FEDERAL COURT OF AUSTRALIA

Secretary, Department of Home Affairs v CCA19 [2019] FCAFC 209

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| Appeal from: | *CCA19 v Secretary, Department of Home Affairs* [2019] FCA 946  |
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| File number: | VID 757 of 2019 |
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| Judges: | **ALLSOP CJ, ROBERTSON AND MOSHINSKY JJ** |
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| Date of judgment: | 28 November 2019 |
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| Catchwords: | **MIGRATION** – Minister’s approval to bring relevant transitory person to Australia – whether the primary judge erred in construing s 198E of the *Migration Act 1958* (Cth) and therefore erroneously found that two doctors were treating doctors for the respondent within the meaning of s 198E – meaning of “assessed the transitory person either remotely or in person” – where assessment on the papers**STATUTORY INTERPRETATION** – construction of definition of “treating doctor for a transitory person” – construction of “assessed the transitory person either remotely or in person”  |
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| Legislation: | *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) Sch 6*Migration Act 1958* (Cth) ss 5(1), 198AA, 198E, 198F, 199A  |
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| Cases cited: | *Australian Securities and Investment Commission v Westpac Securities Administration Ltd* [2019] FCAFC 187 *Esso Australia Resources Pty Ltd v Commissioner of Taxation* [2011] FCAFC 154; 199 FCR 226*Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 256 CLR 1*Minister for Immigration and Border Protection v WZAPN* [2015] HCA 22; 254 CLR 610 *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc* [1994] HCA 54; 181 CLR 404*P & M Quality Smallgoods Pty Ltd v Leap Seng* [2013] NSWCA 167 *Western Union Business Solutions (Aus) Pty Ltd v Robinson* [2019] FCAFC 181Pearce D, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th edition, 2019) at [6.4]  |
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| Date of hearing: | 21 November 2019 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 65 |
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ORDERS

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|  | VID 757 of 2019 |
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| BETWEEN: | SECRETARY, DEPARTMENT OF HOME AFFAIRSAppellant |
| AND: | **CCA19**Respondent |

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| JUDGES: | ALLSOP CJ, ROBERTSON AND MOSHINSKY JJ |
| DATE OF ORDER: | 28 NOVEMBER 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the costs of the respondent, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. The respondent is a 30 year old man originally from Iraq. After arriving in Australia without a visa in 2013, he was taken to Nauru by the Commonwealth of Australia. For the purposes of the *Migration Act 1958* (Cth), Nauru is a “regional processing country”. Having been taken to a regional processing country under s 198AD of the *Migration Act*, the respondent became a “transitory person” within the meaning of s 5 of the *Migration Act*.
2. This appeal is from the orders made by the primary judge on 18 June 2019, as follows:

**THE COURT DECLARES THAT:**

1. Two or more treating doctors for the applicant have notified the respondent that the applicant is a relevant transitory person under s 198E(1) of the *Migration Act 1958* (Cth).

**THE COURT ORDERS THAT:**

1. As soon as practicable, the respondent notify the Minister for Home Affairs that the applicant is a relevant transitory person for the purposes of s 198E(1) of the *Migration Act 1958* (Cth).

1. Each of Dr Alvaro Manovel and Dr Michael Dudley, the “treating doctors” the subject of Declaration 1 of the primary judge, is registered to provide medical or psychiatric services in Australia. Dr Manovel is an emergency specialist at the Prince of Wales Hospital in New South Wales. Dr Dudley is a psychiatrist and a conjoint senior lecturer in psychiatry at the University of New South Wales.
2. Dr Manovel and Dr Dudley were each of the opinion that:

(1) the respondent required medical or psychiatric assessment or treatment; and

(2) he was not receiving appropriate medical or psychiatric assessment or treatment in Nauru; and

(3) it was necessary to remove him from Nauru for appropriate medical or psychiatric assessment or treatment.

1. Each of Dr Manovel and Dr Dudley formed his opinions and prepared his report on the basis of having reviewed the respondent’s medical records and other material relating, inter alia, to medical facilities on Nauru. Neither of the doctors personally interviewed or physically examined the respondent or otherwise personally engaged with him.
2. Both at first instance and on appeal, the case turns on the construction of s 198E of the *Migration Act 1958* (Cth), in particular of the definition of “treating doctor” in s 198E(7). The term “treating doctor” referred to in s 198E(1) is defined in s 5(1) of the *Migration Act* as having the meaning given by s 198E(7). The issue is whether, on the proper construction of s 198E(7), a “treating doctor” for a transitory person must, in assessing the transitory person either remotely or in person, have direct personal interaction with the person.

