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***The Constitution, the High Court and Asylum
Seekers***

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INTRODUCTION

It's almost twenty years since, late one night in April 1992, I was crossing the gravel carpark of Ocean View Budget Accommodation in Port Hedland where I was one of a group of junior lawyers living and working for the first of the so-called "new wave" of boat people from Cambodia.

A large Commonwealth car pulled in, parked next to the brick building, and three people alighted. One, a woman who appeared to be the most senior, identified herself as being from the Department of Immigration and asked if she and her colleagues could come in. I invited them into our common room, where my colleagues and I were told that at 7:00 the next morning they would be handing out decisions on the first of the boat people to be assessed for refugee status. They refused to tell us what the result of the applications were likely to be, although their demeanour did not give us much cause for optimism.

After spending a frantic night engaging the services of pro bono lawyers in Darwin, we attended the handing out of the decisions the next morning which, as expected, were all rejections.

Fortunately our Darwin counsel¹ was quickly able to get injunctions from the Federal Court, and within a few days the Immigration Minister, Gerry Hand, unilaterally withdrew the decisions as being indefensible in the face of judicial review.

The principal applicant in that case was Chu Kheng Lim, who was one of the 36 Cambodians who had arrived in north-western Australia in November 1989 on a boat code-named the *Pender Bay*, thereby ending a period of more than a decade since there had been any boat arrivals in Australia.

¹ Colin McDonald acted for the Cambodian boat people on a pro bono basis throughout the ensuing court proceedings.

The withdrawal of the *Pender Bay* decisions was not the end of the matter. Mr Lim's legal team pressed for his release from detention and, two days before the matter was to be heard before the Federal Court, on 5 May 1992 Parliament enacted new provisions including a requirement that a Court is not to order the release from detention of a so-called "*designated person*".²

This was the beginning of mandatory detention, and it led to the first of the major Constitutional challenges to the treatment of asylum seekers under the *Migration Act 1958 (the Act)*³, when in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 a majority of the High Court determined that the prohibition on the Court from being able to release a designated person in any circumstances was incompatible with the aliens power in s 51(xix) of the Constitution and therefore invalid.⁴ However this was a pyrrhic victory, since the Court then went on to find that in all other respects the detention provisions were compatible with the power of the Parliament to restrain an alien in custody for the purposes of removal.⁵ So the *Pender Bay* group stayed in custody throughout the remittal and ultimate refusal of their applications for refugee status, finally obtaining release and permanent residency in 1995 under a face-saving deal negotiated with the subsequent Immigration Minister Nick Bolkus.⁶

DEVELOPMENTS AFTER 1992

So, in the twenty years after the failure of this first Constitutional challenge it is appropriate to ask what we have since achieved with regard to the treatment of asylum seekers under the Constitution.

In rough order, we have learnt the following from the High Court:

² *Migration Amendment Act 1992*, Division 4B, s 49B - see *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 15-19 (Brennan Deane and Dawson JJ).

³ For earlier Constitutional

⁴ See e.g., *Chu Kheng Lim* at 35-37 (Brennan Deane and Dawson JJ).

⁵ See, e.g., *Chu Kheng Lim* at 30-32 (Brennan Deane and Dawson JJ).

⁶ Pursuant to the so-called Special Assistance Category (**SAC**) programme boat arrivals were encouraged to return to Cambodia and apply for sponsorship back to Australia under the normal migration procedures. 117 asylum seekers returned to Cambodia under the SAC, and some 197 returned with family members in 1994-

- (a) Firstly, in 1999 we learnt that Parliament is entitled to limit the grounds of judicial review of migration decisions before the Federal Court, in accordance with the power of the Commonwealth under s 77(i) of the Constitution to define the jurisdiction of “any federal court”: see *Abebe v Commonwealth* (1999) 197 CLR 510.⁷
- (b) Secondly, in 2003 in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 we learnt that the privative clause in s 474 of the *Migration Act*, which purports to exclude migration decisions from all forms of judicial review, is valid because on a proper construction it does not attempt to oust the jurisdiction of the High Court under s 75(v) of the Constitution. Critically, however, it was read down by the Court so as only to apply to decisions which are not affected by jurisdictional error. In 2004 at this forum Justice Ronald Sackville described *Plaintiff S157* as “one of the most important cases decided by the High Court in recent decades”⁸, and this has certainly been borne out in subsequent years.
- (c) In 2004 the Howard Government’s controversial treatment of boat people⁹ began to reach the High Court with a number of Constitutional challenges to aspects of mandatory detention:

1995: see pamphlet by Brother Kevin Lampard, *Cambodia Boat People 1989-1995*, at p 27.

