THE EMPEROR’S NEW CLOTHES: THE 2016 HIGH COURT DECISION VALIDATING OFFSHORE DETENTION.

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I INTRODUCTION

Constitutional issues raised by Plaintiff M68/2015 (“Plaintiff M68”) v Minister for Immigration and Border Protection [2016] HCA 1 (“M68”) are discussed and analysed in this paper. Plaintiff M68, a Bangladeshi national claiming to be a refugee, had been intercepted by the Commonwealth at sea within the Australian migration zone, and classified as an ‘unlawful non-citizen’. Plaintiff M68 was then detained on Christmas Island before being transferred and placed in continuing detention on Nauru according to applicable provisions of the Migration Act 1958 (Cth) (“the Migration Act”). A central question for the High Court was whether Plaintiff M68’s detention on Nauru had been “funded, authorised, caused, procured and effectively controlled by, and was at the will of, the Commonwealth”. Put differently, the question was whether it was the Commonwealth who detained Plaintiff M68 on Nauru, or the Nauruan Government who detained Plaintiff M68 on Nauru. The Commonwealth maintained it was Nauru who detained Plaintiff M68, thus the Commonwealth need not rely on either s 61 of the Constitution, or s 198AHA of the Migration Act (“198AHA”) as authorisation for a detention for which it was not responsible.

1 As defined in Article 1 of The Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967) (“the Refugees Convention”).
2 Definition within s 5(1) of the Migration Act 1958 (Cth) (“the Migration Act”).
3 Definition within s 14 of the Migration Act; [2016] HCA 1, 77 [266].
4 Plaintiff M68/2015 v Minister for Immigration and Border Protection [2016] HCA 1 (‘M68’) [38] (French CJ, Kiefel and Nettle JJ); [352] (Gordon J).
5 M68 [2016] HCA 1, 7 [26] (French CJ, Kiefel and Nettle JJ).
In Orders the High Court answered special case question 2(a): whether the Memorandum of Understanding (‘MOU’) with Nauru was authorised by s 61 prerogative powers; and question 2(b): whether 198AHA was valid law giving effect to that arrangement. This paper then includes discussion and analyses of the application of the principle in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (‘Lim’), and the scope of executive power to contract, or detain in *Williams v Commonwealth* [2014] HCA 23 (‘Williams No. 2’). Also discussed briefly is the issue of Nauruan constitutional validity for the arrangement, which the High Court found unnecessary to answer. First it is necessary to consider detention without trial, and how *Plaintiff M68* came to arrive at the High Court to ask the questions she did. This is because somewhere in the mix of M68 there is the notion that detention on Nauru is not valid.

**II DISCUSSION AND CRITICAL ANALYSIS**

**A Detention Without Trial**

The Commonwealth argued that any liability for deprivation of liberty under Australian common law did not apply to the Commonwealth, because the common law of Australia did not run to Nauru. This was an “ingenious” argument, thought Gageler J, however an ingenious argument “three centuries too late”. The British *Habeas Corpus Acts* centuries ago, and their importance, have not diminished over time and remain of the “highest constitutional importance”. In fact the law surrounding executive detention without trial was a basis upon which *Plaintiff M68* was able to commence the matter in the High Court. This was not a removal of a constitutional matter from a lower court: s 40 *Judiciary Act 1903*. The matter was

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6 *M68* [2016] HCA 1 attachment to the judgement, and summarised in the orders.
8 *M68* [2016] HCA 1 attachment to the judgement, and summarised in the orders.
9 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 (‘Lim’).
11 Ibid [155].
directly within the original jurisdiction of the High Court: s 75(iii) (Commonwealth being sued); and s 75(v) (writ of Mandamus seeking prohibition or injunction against the Commonwealth). With regard to standing, and despite a lengthy special case question (1), none of the High Court Justices had any issue with Plaintiff M68’s standing. Simply put “[a] party who has been in custody has standing to question the lawfulness of that detention”.