## The statutory provisions

1. Section 198E(7) was inserted into the *Migration Act*, with ss 198C–198J and ss 199A–199E (**Medevac Provisions**), by Sch 6 of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth).
2. Section 198E provides:

**198E Minister’s approval to bring relevant transitory persons to Australia**

(1) If 2 or more treating doctors for a transitory person who is in a regional processing country have notified the Secretary that the person is a relevant transitory person, the Secretary must notify the Minister as soon as practicable.

(2) A transitory person is a ***relevant transitory person*** if:

(a) the person:

(i) is in a regional processing country on the day this section commences; or

(ii) is born in a regional processing country; and

(b) in the opinion of a treating doctor for the person:

(i) the person requires medical or psychiatric assessment or treatment; and

(ii) the person is not receiving appropriate medical or psychiatric assessment or treatment in the regional processing country; and

(iii) it is necessary to remove the person from a regional processing country for appropriate medical or psychiatric assessment or treatment.

(3) After being notified by the Secretary that a person is a relevant transitory person, the Minister must approve, or refuse to approve, the person’s transfer to Australia.

(3A) The Minister must make a decision under subsection (3):

(a) as soon as practicable after being notified; and

(b) no later than 72 hours after being notified.

(4) The Minister must approve the person’s transfer to Australia unless:

(a) the Minister reasonably believes that it is not necessary to remove the person from a regional processing country for appropriate medical or psychiatric assessment or treatment; or

(b) the Minister reasonably suspects that the transfer of the person to Australia would be prejudicial to security within the meaning of the *Australian Security Intelligence Organisation Act 1979*, including because an adverse security assessment in respect of the person is in force under that Act; or

(c) the Minister knows that the person has a substantial criminal record (as defined by subsection 501(7) as in force at the commencement of this section) and the Minister reasonably believes the person would expose the Australian community to a serious risk of criminal conduct.

(4A) Within 72 hours of the Minister being notified under subsection (1), ASIO should advise the Minister if the transfer of the person to Australia may be prejudicial to security within the meaning of the *Australian Security Intelligence Organisation Act 1979* (including because an adverse security assessment in respect of the person is in force under that Act) and if that threat cannot be mitigated.

(5) If the Minister does not make a decision under subsection (3) within the time required by subsection (3A), the Minister is, at the end of the time, taken to have approved the person’s transfer under subsection (3).

(6) The Minister’s powers under this section may only be exercised by the Minister personally.

(7) A medical practitioner is a ***treating doctor*** for a transitory person if the medical practitioner:

(a) is registered or licensed to provide medical or psychiatric services in a regional processing country or in Australia; and

(b) has assessed the transitory person either remotely or in person.

(8) The regulations may prescribe processes to be complied with in relation to the exercise of the Minister’s powers under this section.

1. The expression “transitory person” is defined in s 5(1) of the *Migration Act* as follows:

***transitory person*** means:

(a) a person who was taken to another country under repealed section 198A; or

(aa) a person who was taken to a regional processing country under section 198AD; or

(b) a person who was taken to a place outside Australia under paragraph 245F(9)(b) of this Act, or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*; or

(c) a person who, while a non‑citizen and during the period from 27 August 2001 to 6 October 2001:

(i) was transferred to the ship *HMAS Manoora* from the ship *Aceng* or the ship *MV Tampa*; and

(ii) was then taken by *HMAS Manoora* to another country; and

(iii) disembarked in that other country; or

(d) the child of a transitory person mentioned in paragraph (aa) or (b), if:

(i) the child was born in a regional processing country to which the parent was taken as mentioned in the relevant paragraph; and

(ii) the child was not an Australian citizen at the time of birth; or

(e) the child of a transitory person mentioned in paragraph (aa) or (b), if:

(i) the child was born in the migration zone; and

(ii) the child was not an Australian citizen at the time of birth.

Note 1: For who is a child, see section 5CA.

Note 2: A transitory person who entered Australia by sea before being taken to a place outside Australia may also be an unauthorised maritime arrival: see section 5AA.