7 The judgements in decision included the prophetic recognition, by Gleeson CJ and McHugh J at 534 [80], that such “...restriction may have significant consequences for this Court because it must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched s 75(v) jurisdiction of this Court. The effect on the business of this Court is certain to be serious”.

8 Justice Ronald Sackville, *The 2003 Term: The Inaccessible Constitution*, 2004 Constitutional Law Conference, University of New South Wales, 20 February 2004.

9 See generally, Maley W, “Refugees” in Manne R (ed), *The Howard Years* (Black Inc. 2004) at 144-166.

- (i) In early 2004 in *Minister for Immigration v B* (2004) 219 CLR 365 the High Court found that the Family Court of Australia has no jurisdiction to order the Minister for Immigration to release children from detention or to otherwise make orders concerning their welfare, because there has been no conferral of such jurisdiction by Parliament to the Family Court under s 77 of the Constitution.
- (ii) Perhaps the nadir of hope for those with concern over the mandatory detention of asylum seekers came on 6 August 2004, when the High Court handed down two devastating decisions. In the first - *Al-Kateb v Godwin* (2004) 219 CLR 562 - the High Court held that provisions in the *Migration Act*¹⁰ effectively allowing for the indefinite detention of asylum seekers, where there is no real likelihood or prospect of removal, does not infringe Chapter III of the Constitution concerning judicial power and the courts.¹¹ Then in *Behrooz v Secretary, Department of Immigration* (2004) 219 CLR 486 the Court held that the harshness of the conditions of detention is not relevant to the legality of that detention, even if the conditions of detention might be seen to go beyond what is reasonably necessary for immigration control.
- (iii) Finally, a few months later in *Re Woolley; ex Parte Applicants M276/2003* (2004) 225 CLR 1, the High Court held that the detention of children was valid under the aliens power in s 51(xix) of the Constitution.

¹⁰ Section 189 requires an officer who knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen to detain the person. Section 196(1) requires an unlawful non-citizen detained under s 189 to be kept in immigration detention until he or she is removed from Australia.

¹¹ McHugh J in his judgement at 581 [31] described the outcome of this case as “tragic”; repeating the comment in *Minister for Immigration v Al Khafaji* (2004) 219 CLR 664 at 668 [4].

- (d) Two decisions later in the decade reinforced the jurisdiction of the High Court to consider applications for the constitutional writs. In *Bodruddaza v Minister for Immigration* (2007) 228 CLR 651 the Court determined that a non-extendable time limit¹² on the lodgement of applications for constitutional writs was invalid. In *MZXOT v Minister for Immigration* (2008) 233 CLR 601 the Court upheld a provision which prohibited it from remitting applications to the Federal Magistrates Court.¹³ It was found to be a valid law defining the jurisdiction of “any federal court” under s 77(i) of the Constitution.

THE LABOR YEARS

It is fair to say that by the change of Federal Government in November 2007, accompanied by a change to the make-up of the High Court¹⁴, the two sides in the asylum seeker debate had, more or less, fought themselves to a Constitutional standstill. On the Government side mandatory detention had been tested to the limit and had held firm. Asylum seekers, including children, could be held indefinitely in detention; arguably regardless of the conditions. On the applicants' side - in the words of former Immigration Minister Ruddock - the courts had found a way of “*dealing themselves back*” in to the review game.¹⁵ Indeed as a result of *Plaintiff S157* the efforts of the Howard Government to insulate migration decisions from judicial review had instead ensured that the judicial review of such decisions was now - as has been described by Justice Nye Perram - “*permanently crystallised in s 75(v) of the Constitution in a way which is now “permanently beyond Parliamentary interference*”.¹⁶

¹² In s 486A of the *Migration Act*.

¹³ In s 476B(2) of the *Migration Act*.

¹⁴ Chief Justice French was appointed to the High Court of Australia in September 2008, Justice Kiefel was appointed in September 2007, and Justice Bell was appointed in February 2009.

¹⁵ See Irving H, “A True Conservative?” in Manne R (ed), *The Howard Years* (Black Inc. 2004) at 106.

¹⁶ Hon Justice Nye Perram, untitled paper delivered to the Government Solicitors Conference on 1 September 2010, p 6 [20].

So, absent any appetite for a referendum to exclude asylum seekers from s 75(v) the Constitution - something which was at least contemplated by Minister Ruddock¹⁷ but never formally under consideration¹⁸ - how was the Government to push back at the apparently untrammelled access of asylum seekers to judicial review, especially the politically sensitive boat people?