B Section 51, and 198AHA

As for the authority for s 198AHA as the basis for continuing detention, the Commonwealth submitted that s 198AHA is a valid law and supported by s 51(xxix) the external affairs power, s 51(xxx) the Pacific islands power, and/or s 51(xix) the alien power. Lim had confirmed s 51(xix) as authority for the executive to detain an alien for the purposes of deportation or expulsion. Plaintiff M68 submitted that s 51(xix) did not authorise the nature of the detention within s 198AHA. The court disagreed with Plaintiff M68’s submission, and found little need to look beyond s 51(xix) power as statutory authority for s 198AHA.

However, for this author, there are worthy constructional and interpretational challenges for s 51. That is to say, first, that s 51 provides the legislature with the power to make laws for “the peace, order, and good government of the Commonwealth” (emphasis added). The obiter comments of Kirby J in dissent in Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case) (1998) 195 CLR 337 are relevant. Kirby J looked at the context and interpretation of for relevant to s 51(xxvi). He observed the word “for” is ambiguous, and that “for” had applications throughout s 51. “For” could wear different hats, but “for” as “in respect of” or “for” “the benefit of” seemed fitting. Kirby J saw an interpretation of “for” in s 51(xxvi) that was being used in the Hindmarsh Island Bridge Case to promote a “detrimental or adversely discriminatory” end, thus not used beneficially. This author sees the relevance of that thinking to the extent that s 51 appears properly read as being beneficial in nature, by being for “the peace, order, and good government of the Commonwealth”.

15 M68 [2016] HCA 1, 21 [75]; 67 [234].
16 Kartinyeri v Commonwealth (1998) 195 CLR 337 (Hindmarsh Island Bridge Case), 411-413.
17 Ibid [155].
18 Ibid [154],[157].
Secondly, as a matter of construction and context, it should be noted that s 51(xix), in full, is “naturalization and aliens”\(^\text{19}\). Naturalisation is not defined in the Constitution and, in fact, is only mentioned once. Naturalisation is not defined in the Acts Interpretation Act 1901 (Cth). The Macquarie Dictionary defines naturalisation in a generally positive and beneficial light: as a verb ‘to invest (an alien) with the rights and privileges of a subject or citizen’ (emphasis added).\(^\text{20}\) The two short limbs of “naturalization and aliens” then join in cumulative effect the idea of naturalisation ‘and’ the idea of investing the alien with rights of citizenship. Read in this manner, utilising the s 51(xix) alien power as the head of legislative power to authorise Plaintiff M68’s continuing detention in Nauru, s 198AHA seems a “detrimental and adversely discriminatory”\(^\text{21}\) harsh cut from the constitutional belt. The asserted constitutional validity “for” the purpose of detaining, and divesting not investing, offshore an international refugee seeking refugee status seems a cold hammering tool for Australia to wield. The tool seems too large for the job. The tool is disproportionate to that needed for a reasonably appropriate and adapted response to unlawful non-citizen arrivals near Australian shores.

Was this non-beneficial interpretation of an alien intended by the framers of the Constitution who wrote ‘naturalization and aliens’ into s 51\(^\text{22}\)? Perhaps the answer is “yes”.\(^\text{23}\) Although, as observed in Lim, under the common law of Australia “an alien who is within this country, whether lawfully or unlawfully, is not an outlaw”.\(^\text{24}\) Involuntary executive detention clearly raises questions of punishment, and is a reason that the practice should receive careful consideration. Jeremy Bentham posited that all punishment is evil and that, where the evil of a punishment is disproportionate to the evil of the offence, there is no profit in the punishment.\(^\text{25}\) That the Commonwealth argued so deliberately, and successfully, that Plaintiff M68 was an

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\(^{19}\) Australian Constitution s 51(xix) original spelling of naturalization quoted from the Constitution, however in discussion it is the Macquarie dictionary spelling which is preferred.


\(^{21}\) Hindmarsh Island Bridge Case (1998) 195 CLR 337, 411 [154]-[157].

\(^{22}\) Ibid [155].

\(^{23}\) Pacific Island Labourers Act 1901 (Cth) s 10, Immigration Restriction Act 1901 (Cth).

\(^{24}\) Lim (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ); M68 [2016] HCA 1, 45 [149] (Gageler J) citing Lim (Brennan, Deane and Dawson JJ (with whom Mason CJ agreed)).