Note 3: Paragraphs (d) and (e) apply no matter when the child was born, whether before, on or after the commencement of those paragraphs. See the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

1. If the Minister refuses to approve a relevant transitory person’s transfer to Australia on the ground in s 198E(4)(a), that ground being that the Minister reasonably believes that it is not necessary to remove the person from a regional processing country for appropriate medical or psychiatric assessment or treatment, then the Minister must notify the Independent Health Advice Panel (**IHAP**) established by s 199A as soon as practicable: s 198F(1). The IHAP consists of the persons set out in s 199B(1): the Chief Medical Officer of the Department and the Surgeon-General of the Australian Border Force; the Commonwealth Chief Medical Officer; and six or more persons including nominees of medical associations.
2. As soon as practicable and no later than 72 hours after being notified, the IHAP must “conduct a further clinical assessment of the person (whether in person or remotely)” and “inform the Minister of the findings of that assessment” including its recommendation: s 198F(2). If it does not do so in time, then it is taken to have recommended approval of the transfer: s 198F(3). The Minister must then, as soon as practicable and no later than 24 hours after being informed of the IHAP’s findings and recommendations, reconsider his refusal decision: ss 198F(4), (4A). If the IHAP has recommended that the person’s transfer be approved, the Minister may only refuse the transfer on the bases set out in s 198F(5), being either: (a) reasonable suspicion that the transfer would be prejudicial to security within the meaning of the *Australian Security Intelligence Organisation Act 1979* (Cth); or (b) knowledge that the person has a substantial criminal record (as defined in s 501(7)) and reasonable belief that they would expose the Australian community to a serious risk of criminal conduct. If the Minister does not reconsider and make a decision within time, he or she is taken to have approved the transfer: s 198F(6). If a transfer is approved by the Minister, an officer must, as soon as practicable, bring the person to Australia for the temporary purpose of medical or psychiatric assessment or treatment: s 198C(2).

## The reasons of the primary judge

1. The primary judge held, at [23], that the matters to be assessed by the IHAP are the same as those specified by s 198E(2)(b) dealing with the anterior treating doctors’ assessment. Further, he continued at [24], just like for s 198E(7)(b), the assessment of the person is to be conducted by the IHAP under s 198F(2)(a) “whether in person or remotely”. At [52], the primary judge said s 198F(2)(a) requires an assessment by the IHAP of the same kind as that required by s 198E and uses similar language to that used in s 198E(7) and in particular the same reference to the assessment being conducted in person or remotely. Given the constitution of the IHAP (at least eight people, some of whom are senior bureaucrats: s 199B(1)) and the urgency with which the IHAP’s assessment must be made (no later than 72 hours after notification of the Minister’s refusal: s 198F(2)), it seemed to the primary judge unlikely that Parliament intended to require, in all cases, personal engagement, whether in person or achieved remotely, between the IHAP and the transitory person.
2. The primary judge held, at [42], that he would not conclude, from the available textual and contextual indications, that personal engagement between the “treating doctor” and the transitory person was intended as a mandatory requirement for the assessment required by s 198E(7) in order to gain entry under s 198E(1) to the scheme established by the Medevac Provisions.
3. The primary judge concluded, at [56], that a declaration should be made that two or more treating doctors for the respondent had notified the Secretary that the respondent is a relevant transitory person under s 198E(1). The primary judge also concluded that an order should be made requiring that, as soon as practicable, the Secretary notify the Minister that the respondent is a relevant transitory person for the purposes of s 198E(1) of the *Migration Act*.

## The notice of appeal

1. The notice of appeal is in the following terms:
2. The primary judge erred in construing s 198E of the *Migration Act 1958* (Cth) (the Act) and, by virtue of that error, wrongly found that Dr Alvaro Manovel and Dr Michael Dudley were treating doctors for the Respondent within the meaning (sic) s 198E of the Act.

**Particulars of incorrect construction**

(a) The primary judge gave insufficient weight to the subject matter of the assessment being “the transitory person”.

(b) The primary judge appeared to accept at [53] that the medical practitioners should have performed a “clinical assessment” to be a “treating doctor” but then concluded that personal engagement is not a necessary condition for a “medical assessment”.

(c) The primary judge wrongly concluded at [52] that the Panel is not required to engage in any personal assessment of a transitory person in conducting its “further clinical assessment”.

(d) The primary judge characterised the Appellant’s construction as involving the reading in of words into s 198E (at [38]), when that construction merely involved interpretation of the text in its context.

(e) The primary judge’s conclusion implicitly construes the words “either remotely or in person” as meaning “whether in person or otherwise”, and gives insufficient weight to the binary options imposed by the text.

(f) The primary judge erred in placing too much weight on the “obvious beneficial purpose of the Medevac legislation” (at [49]) without sufficiently recognising the limits of interpreting legislation beneficially.

(g) Section 198E(1), (2) and (7) refers (sic) to a “treating doctor” rather than to doctors or medical practitioners as such. Dr Manovel and Dr Dudley acted exclusively as consultants, and were not the respondent’s treating doctors.

