material would need to canvass complex issues of fact and degree concerning social conditions and standards of governance, which would ultimately need to be proved by admissible evidence in a court.

Papua New Guinea

Existing Declaration

38. The exercise, or purported exercise, of the power in s 198A(3)(a) in relation to PNG occurred on 12 October 2001 when the Minister for Immigration and Multicultural Affairs signed the instrument of declaration bearing that date. That declaration, like the existing declaration in relation to Nauru, has no end date.

39. PNG had acceded to the Refugees Convention and Protocol on 17 July 1986, but made reservations against seven articles including those in relation to employment, housing, education, freedom of movement and refugees unlawfully in the country of refuge. This remained its position in October 2001. These reservations meant that PNG was not at that time subject to several important obligations comprehended by the "protections" referred to in the joint judgment at [119]. The international obligations it had undertaken were somewhat less than a "reflex" of Australia's obligations.

40. At that time PNG: did not have domestic laws that entitled a person to protection from *refoulement* for persons seeking asylum pending determination of their refugee status; had an enactment that created a discretionary power (not an obligation) to recognise a person as a "refugee" (an expression which was defined, but not in terms that imported the Convention definition of a refugee); did not have domestic laws that guaranteed to persons given refugee status all of the protections provided under the Refugees Convention and Protocol, pending their voluntary repatriation or resettlement; but may have had, as a matter of practical and reality and fact, processes that provided the access and protection specified in s 198A(3)(a).

41. We do not think it could be said, by reference only to PNG's Convention obligations and its domestic laws, that it met the necessary legal elements of s 198A(3)(a)(i) to (iii), as set out in the reasoning of the majority Justices in *Plaintiff M70*.

42. Prior to the making of the declaration, the Australian Ambassador to PNG and the Secretary to PNG's Department of Foreign Affairs had on 11 October 2001 signed a Memorandum of Understanding "in relation to the processing in PNG of certain persons, and related issues" (the PNG MOU). It is not expressed to have an end date, and so far as we are aware it is still operative (although, given its terms as summarised below, it may have no work left to do). The PNG MOU contained the following terms: activities under the MOU were to be conducted in accordance with international law and the international obligations of both parties; Australia was to bear "all reasonable costs"

incurred by PNG related to the activities conducted under the MOU; "administrative measures giving effect to" the MOU were to be settled between the parties; a "suitable site for processing persons" was to be agreed between the parties; Australia was to guarantee that all persons entering PNG "will have left after six months of entering PNG, or as short a time as is reasonably necessary", subject to any joint decision to extend that time; PNG was to "permit entry" to a particular group of persons (specified by reference to their having been taken on board particular Australian Naval vessels on particular dates); and additional persons could be "accommodated and processed by joint determination of both parties".

43. In terms of the principal analysis of the majority in *Plaintiff M70*, the relevant criteria could be met only if the PNG MOU gave rise to binding obligations *upon PNG* to provide the access to effective procedures and the protection specified in the criteria in s 198A(3)(a). Even if the PNG MOU gave rise to binding obligations between its parties, the obligations it imposed on PNG did not include any of the obligations referred to in provisions of the Refugees Convention against which PNG had lodged reservations; in other words, it did not add to the "protections" that PNG was obliged to provide. For example, the PNG MOU envisaged persons being required to reside in an "immigration processing centre", presumably by means of the exercise of powers under ss 15B and 15C of the *Migration Act 1978* (PNG) (and this appears to be what occurred). The Refugees Convention, in Article 26 (to which PNG is not subject), requires a contracting state to provide freedom of movement for refugees lawfully within its territory.

44. In any event, we do not consider that there is much force in any argument that the PNG MOU gave rise to binding obligations. Like the Nauru MOU discussed above, its language indicated that the parties had reached an "understanding", not an agreement; it used "will" and "decided" rather than "shall" and "agreed"; it referred to "commitments" rather than obligations or duties; it was "signed" rather than "done";

and it was not submitted to the United Nations in accordance with article 102 of the UN Charter.

45. For these reasons, we are not at all confident in the light of *Plaintiff M70* that the existing declaration for PNG is valid under s 198A(3)(a) so as to be able to be relied upon as a basis to take offshore entry persons to PNG under s 198A(1) of the Act.

A Future Declaration

46. As at November 2010, PNG maintained its reservations against various articles of the Refugees Convention, although discussions were underway with a view to removing them. We understand that these reservations remain in place. We also understand that PNG's domestic migration laws, in so far as they deal with the position of refugees and asylum seekers, remain in the form discussed above.

47. The PNG MOU appears to remain on foot but, for the reasons discussed above, does not in our view provide any strong basis for an argument that PNG meets the relevant criteria.

48. It is therefore not possible to have any confidence that a future declaration of PNG under s 198A(3)(a) would be valid, unless it is preceded or accompanied by some significant development in PNG's international obligations or domestic laws relating to the status of refugees: for example, removal of the reservations against provisions of the Refugees Convention, or a separate binding instrument imposing additional protection obligations. Even then, on the view which we take of s 198A(3), it would probably be necessary for there to be evidence capable of establishing in an Australia court that, as a matter of practical reality, PNG met, and would continue to meet, its protection obligations and relevant human rights standards. That would, of course, involve complex matters of fact and degree requiring detailed analysis and assessment.

Dated: 2 September 2011

STEPHEN GAGELER

STEPHEN LLOYD

GEOFFREY KENNETT

SCHEDULE

1. Convention Relating to the Status of Refugees (1951) and Protocol Relating to the Status of Refugees (1967)

Republic of Nauru

2. *Immigration Act 1999* (Republic of Nauru)

3. *Immigration Regulations 2000* (Republic of Nauru)

4. Statement of Principles between the Republic of Nauru and Australia, 10 September 2001

5. First Administrative Arrangement in accordance with Statement of Principles between the Republic of Nauru and Australia, 10 September 2001

6. Declaration made pursuant to s 198A(3) of the *Migration Act 1958* (Cth) with respect to Republic of Nauru, 2 October 2001

7. Declaration made pursuant to s 198A(3) of the *Migration Act 1958* (Cth) with respect to Republic of Nauru, 25 November 2002

8. Memorandum of Understanding between the Republic of Nauru and Australia, 11 December 2001

9. Memorandum of Understanding between the Republic of Nauru and Australia, 9 December 2002

10. Memorandum of Understanding between the Republic of Nauru and Australia, 25 February 2004

11. Memorandum of Understanding between the Republic of Nauru and Australia, 20 September 2005

Papua New Guinea

1. *Migration Act 1978* (Papua New Guinea)

2. Memorandum of Understanding between Papua New Guinea and Australia, 11 October 2001

3. Declaration made pursuant to s 198A(3) of the *Migration Act 1958* (Cth) with respect to Papua New Guinea, 12 October 2001

4. Declarations of Relocation Centres under the *Migration Act 1978* (Papua New Guinea), National Gazette, 16 April 2002

5. Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: PAPUA NEW GUINEA, November 2010

6. Draft proposed Administrative Arrangements 'Supporting the Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer to, and Assessment of persons in Papua New Guinea, and Related Matters', 26 August 2011

IN THE MATTER OF THE IMPLICATIONS OF *PLAINTIFF M70/2011 V MINISTER FOR IMMIGRATION AND CITIZENSHIP* FOR OFFSHORE PROCESSING OF ASYLUM SEEKERS UNDER THE *MIGRATION ACT 1958* (CTH)

OPINION

SG No. 21 of 2011