“outlaw” to detain in the manner which 198AHA effects implies a convergence of government policy with constitutional interpretation. This author suggests the courts must administer this convergence carefully.26

Yet there appears a simpler way to tackle s 51 authority for s 198AHA, and disable Ch II s 51 from entering Ch III territory. Gordon J believed s 51(xix) was *prima facie* a valid legislative power for s 198AHA, but did not validate s 198AHA because 198AHA exceeded the authority in *Lim*.27 In a clear interpretation away from the majority, Her Honour’s appraisal cut to the core of the matter. External affairs s 51(xxix) was, subject to limits, the best authority for s 198AHA,28 because all powers in s 61 are subject to the constitutional restraints of Chapter III.29 In essence, Gordon J observed what history has delivered to the rule of law in Australia’s modern constitutional democracy: detention is fundamentally a judicial function, and the executive does not have that power to detain outside of the *Lim* exception.30

**C Sections 189, 198AH Migration Act, and Lim**

Section 189 of the Migration Act provides the Commonwealth with the statutory authority to detain unlawful non-citizens. However, according to s 198AD(2) of the Migration Act, the Commonwealth must “as soon as reasonably practicable” take the unlawful non-citizen to a regional processing country such as Nauru. Thus the statutory authority is for the temporary detention and purpose of removal of the person as part of a process. The statutory authority is not for the indefinite detention of the person for the purpose of indefinite detention,31 or an indefinite detention that has that effect even though not the purpose.32 The principle of *Lim* is different. *Lim* involved 35 Cambodian nationals who arrived in Australia in 1989-1990 as boat people without valid visas. They were subsequently detained. The 36th Cambodian national in detention was Lim William, a baby boy born to one of the original arrivals. The principle in

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31 *Fardon v Attorney-General (Qld)* [2004] 223 CLR 575.
Lim is that the executive may detain an alien for the purpose of expulsion or deportation, and this does not infringe the judicial power of Chapter III courts.\(^{33}\) However, very importantly, that authority is only valid as long as detention is imposed under a valid statutory authority.\(^{34}\) If s 198AHA were not a valid law, the principle in Lim by itself is insufficient authority for the executive.

The decision in Lim, summarised in M68, further provides that “laws for the detention by the executive of aliens necessary to enable their deportation are not punitive in character”.\(^{35}\) This is so even though Lim observed, exceptions aside, the involuntary detention of a citizen is punitive in character and exclusively a judicial function for punishing criminal guilt\(^{36}\) (emphasis added). Aliens then are an exception to the rule for citizens. Plaintiff M68 argued against this exception, that the Commonwealth had exceeded the authority of Lim, and that the detention was punitive: that is, a punishment.\(^{37}\) The High Court’s views on the application of Lim seem best summarised by Bell J: there was a non-application of Lim, because it was Nauru that was detaining the plaintiff.\(^{38}\)

Juggling the exceptions to involuntary non-criminal detention appears not an easy task (exceptions include the mentally ill, limiting the spread of disease, contempt of Parliament, and court martial).\(^{39}\) The correct interpretation or application, or not, of Lim in M68 may be hard to pin down. It has been said there is a near “chaotic division amongst High Court Justices”\(^{40}\) on the constitutional immunity regarding detention outside the criminal process. Again we return to Bentham (supra) and what punishment means. When does detention become punishment? If detention is punishment then when does the punishment lack proportionality? The courts perhaps should be cautious in creating “new exceptional categories”\(^{41}\) of imprisonment, and prevent invalid or unauthorised interferences with liberty.\(^{42}\) Any exercise of power in excess

\(^{33}\) Lim (1992) 176 CLR 1, 2 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

\(^{34}\) M68 [2016] HCA 1, 10 [38] (French CJ, Kiefel and Nettle JJ).

\(^{35}\) M68 [2016] HCA 1, 68 [238] (Keane J); Al Kateb v Godwin [2004] 219 CLR 562, 584 (Hayne J).

\(^{36}\) Lim (1992) 176 CLR 1, 27 (Brennan, Deane, Dawson JJ).

\(^{37}\) M68 [2016] HCA 1, 66 [229] (Keane J).

\(^{38}\) M68 [2016] HCA 1, 28 [99] (Bell J); see also M68 [2016] HCA 1, 11 [41] (French CJ, Kiefel and Nettle JJ);


\(^{40}\) Ibid, 43.