## The submissions of the appellant

1. The appellant submitted that, properly construed, a medical practitioner fitted the definition of a “treating doctor” in s 198E(7) only if he or she had: (i) clinically assessed the transitory person, which involved a level of personal engagement with the person; and/or (ii) undertaken that clinical assessment in a treating or therapeutic capacity rather than as an independent expert or consultant. There were several matters which supported this interpretation, the appellant submitted.
2. First, the appellant submitted, the assessment referred to in s 198E(7)(b) must be a clinical assessment, and that clinical assessment must be undertaken either remotely or in person. The need for a clinical assessment followed from s 198F(2)(a), the appellant submitted, which referred to the IHAP conducting a “further clinical assessment of the person”. The appellant submitted that the word “further” assumed that a clinical assessment had already taken place, which must have been by the “treating doctors”. The point was reinforced by s 199C(2)(f), the appellant submitted, which identified the IHAP as having a function of “adjudicat[ing] between treating doctors if there are differing clinical assessments and recommended treatment options”. The *Migration Act* did not define “assessed”, “assessment”, “clinically assessed” or a “clinical assessment”, and the ordinary meanings of “assessed” and “assessment” may be wide enough to comprehend the formation of an opinion by whatever means or on any basis. However, the appellant submitted, the *Migration Act*’s requirement that an “assessment” be a “clinical assessment” must be respected: the requirement must be given real work to do as a qualifier or limitation on the ordinary meaning of “assessment”.
3. The appellant submitted that the ordinary meaning of the word “clinical” denoted the observation and treatment of diseases in patients, rather than artificial, theoretical or laboratory studies. The appellant referred to the Oxford Concise Medical Dictionary, which defined “clinical medicine” as “the branch of medicine dealing with the study of actual patients and the diagnosis and treatment of disease at the bedside, as opposed to the study of the disease by pathology or other laboratory work”. The appellant submitted that this ordinary meaning was consistently reflected in a large number of other (medical) dictionaries.
4. The appellant submitted that, having regard to the common usage of “clinical” in the context of medicine, a “clinical assessment” contemplated some form of personal contact between a transitory person and the assessing doctor. The word “clinical” imported into the expression “clinical assessment” the concept of a “bedside” engagement with a patient, the appellant submitted, involving observation or treatment focused on diagnosing or treating the patient’s condition and distinguished this kind of engagement from a study of a patient that is a pathological or theoretical study “on the papers”.
5. Second, the appellant submitted, s 198E(7) expressly limited and confined the category of medical practitioners who may express an opinion that will trigger the rigid time limits of the statutory scheme. It was not just any “medical practitioner” who counted. The appellant submitted that the opening words of s 198E(7), referring to a “medical practitioner … for a transitory person”, comprehended the rendering of medical practitioner services to a transitory person. The appellant submitted that this meaning was reinforced by the terms of s 198E(7)(a), which required that the medical practitioner be registered or licensed to provide medical or psychiatric services in a regional processing country or in Australia, which the appellant submitted meant the services rendered to the transitory person. The appellant submitted that the two limbs of the definition in s 198E(7) should be read together. The assessment comprehended by s 198E was that of a medical practitioner acting in his or her clinical role, the appellant submitted, and the concluding words of s 198E(7)(b) then dealt with how the clinical role may be performed: “either remotely or in person”.
6. The appellant submitted that the only point of distinction between “remotely” or “in person” was whether or not the medical practitioner and the transitory person were co-located or distant in space. It followed, the appellant submitted, that whichever of these “how” alternatives applied, the fundamental nature of the assessment in question, its clinical character, involving some degree of interaction between medical practitioner and transitory person, was not altered. The clinical interaction could be transacted in person or it could occur remotely (over the telephone, via computer, video, etc, without the doctor and transitory person being in the same place). Were it otherwise, the appellant submitted, a doctor physically located in the hospital facility where a person was being treated would be able to conduct an “assessment” meeting the requirements of s 198E(7)(b) without actually examining or interacting with the person, on the basis that this would be “assessing” the person “remotely”. As another example, the appellant submitted, a group of a dozen doctors reviewing papers such as tests, and medical reports, in an academic context (eg a case study discussion) would all appear to be treating doctors of the transitory person if this alternative interpretation was correct. The appellant submitted that the legislature was unlikely to have intended these outcomes. If such outcomes were intended, the appellant submitted, the legislature could have simply required an assessment “on the papers” as opposed to a clinical assessment in person or remotely.
7. Third, the appellant submitted, the subject matter of the assessment is “the transitory person”.
8. Fourth, the appellant submitted, the words “for a transitory person” suggested a degree of contact or engagement between the medical practitioner and the transitory person that went beyond a mere review of the person’s papers. These words were deliberately added to these provisions, and did not appear in the Migration Amendment (Urgent Medical Treatment) Bill 2018 (Cth), which was introduced into the House of Representatives on 3 December 2018 and lapsed at dissolution of the Parliament on 11 April 2019. In that Bill, proposed s 198C (the antecedent of now s 198E) employed the term “treating doctor” whereas section 198E employs the compound expression “treating doctors for a transitory person”.
9. Fifth, the appellant submitted that his construction was consistent with, and was not inimical to, the purpose of these provisions. In the Second Reading Speech for the initial Bill, Dr Phelps MP called for “[a] clinically led process for medical transfer”, and noted that “clinical need, not politics, should determine access to care”.
10. Sixth, the appellant submitted it was not irrelevant that the Parliament selected the defined term “treating doctor”. A treating doctor is a person’s medical practitioner who treats a patient rather than an independent expert or consultant. The appellant referred, by way of example, to *P & M Quality Smallgoods Pty Ltd v Leap Seng* [2013] NSWCA 167 at [104]; *Western Union Business Solutions (Aus) Pty Ltd v Robinson* [2019] FCAFC 181 at [8].