The Constitutional battle here moves offshore, to Christmas island, where in 2001 the Howard Government had responded to the arrival of the *Tampa* by enacting six pieces of legislation retrospectively validating the apprehension and removal of the rescuees from Australian territory, and creating a series of “excised offshore places” where asylum seekers could be held beyond the reach of the courts before their removal to a “declared country”.¹⁹

In 2001 in *Ruddock v Vadarlis* (2001) 110 FCR 49 a majority of the Full Federal Court had found that s 61 of the Constitution, which vests the executive power of the Commonwealth in the Governor-General and thereby Ministers of the Crown, enabled the Government even without an Act of Parliament to send troops to secure the *Tampa* and prevent it from landing on Christmas Island.²⁰ For several years boat people languished on Nauru and Manus Island, apparently beyond the jurisdiction of the Australian courts.

17 See, e.g., “Ruddock hints at changing law after ruling on detention”, *The Age*, 21 April 2003.

18 For example, it was not mentioned in a 2011 report by the former Ombudsman, Prof John McMillan, to the Minister for Immigration entitled “Regulating Migration Litigation after Plaintiff M61”.

19 *Migration Act*, s 198A(1) and 198(2)(d). See, generally, Foster M and Pobjoy J, “A Failed Case of Legal Exceptionalism? Refugee Status Determination in Australia’s ‘Excised’ Territory”, (2011) 23(4) *International Journal of Refugee Law*, pp 583-631.

20 See also French R, “Constitutional review of Executive Decisions - Australia’s US Legacy”, (2010) 35 *UWA Law Review* 35 at 42-44. The matter subsequently came before the High Court on a special leave application; however leave was refused as by then the applicants had been transferred to Nauru and New Zealand so the principal claim for *habeas corpus* was no longer viable: *Vadarlis v Minister for Immigration* [2001] HCATrans 625.

The offshore processing regime remained unchallenged and did not come back into focus until 2008, when the Rudd Government closed the detention centres in Nauru and Manus Island and dismantled the former “Pacific Solution”. Despite this positive development, however, the Government entrenched the offshore processing of boat arrivals on Christmas Island insisting that it was a “non-statutory” process and not amenable to judicial review.²¹

This fiction came to an abrupt end in November 2010, with the challenge to the offshore processing regime in *Plaintiff M61/2010E and Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 243 CLR 319. In that case the Constitutional challenge was peripheral and unsuccessful; the Court found that s 46A of the *Migration Act*, which removes any duty on the Minister to consider an application for a protection visa by an “offshore entry person”, is a valid exercise of the legislative power of the Commonwealth.²² In the end, it was a process of statutory construction which won the day²³; the Court rejected the Commonwealth’s characterisation of the decision-making process as “non-statutory”, finding that the process did have a statutory foundation, which included the continued detention of non-citizens prior to the Minister deciding whether or not to “*lift the bar*” on allowing a claim for asylum²⁴. This in turn meant that the “*well established principles*” governing the exercise of statutory power were applicable, including the common law rules of procedural fairness.²⁵

Here the decision-maker had failed to put country information regarding the current situation in Sri Lanka to the plaintiffs and had failed to consider one of the plaintiff’s claims, which was clearly in breach of the rules of procedural fairness.²⁶ In the event, the Court concluded that since the Minister does not have a duty under s 46A to exercise his discretion to allow the plaintiffs to

21 Foster M and Pobjoy J, *op cit*, pp 589-592.

22 *Plaintiffs M61/M69* at 345-347 [53]-[61].

23 As observed by Williams G and Lynch A, “The High Court on Constitutional Law - The 2010 Term”, (2011) 34(3) *UNSW Law Journal* 1006 at 1025.

24 *Plaintiffs M61/M69* at 348-350 [62]-[67].

25 *Ibid* at 351-353 [73]-[75].

26 *Ibid* at 356-357 [90]-[91].

apply for a protection visa, neither mandamus nor certiorari would lie; however the Court ordered declaratory relief that there had been an error of law²⁷, along with a broad hint that injunctive relief would be available if there had been a threat to remove the plaintiffs without a further lawful assessment.²⁸

So, in one fell swoop, the Court practically restored access by offshore asylum seekers to the full range of judicial review; indeed the application of common law natural justice to “offshore” decisions is now somewhat broader than the statutory procedural fairness provisions in the *Migration Act* for onshore applicants.²⁹

To its credit, the Government did not immediately move to limit the available grounds of review now that offshore asylum seekers had real access to the courts. In addition, it implemented some positive measures, including the provision of legal advice to detainees and the appointment of two additional Federal Magistrates to cope with expected additional caseload.³⁰

However the Government maintained the offshore system, with its arguably inferior determination process.³¹ Then, on 25 July 2011 it entered into an “Arrangement” with Malaysia, by which up to 800 asylum seekers would be transferred to Malaysia for refugee status determination in return for 4,000 recognised refugees to be resettled in Australia over four years. The obvious purpose of this was to virtually eliminate the processing of boat people, since arrival by boat would, in the words of the new Prime Minister Julie Gillard, “just be a ticket back to the regional processing centre”³²

27 *Ibid* at 358-360 [99]-[105].