\(^{41}\) Jeffrey Steven Gordon, above n 36, 102.

of a valid statutory authority that “would cease to be lawful”^43 may well be a place best avoided if the rule of law is to be respected. If the rule of law is not to be respected in a place, that is another place.

**D Plaintiff M68 Detained By The Commonwealth On Nauru, Or Nauru On Nauru**

In the District Court of Queensland, the occupier of a place is not necessarily responsible for a ‘place within a place’.^44 In this way, a container of drugs in a cupboard in a house can be held to be an exception to the presumption of the occupier’s possession in the *Drugs Misuse Act 1986*.^45 While this District Court decision may carry little authority in the High Court, the idea of control and possession does have High Court reach.^46 This author wishes to apply this thinking to the detention of *Plaintiff M68* within Nauru’s Regional Processing Centres (‘RPCs’). It is the Commonwealth that appears clearly in control of places (RPCs) within a place (Nauru). How in control? Control can be physical, or constructive control. Here it appears to be both.

While the Commonwealth consistently maintained that it was Nauru who detained *Plaintiff M68*, the Commonwealth did concede the causal link between its conduct and the detention on Nauru.^47 The Commonwealth’s involvement in the detention of *Plaintiff M68* is like a lost chapter from the Emperor’s New Clothes. Everyone can see the truth, but must search hard to find one to speak the truth. The sheer magnificence of the Commonwealth’s arrangements expose the degree of control over the arrangements: a dedicated regional processing visa for which only the Commonwealth may apply on behalf an unauthorised arrival without their consent;^48 the MOU enabling the arrangements;^49 the 129 page Australian National Audit

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^43 M68 [2016] HCA 1, 29 [101] (Bell J).
^44 Flavell v Power [2008] QDC 134 [14].
^45 Section 129(1) of the *Drugs Misuse Act 1986* (Qld) reverses the onus of proof for as person relying on s 24 *Criminal Code* mistake of fact. Usually the occupier of the place is conclusive proof of possession, however the option is available for an occupier of a place to assert the place within the place is not under their control.
^46 Tabe v R (2005) 79 ALJR 1890.
^48 Section 9(3) Nauru Immigration Regulations 2013 <http://ronlaw.gov.nr/nauru_lpms/files/subordinate_legislation/554ee8f7b3d0e2edbf78a0e8bfc5b2e0.pdf>.
^49 Department of Foreign Affairs and Trade, Australian Government, above n 7.
Office (‘ANAO’) report\(^{50}\) (a report scathing at the lack of oversight and waste of taxpayers’ money) ; the 345 page RPC procedural manual produced by Transfield for Nauru and Manus Island, and published on the Australian Home Affairs website;\(^{51}\) and the location of Australian Border Force officers wearing Australian Border Force uniforms inside Australian Border Force offices within the RPCs.\(^{52}\) Then there is the Commonwealth’s contractual trump card: the ‘step in’ provision. It is curious that Bell and Gordon JJ were the only M68 High Court Justices to mention the “step in provision”.\(^{53}\) The ‘step-in right’ under cl 17.13 of the Transfield Contract\(^{54}\) provides the Commonwealth’s Secretary of the Department of Immigration and Border Protection the power to intervene if they:

- consider[ed] that circumstances exist which require the Department’s intervention, the Department may, in its absolute discretion, suspend the performance of any service by [Transfield], arrange for the Department or a third party to perform such suspended service or otherwise intervene in the provision of the Services by giving written notice to [Transfield] (Step-in Right).\(^{55}\)

These layers of control expose the naked truth and sustain Plaintiff M68’s submission that her detention was “funded, authorised, caused, procured and effectively controlled by, and was at the will of, the Commonwealth”.\(^{56}\)


\(^{52}\) M68 [2016] HCA 1, 86 [306] (Gordon J).

\(^{53}\) M68 [2016] HCA 1, [332], [353],[398] (Gordon J); [88] (Bell J).


\(^{55}\) Ibid.