## The submissions of the respondent

1. The respondent submitted that each of the two doctors formed his opinion and prepared his report on the basis of having reviewed the respondent’s medical records together with material relating (inter alia) to medical facilities on Nauru.
2. The respondent submitted the primary judge did not err in rejecting the construction for which the appellant contended, namely that s 198E(7)(b) required “personal interaction or engagement with the [transitory person] in the conduct of the assessment”. The construction adopted by the primary judge was supported by the statutory text, context and purpose, the appellant submitted, which provided no basis for reading the words “assessed either remotely or in person” as meaning assessed either in person or remotely “as though in person”.
3. The respondent submitted that if the Minister refused based on the condition in s 198E(4)(a)—he reasonably believed that it was not necessary to remove the person for “appropriate medical or psychiatric assessment or treatment”—he must notify the IHAP as soon as practicable (s 198F(1)).
4. The IHAP was established by s 199A. It consists of the persons set out in s 199B: the Chief Medical Officer of the Department and the Surgeon-General of the Australian Border Force, the Commonwealth Chief Medical Officer, and six or more persons including nominees of medical associations. Upon the Minister’s notification, the IHAP must, as soon as practicable and within 72 hours, “conduct a further clinical assessment”, whether in person or remotely (s 198F(2)(a)), and inform the Minister of its recommendation. It must recommend either confirmation of the refusal, or approval of the transfer (s 198F(2)(b)). If it is to approve, the Minister must do so as soon as practicable and within 24 hours (s 198F(4), (4A)), unless satisfied in relation to national security or criminality (s 198F(5)).
5. After approval, an officer must, as soon as practicable, bring the person to Australia for the temporary purpose of medical or psychiatric assessment or treatment (s 198C(2)).
6. It was plain from their reports, the respondent submitted, that each doctor “evaluated” or “judged” the respondent, and more particularly his medical circumstances, on the basis of having reviewed medical records relating to him, and each expressed his opinion on the basis of having done so.
7. Nothing in the ordinary meaning of the word “assess” favoured a narrow interpretation, such as would restrict an assessment to one following consultation either in person or by telephone or video conference, the respondent submitted. A narrow construction would require additional words to be read into s 198E(7)(b). It would require not only that a doctor “assess” a person, but that he or she “consult personally with” the person. In so far as the appellant sought to rely on medical dictionaries, the respondent submitted that this belied the fact that the word “assessed” may be given its ordinary meaning. If the appellant sought to rely on any specialist or technical meaning of “assessed” in the medical context, the respondent submitted that this meaning should have been established by way of expert evidence. In fact, the respondent submitted, the only expert evidence before the primary judge, which was unchallenged by the appellant, was to the effect that clinical assessments were able to be carried out without any direct personal interaction or engagement with the person whose medical condition and treatment were assessed.
8. The opinions required to be expressed in order for a person to be a “relevant transitory person” were stipulated in s 198E(2)(b), the respondent submitted. There was thus a teleological link between the “assessment” required by s 198E(7) and the s 198E(2)(b) opinions. The respondent submitted that medical practitioners “assess”, within the meaning of s 198E(7), for the purpose of enabling them to form and express the opinions in s 198E(2)(b).
9. The opinions required by s 198E(2)(b) were informative in two ways, the respondent submitted. First, it was not necessary that the practitioner express a view that treatment was required; it sufficed that he or she expressed a view that assessment was required. Second, the opinions to be expressed involved an evaluation of the availability of the required assessment or treatment in the regional processing country and elsewhere. This involved a wide range of considerations that were not confined to personal observations about the particular transitory person.
10. The kinds of opinions required by s 198E(2)(b) were capable of expression by reference to an evaluation and review of medical records in relation to the transitory person, the respondent submitted. He submitted that such records might be far more informative than a cursory physical examination or interview conducted with the transitory person, and might include the evaluation and review of x-rays or other medical imaging or the results of pathology tests, together with detailed medical notes. In some cases, it might be necessary or appropriate to form an opinion “on the papers”, including situations in which the transitory person is unconscious or incapable of attending or participating in any personal consultation with the medical practitioner.
11. The respondent submitted that the appellant’s construction would have the result that, even where it was unnecessary or even counterproductive for there to be personal consultation or interaction between the transitory person and the medical practitioner, such an interaction was invariably required. This ran contrary to common sense, and was not an intention that should be attributed to the legislature, the respondent submitted.
12. The respondent submitted that the expression of the requisite opinions under s 198E(2) was the “gateway” to, or the beginning of, the Medevac process. The notification under s 198E(1) did not irrevocably lead to transfer. The Minister could form a different view of the medical position, leading to review and a “further clinical assessment” by the IHAP. In this context, there was no reason to stretch language to construct a barrier to the initial assessment by the treating doctors. Further, as the primary judge found at [51], any requirement of personal consultation would be potentially arbitrary, in so far as it would cover a cursory assessment by a general practitioner who had the briefest of consultations with the transitory person, but exclude an opinion given by a specialist medical practitioner set out in a detailed report following a review and evaluation of complete medical records.
