

Last update: 26 June 2014

- regional processing country , the Minister is not required to consider any factors other than those mandated by the Act, namely the regional processing country s giving of assurances as to *non-refoulement* and refugee status determination
- ◁ In particular, the Minister does not need to have regard to UNHCR s advice on the matter, the regional processing country s international or domestic law, or its capacity to implement those obligations
 - ◁ The Parliament has succeeded in its intention to restor[e] to the executive the power to manage one of a government s core functions - (as stated by the then [Immigration Minister](#) following the High Court s previous decision in the [Malaysia Declaration case](#))
 - ◁ Australia s migration legislation may therefore no longer respond to its international obligations under the Refugee Convention.

Case note

On 18 June 2014 Australia s High Court unanimously dismissed a challenge to the legality of the legislation underpinning offshore processing. The High Court upheld the constitutionality of the legislation, the validity of the Minister s designation of Papua New Guinea (PNG) as a regional processing country, and the Minister s direction as to where asylum seekers were to be transferred (Nauru and PNG).

The legal history of offshore processing

The legal history of the legislation challenged in *Plaintiff S156* is complex. It begins with the suite of legislation passed by the Howard Government to enact the Pacific Solution



Rather, there must be a pre-existing external affair to enliven the power. Further, and in the alternative, the breadth of the external affairs power was constrained by the constitutional limit identified by the majority in *Chu Kheng Lim* (the exclusivity of judicial power).

The administrative law challenge

The plaintiff's principal argument in relation to the invalidity of the designation by the Minister was that, notwithstanding the legislative direction that the Minister must only consider one matter, there remained a range of factors that the Minister was required to consider as being relevant. These included:

- < consultations with and advice from UNHCR (which was not received before designation, as noted above);
- < ~~expressions of public concern and international obligations of domestic law and international law~~ (which did not exist);
- < PNG's capacity to ~~investigate and prosecute~~ (which was very limited);
- < ~~conditions of the refugee camp, the international law and treaties referenced in the relevant legislation and the fact that the camp was not a safe haven, representation or judicial review;~~
- < ~~the violation or breach of Australia's international obligations to the refugee camp~~ (the violation or breach of Australia's international obligations which the Minister did not consider).

This challenge ran aground on the clear language of x