\(^{56}\) M68 [2016] HCA 1 [352] (Gordon J); [38] (French CJ, Kiefel and Nettle JJ).
E. Contracting, ss 61 and 51 xxxix, Williams, Pape, AAP

The Commonwealth entered into arrangements with Nauru using MOUs. The second MOU\(^57\) signed into effect on 3 August 2013 replaced the first MOU signed on 29 August 2012. The second MOU cl 6 ‘Guiding Principles’ states that the Commonwealth agrees to “bear all costs incurred under and incidental to this MOU”\(^58\). That reads like the Commonwealth asserting an application of the implied nationhood power utilising s 61 and s 51(xxxix) incidental powers as in the AAP case.\(^59\) One observation of M68, then, was whether the executive had a valid head of power to enter an agreement, not so much for the expenditure related to, but for the detention of, M68.

Williams No. 2 provides that s 61 executive power alone is insufficient. That case “turned on the scope of executive power” to enter agreements and make funding in the absence of statutory authority.\(^60\) In Williams No. 2 the Commonwealth had attempted to retrospectively make amendments to validate the operation of the National Schools Chaplaincy Program (‘NSCP’). These amendments were found to be invalid, just as the NSCP had earlier been found to be invalid in Williams v The Commonwealth (2012) 248 CLR 156 (“Williams No 1”). There must be a valid authority, that is to say, a valid statutory authority passed by an Act of Parliament, and that statutory authority must have a valid constitutional head of power. Executive power is not coextensive with legislative power.\(^61\)

Put another way, while the executive may have a valid head of legislative power, that valid head of legislative power does not replace the requirement to use it to obtain statutory authority. The broad interpretation of s 61 from the AAP case was applied in Pape v Federal Commissioner of Taxation (2009) 238 CLR 1 (‘Pape’). The executive effectively has unlimited power to contract applying nationhood powers in certain circumstances (global financial crisis or national emergency) under a broad interpretation almost akin to any individual’s freedom to

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57 Department of Foreign Affairs and Trade, Australian Government, above n 7.
58 Ibid.
61 Ibid 42.
contract within a liberal democracy.\textsuperscript{62} Under the narrower authoritative interpretation in \textit{Williams No. 1 and Williams No. 2} that power is not unlimited. As a principle of responsible and representative government\textsuperscript{63} the executive, as members chosen by the people,\textsuperscript{64} is required to respect Australia’s Federal bicameral system of government, the role of the senate, parliamentary debate, and associated mechanisms.

This author may have overlooked or failed to see, in reading M68, an extensive discussion regarding the Commonwealth’s ability to contract to spend public money. However, one cannot but feel that more should have been made of this. The extraordinary waste and mismanagement of taxpayers’ money related to offshore detention is highlighted throughout the ANAO report: “[s]ignificant loss of infrastructure; loss of essential services; failure to maintain infrastructure; failure to deliver contracted services efficiently or effectively; ineffective financial management; and fraudulent activity by staff or service providers”.\textsuperscript{65} The Transfield contracts and other service provider contracts aside, this author suggests greater constitutional discussion could have been applied to s 61 contractual aspects in M68. The historical and structural understanding of exactly what power s 61 provides the executive to execute and maintain the Constitution is “barren ground for any analytical approach”.\textsuperscript{66}

\textit{F. Validity under Nauru Constitution, Moti, PNG decision}

Exactly twelve weeks after the decision in M68, Papua New Guinea’s Supreme Court found that the arrangement enabling the Manus Island detention centre was invalid\textsuperscript{67} under s 42 of