13. The respondent submitted that the Medevac Provisions were intended to address a worsening medical crisis by putting medical decisions in the hands of doctors rather than bureaucrats, and by creating a process for orderly (rather than litigious) claims for urgent medical treatment by transitory persons. The respondent submitted an interpretation of the Medevac Provisions that best achieved these purposes was to be preferred to any other interpretation. These purposes were properly to be regarded as remedial and beneficial, the respondent submitted, referring to the reasons of the primary judge at [49], so that a generous, fair, liberal, and large interpretation was appropriate.
14. The respondent accepted that, by implication from s 198F(2)(a), the assessment under s 198E(7)(b) must be a “clinical” assessment, and that the ordinary meaning of “clinical” denotes the “observation and treatment of diseases in patients, rather than artificial, theoretical or laboratory studies”. This did not assist the appellant, the respondent submitted, as the assessments of Dr Dudley and Dr Manovel, and their opinions, were clinical in that sense. They related to a particular patient. They were not artificial or theoretical. They were not laboratory studies. They involved the “study of actual patients” —the respondent—rather than pathology or laboratory work, the respondent submitted.
15. The respondent submitted that the primary judge did not find that the only point of distinction between the alternatives of an assessment conducted “remotely or in person” was whether or not the medical practitioner and the transitory person were co-located or distant. Rather, the respondent submitted, the primary judge found that the required assessment may be conducted with or without the co-location of the assessor and the transitory person, that is, in person or not in person, referring to the reasons of the primary judge at [31]–[32]. In particular, the respondent submitted, the primary judge expressly (and correctly) rejected the appellant’s contention that a “remote” assessment was required to share the characteristics of an assessment in person (or the “in-person gold standard” as put by the appellant below).
16. The respondent submitted that there was no absurdity in regarding a review conducted by a doctor located in the same hospital as an “assessment”, whether or not that doctor had a personal consultation with the patient. For example, the respondent submitted, an x-ray or other test results might be referred to a surgeon or other specialist for a clinical opinion as to what treatment or assessment is required. The example of an academic review of medical cases was inapt, the respondent submitted, as the doctors in that context would not review the medical reports for the purposes of expressing clinical opinions about the medical treatment required by a particular person.
17. The respondent submitted that the appellant accepted as “descriptively accurate” the primary judge’s finding that many assessments are capable of being done on the papers (eg, examining x-rays or biological tests), and noted that the appellant went on to say that this is “beside the point” because, “[l]egislation often draws lines, and the interpretive task is to identify where s 198E draws its lines.” The respondent submitted that in drawing the lines of which the appellant spoke, the primary judge was clearly entitled to take into account the consequences of adopting the appellant’s construction. If it was “descriptively accurate” that many assessments can be done “on the papers”, it would be capricious and inconvenient for the legislature to exclude such assessments from initiating the Medevac process, the respondent submitted.
18. The primary judge precisely identified the purpose of s 198E(7)(b), the respondent submitted, referring especially to [20] and [44] of his reasons. The respondent submitted that the primary judge was correct to identify that the Medevac Provisions had an “obvious” beneficial purpose, and to have regard to that purpose in interpreting and applying s 198E(7)(b).
19. The respondent submitted that in particular, and contrary to the appellant’s submission, the primary judge did not say that a line drawn by the Parliament lacked common sense; rather, he found that the appellant’s construction lacked common sense, and thus declined to ascribe it to the Parliament. Such an approach was orthodox, the respondent submitted.
20. In ascertaining the meaning of s 198E(7)(b), the respondent submitted that it was not permissible to have regard to the defined term (“treating doctor”) in construing the definition itself. The respondent submitted that it was held in *Owners of the Ship “****Shin Kobe Maru****” v Empire Shipping Co Inc* [1994] HCA 54; 181 CLR 404,at 419, that it was impermissible “to construe the words of a definition by reference to the term defined”, and that the continuing authority of that case has been confirmed in *Minister for Immigration and Border Protection v WZAPN* [2015] HCA 22; 254 CLR 610 at [48]. The respondent submitted that this line of authority was binding on this Court. The primary judge did not treat that principle in *Shin Kobe Maru* as essential to the rejection of the appellant’s construction of s 198E(7)(b), the respondent submitted, referring to the reasons for judgment at [54]. On the contrary, the respondent submitted, the primary judge assumed in the appellant’s favour that it was permissible to use the term “treating doctor” as a contextual indication of the nature of the requisite assessment, referring to the reasons of the primary judge at [35]. Accordingly, the respondent submitted, this was not a basis on which to find error in his Honour’s reasoning.