28 *Ibid* at 334 [8].

29 In Part B, Part 7, Division 4 of the *Migration Act*.

30 As noted by Foster M and Pobjoy J, *op cit*, p 616.

31 Discussed in *Plaintiffs M61/M69* at 342-345 [37]-[52].

32 See Foster M and Pobjoy J, *op cit*, p 617-618.

The power to remove asylum seekers to Malaysia was said to be found in s 198A of the *Migration Act*, which had been introduced by the Howard Government in 2001 to facilitate the removal of the *Tampa* detainees to Nauru.³³ It allows for the removal of “offshore entry persons” to a “specified country”, by force if necessary. However s 198A(3)(a) requires that the Minister may declare in writing that the specified country meets certain standards in the treatment of asylum seekers, including effective procedures for assessing their need for protection pending resettlement, as well as meeting other relevant human rights standards.

This is where the “Malaysian Solution” came unstuck. When on 7 August 2011 the Minister made a decision to remove two Afghani asylum seekers from Christmas Island to Malaysia an injunction was quickly obtained in the High Court and the matter was listed for hearing before the Full Bench two weeks later.³⁴

When the decision was handed down in *Plaintiff M70/2011 v Minister for Immigration; Plaintiff M106/2011 v Minister for Immigration* (2011) 280 ALR 18; [2011] HCA 32, once again it was not the Constitution which came to the rescue of the plaintiffs, other than to provide a remedy under s 75(v). It was the construction of s 198A by the Court; in particular, the majority finding (Heydon J dissenting) that s 198A was to be read as intended, so that the “specified country” must in fact meet the relevant standards set by the provision.³⁵ The majority rejected the Minister's reliance on advice about the situation in Malaysia from the Department of Foreign Affairs and Trade as being insufficient to meet these requirements³⁶, and found that the Minister's declaration of Malaysia as a “specified country” had been made beyond power.³⁷

33 Churches S, “An Activist Court or a Court Scrupulous to Common Law Standards?” (2011) 19 *AJ Admin L* 13.

34 [2011] HCATrans 195, 196 and 219.

35 *Plaintiff M70/2011 v Minister for Immigration; Plaintiff M106/2011 v Minister for Immigration* (2011) 280 ALR 1 at 42 [58]-[59] (French CJ); 55 [116]-[117] (Gummow, Hayne Crennan and Bell JJ)

36 *ibid* at 44 [66] (French CJ); 60 [134] (Gummow, Hayne Crennan and Bell JJ)

37 *ibid* at 45 [68] (French CJ); 61 [136] (Gummow, Hayne Crennan and Bell JJ)

The Government's response to *Plaintiff M70* has been depressingly familiar and harkens back to May 1992 in seeking to legislate its way out of trouble. Within a few weeks the Government introduced the *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011*, which creates a broad and unencumbered power in a new s 198AB enabling the Minister to designate an "offshore processing country". The only binding condition on the exercise of the power is that the Minister must think that it is in the "*national interest*" to designate the country. As is well-known the Bill failed to gain the support of sufficient independents and the Opposition, and it now sits festering in the Daily Bills List.

CONCLUSION

So, in twenty years of Constitutional challenges to the treatment of asylum seekers we have travelled from "designated person" to "designated country". But has much been achieved? The detention regime has held firm, but then again so has the Rule of Law, through the minimum guarantee of access to the High Court to seek the constitutional writs under s 75(v).

The most disturbing aspect of the recent developments is that, having failed to keep asylum seekers out of the courts, the Government - along with the Opposition³⁸ - appears to be determined to keep one group of asylum seekers in particular - the boat arrivals - out of Australia all together.

Many commentators - and frankly many lawyers - were surprised when the High Court "blew away" the Malaysian Solution. Only time will tell whether there are further surprises in store.

³⁸ The Liberal Party of Australia's "Action Contract" (www.liberal.org.au/) promises to maintain rigorous offshore processing of boat people, reintroduce temporary protection visas and be ready, where possible, to turn boats back.