\textsuperscript{62} Ibid 11.
\textsuperscript{63} Ibid 17,18,30,40.
\textsuperscript{64} \textit{Australian Constitution} ss 7, 24.
\textsuperscript{65} Department of Immigration and Border Protection. ANAO Report, above n 46, 54 [3.16]. Systemic failures, financial mismanagement and poor oversight are themes of failure throughout the report.
the Constitution of The Independent State of Papua New Guinea (‘PNG Constitution’). The lead judgement was delivered by Higgin JJ, and supported by the full court. The relevant subsections state: s 42(1) a person shall not be deprived of their liberty; and s 42(2) states a detained person has rights including a right to communicate without delay and in private with a lawyer of their choice. The Commonwealth’s detention of unlawful non-citizens on Manus Island was invalid under the PNG Constitution because the detention infringed these constitutional rights. The Constitution of Nauru has a similar deprivation of liberty clause s 5(1). Yet for various reasons (unnecessary to answer, not warranted, does not arise, not necessary to address) none of the M68 High Court had any appetite to consider the validity of the arrangements according to The Constitution of Nauru. This is despite clear statements within cls 5-6 of the MOU that the arrangements should comply with all domestic laws of Nauru and Australia, and their respective Constitutions. While Gageler J did think the validity under the The Constitution of Nauru was controversial the gist of the thinking was that ‘international comity and judicial restraint’ encourages the court not to cast judgement beyond Australia’s shores. This is not a blanket rule. The court does not always restrain itself from doing so: Moti v The Queen (2011) 245 CLR 456 (‘Moti’).

It is curious that special question (11)(a), specifically enquiring about the validity of the restrictions placed on Plaintiff M68 in Nauru, was not answered. Perhaps it related less to what was happening inside the courtroom, and related more to what was happening outside. The winds were blowing and quickly shifting direction. Announced just prior to the M68 decision were 24/7 ‘open centre’ arrangements, and this further eroded the case for Plaintiff M68

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68 Constitution of The Independent State of Papua New Guinea <http://www.unesco.org/education/edurights/media/docs/600e78096209b63b86f0135f52694b257b4b0c0e.pdf>.
69 Above n3.
71 Department of Foreign Affairs and Trade, Australian Government, above n 7.
72 M68 [2016] HCA 1 [106] (Gageler J).
already trying to battle the retrospectively enacted s 198AHA. These rule changes effectively neutralised much of Plaintiff M68’s argument against her detention. So despite the smell of Manus Island constitutional invalidity blowing in the air, and instead of applying a Moti curiosity to Nauruan constitutional validity, the court window was simply shut. Why? Perhaps there was some kind of silent policy agenda or cataclysmic mindset76 at work guiding the court towards finding the detention valid. This author does not suggest the High Court of administering policy at the behest of the Executive,77 however he does suggest the ‘great cleavage’78 should be clearly and visibly maintained.

\[G\] Just terms

As a small aside, the idea of an acquisition of property on just terms appears another possible constitutional challenge to the detention.79 Property has many species.80 This author asks whether “the acquisition of property from any person for any purpose for which the Parliament has to make laws” is applicable to Plaintiff M68 (emphasis added). Should Plaintiff M68 meet the criteria for any person, then being stripped of an incorporeal right to claim refugee status in Australia, beneath an international agreement to which Australia is a signatory81, appears an acquisition of property not on just terms. The Commonwealth’s anticipated defence would apply contemporary thinking: a mere taking, or extinguishment, is not an acquisition82 nor creates a proprietary interest.83

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79 Australian Constitution s 51(xxxi).
80 Minister of State for the Army v Dalziel [1944] 68 CLR 261, 290 (Starke J).
81 Refugees Convention, above n 1.
III CONCLUSION

Plaintiff M68 argued her detention was “funded, authorised, caused, procured\(^{84}\) and effectively controlled by, and was at the will of, the Commonwealth”. That question was asked, and should have been answered “yes” by the majority. Executive powers to detain without trial appear to have been stretched beyond the principles in Lim, because the effect and purpose of the detention went beyond the powers of Lim. The constitutional validity of the full contractual arrangements and spending made under the MOU were not fully considered. The validity of the arrangement under The Constitution of Nauru was artfully sidestepped. Section 61 by itself was insufficient, and needed s 198AHA to be retrospectively enacted to validate the detention. There would appear to have been shifting goalposts, shifting sands, and shifting winds. When the ground is constantly moving it appears hard for a refugee to find a safe place to stand.

Word count: 3545 (with minor corrections before publication).

\(^{84}\) M68 [2016] HCA 1 [38] (French CJ, Kiefel and Nettle JJ); [78] (Bell J); [113],[173],[187] (Gaejer J); [199],[222],[236],[239] (Keane J); [323],[352],[354] (Gordon J); Macquarie concise dictionary, 5th edition, 1002 ‘procured’: to effect; cause; bring about, especially by unscrupulous or indirect means.