## Consideration

1. There can be no doubt that Dr Dudley conducted a file review only and that at the time of his report on 1 May 2019 he had not interviewed the respondent. Similarly, Dr Manovel stated in his report of 28 April 2019 that he had neither interviewed nor examined the respondent but had prepared his report based on his letter of instruction, clinical notes from IHMS’ records, an Overseas Services to Survivors of Torture and Trauma consultation note and a statutory declaration by Dr Martin, Senior Medical Officer IHMS.
2. In our opinion, the provisions need to be read as a whole and in context.
3. The expression “a treating doctor for a transitory person” is central as “treating doctor” is defined in s 5(1) of the *Migration Act* to have the meaning given by s 198E(7), subject of course to a contrary intention.
4. There was some discussion between the parties of the proposition that it is impermissible “to construe the words of a definition by reference to the term defined” articulated in *Shin Kobe Maru* at 419 and more recently referred to by French CJ, Kiefel, Bell and Keane JJ in *WZAPN* at [48].
5. In *Shin Kobe Maru*, which concerned the *Admiralty Act 1988* (Cth),the relevant argument was that the expression “a claim … relating to … ownership of, a ship” should be read down by reason of its statutory context, relying on the *Admiralty Act*’s description of a claim falling within s 4(2) as “a *proprietary* maritime claim” (emphasis in original) and on s 6 which provided that, s 34 apart, the *Admiralty Act* did not create any new maritime lien or other charge and did not create any new cause of action. Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, in rejecting the submission, said:

The Act’s description of a claim falling within s. 4(2) as a “proprietary maritime claim” is of no assistance in construing the expression “a claim … relating to … ownership”. The use of the word “proprietary” in the term to be defined does not colour the meaning to be given to the definition which follows it. It would be quite circular to construe the words of a definition by reference to the term defined. [See *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503.]

1. The principle is also discussed in *Esso Australia Resources Pty Ltd v Commissioner of Taxation* [2011] FCAFC 154; 199 FCR 226 at [102]–[103] per Keane CJ, Edmonds and Perram JJ and in *Australian Securities and Investment Commission v Westpac Securities Administration Ltd* [2019] FCAFC 187 at [22] per Allsop CJ. In *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 256 CLR 1 at [33] French CJ, Hayne, Kiefel and Nettle JJ referred with apparent approval to the approach in *Shin Kobe Maru*. The issue is discussed in Professor Pearce’s *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th edition, 2019) at [6.4].
2. In our opinion, the terms of the definition of “treating doctor” are not ambiguous, so that issue does not arise. If it did arise, the reasoning in *Shin Kobe Maru* would provide support for not limiting the words of the definition of “treating doctor” in s 198E(7), being a medical practitioner who (a) is registered or licensed to provide medical or psychiatric services in a regional processing country or in Australia, and (b) has assessed the transitory person either remotely or in person, by reference to the term defined, being “treating doctor”.
3. Therefore, whatever content might ordinarily be given to the phrase “treating doctor” in terms of primacy or regularity of treatment of a patient, under this statutory scheme a medical practitioner is a treating doctor for a transitory person if the two conditions in s 198E(7) are satisfied. We get no assistance therefore from *P & M Quality Smallgoods Pty Ltd* at [104] or *Western Union Business Solutions (Aus) Pty Ltd* at [8] which each contains a passing reference to treating doctors or a treating practitioner as opposed to medico-legal practitioners.
4. The first statutory condition, that the medical practitioner is registered or licensed to provide medical or psychiatric services in a regional processing country or in Australia, is not in dispute.
5. The second statutory condition is whether the medical practitioner has assessed the transitory person either remotely or in person.
6. In our opinion, the dominant word is “assessed”. An assessment is neutral as to the means by which it may be carried out. Here each of the medical practitioners has assessed a transitory person, the respondent, and has done so by way of a file review of medical material relevant to the transitory person himself and without interviewing him.
7. The question then becomes whether the words “either remotely or in person” (in s 198E(7)) or “whether in person or remotely” (in s 198F(2)(a), which the parties agreed contemplated the same kind of assessment) operate to narrow what would otherwise be the scope of the word “assessed”. In our view they do not, and do no more than make it clear that the assessment does not have to be conducted in person. We would not read the word “remotely” as a word of limitation.
8. A construction of the provision that requires direct personal interaction in order to constitute a clinical assessment by the medical practitioner in our view lacks fit with the legislative purpose of establishing a process to remedy urgent medical needs of transitory persons. First, it seems to leave little to the assessment by the medical practitioner as to whether that practitioner needs to have direct personal interaction in order to form the opinions: that the person requires medical or psychiatric assessment or treatment; that the person is not receiving appropriate medical or psychiatric assessment or treatment in the regional processing country; and that it is necessary to remove the person from a regional processing country for appropriate medical or psychiatric assessment or treatment. Second, a construction which means that in each case direct personal interaction by means of a telephone suffices to qualify as clinical assessment seems to leave out of account the inadequacy or inappropriateness of such a “clinical assessment” in the case of many illnesses or diseases. The discrimen of direct personal interaction may well be too much in some cases and too little in others.
9. This construction seems to us to be fortified by the obvious circumstance that it may well be practically difficult to assess a transitory person in person or remotely if the word “remotely” is limited to direct personal communication between the doctor and the transitory person such as by telephone or by video link. The provision only operates where the person was in a regional processing country on the day the section commenced or was born in a regional processing country: s 198E(2)(a). The regular circumstances which may prevail, for example, as between patient and doctor in Australian suburban surroundings are not apposite. Even if those circumstances did prevail, it would be unlikely that a person would have more than one doctor who might be described as a treating doctor.
10. The appellant then argues that the word “assessed” should be given a particular meaning because the following section of the *Migration Act*, s 198F, provides that the IHAP “must conduct a further clinical assessment of the person (whether in person or remotely)”. The appellant emphasises the word “clinical”. It was common ground that the assessment referred to in s 198E(7)(b) was a clinical assessment.
11. In our opinion, this provision does not provide a firm enough basis to construe “assessed the transitory person either remotely or in person” or “whether in person or remotely” as requiring a direct personal communication with the transitory person.
12. “Clinical assessment” does not to our minds require personal communications, let alone a bedside assessment, either at all or in the present context of urgency. We prefer the ordinary meaning of “clinical” given in the Macquarie Dictionary as “4. concerned with observation and treatment of disease in the patient, as distinguished from an artificial experiment.” We see no occasion to resort to medical dictionaries.
13. We take into account the terms of s 199C which provide that the IHAP is to carry out its functions in such manner as the IHAP determines (s 199C(1)) and may assign different members of the IHAP to monitor and assess the health of transitory persons in different regional processing countries (s 199C(2)(a)). It follows that it may be possible for the IHAP by one or more of its members to have a direct communication with a transitory person. We would not base our conclusion as to the proper construction of the words “the medical practitioner … has assessed the transitory person either remotely or in person” in s 198E(7) by reference to any practical difficulties the IHAP may face in having a direct communication with, or making a bedside assessment of, a transitory person.
14. In our opinion, each of the two doctors, Dr Dudley and Dr Manovel, assessed the respondent and was a treating doctor for a transitory person as defined, that person being the respondent.

## Conclusion and orders

1. For these reasons, we would dismiss the appeal, with costs.

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| I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and Justices Robertson and Moshinsky. |

Associate:

Dated: 28 November 2019