COURTS AND IMMIGRATION DETENTION: THE AUSTRALIAN EXPERIENCE - "ONCE A JOLLY SWAGMAN CAMPED BY A BILLABONG"

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I INTRODUCTION

This paper deals with the way in which the courts in Australia have considered and determined issues of immigration detention.

Litigation on the subject cannot be divorced from both the history of the global movement of people and, in particular, the history of migration to Australia. Nor can it be divorced from the legislative and policy changes which have occurred over the years. Thus, the paper sketches the history of these matters so far as it is necessary to provide a coherent picture.

In the course of the narrative thus undertaken, the paper seeks to locate the role of the Australian courts in an historical place, and to reflect on the developments which might occur in the future in the courts in Australia dealing with such issues.

This brings us to the subtitle – "Once a jolly swagman camped by a billabong".

These words are the opening line of the well-loved Australian folksong written by Banjo Patterson. The song tells the story of a swagman camped by a billabong. A swagman is a person who wanders the countryside with a swag, being his bedding, on his back. He is usually down on his luck, shabbily dressed, and rather a cast-off of society.

The important image is the billabong. The word comes from an Aboriginal language. A billabong is usually a branch of a river which is dried up except for a small remaining waterhole. The billabong is cut off from the main river until perhaps a major flood rejoins the dried bed with the river.

The question which this paper examines is whether Australian courts dealing with immigration detention issues have been camped by a billabong. That is to say, whether issues of immigration detention have been litigated by reference to a drying-up bed of local law more and more isolated from the 'main stream'. The 'main stream' is the body of international human rights law embodied in the Convention Relating to the Status of Refugees of 28 July 1951 and the Protocol Relating to the Status of Refugees (the Refugees Convention), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CROC). The paper examines whether there might be a flood in the future which will reunite the billabong with the 'main stream'.

II THE EARLY APPROACHES TO IMMIGRATION DETENTION IN AUSTRALIA

A Pre-1901 Immigration Laws

Before federation, in colonial Australia, the courts applied the prevailing view that every sovereign nation had the right to exclude aliens.

One case which suggests this view, and which is of inherent historical interest, is *Toy v Musgrove.*[1] The case was heard by all six judges of the Supreme Court of Victoria. It came to the Full Court as a case stated by the primary judge.

The plaintiff was a Chinese national who arrived in Hobson's Bay, Victoria, on the British vessel, *Afghan*, on 27 April 1888. The *Afghan* carried 268 Chinese immigrants.

The Chinese Act 1881(Vic) provided that if a ship arrived with more than one immigrant for every hundred tons of the tonnage of the vessel, the Master was liable to a penalty of 100 pounds for each immigrant carried in excess of the limitation. The *Afghan* was of 1439 tonnes. Consequently, it arrived with 254 Chinese immigrants more than permitted under the Act.

The Act also provided that no Chinese immigrant could enter Victoria unless the Master paid to the Collector of Customs ten pounds for each immigrant. The Master of the *Afghan* was at all times prepared to pay the ten pounds in relation to the plaintiff. The Collector of Customs refused to accept the payment and refused to allow the plaintiff to land.

A majority of the Full Court[2] held in favour of the plaintiff on the ground that there was no law in Victoria which permitted the authorities in Victoria to exclude aliens. The decision was, thus, concerned with the constitutional arrangements between the colony and Britain.

On appeal the Privy Council reversed the decision of the Supreme Court. [3] The Privy Council analysed the plaintiff's claim as dependent upon establishing that the Collector of Customs had a duty to accept the ten pounds from the Master. This followed, so their Lordships said, because the plaintiff had contended that he had been hindered and impeded from landing by reason of the breach by the Collector of Customs of a duty. The Privy Council held that, on the proper construction of the Act, it was made unlawful to bring in more Chinese immigrants than stipulated. There was therefore no right on the immigrant to compel the Collector to receive payment of the ten pounds. The Privy Council concluded:[4]

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1 (1888) 14 VLR 349.

2 Justices Williams, Holroyd, A'Beckett, and Wrenfordsley.

3 *Musgrove v Toy* [1891] AC 272.

4 Ibid 282.

> Their Lordships have so far dealt with the case, having in view only the enactments of the legislature of Victoria, and it appears to them manifest that upon the true construction of these enactments no cause of action is disclosed on the record. This is sufficient to determine the appeal against the plaintiff, but their Lordships would observe that the facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native; but it is quite another thing to assert that an alien excluded from any part of Her Majesty's dominions by the executive government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal.

B Post-1901: Federal Immigration Law – the Kisch *Case*

Since 1901, the power to make laws for the detention of non-citizens has been vested in the federal Parliament by the Australian Constitution (the Constitution) in the form of powers to make laws for the peace, order and good government of Australia with respect to immigration and emigration,[5] naturalization and aliens,[6] and external affairs.[7] These powers are exercised by the Federal Department of Immigration and Multicultural and Indigenous Affairs (the Department), as it is currently known.

Pursuant to these constitutional powers, detention of illegal immigrants has been a feature of Australia's immigration laws since 1901.[8] The Immigration Act 1901 (Cth)[9] (Immigration Act) contained the first provisions for detention of immigrants in Australia. Under the Immigration Act, persons deemed to be

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5 *Australian Constitution* s51(xxvii).

6 *Australian Constitution* s51(xix).

7 *Australian Constitution* s51(xxix). In *Robtelmes v Brenan* (1906) 4 CLR 395, the High Court held that any of these three provisions of the Constitution provided the federal legislature with the authority to make laws fulfilling its sovereign power to detain and exclude aliens from Australia.

8 Don McMaster, *Asylum Seekers: Australia's Response to Refugees* (2001) 68.

9 Assented to on 23 December 1901.

'prohibited immigrants'[10] were guilty of an offence and liable upon summary conviction to imprisonment for six months as well as deportation.[11] Persons became prohibited immigrants, for example, if they failed to pass the well-known dictation test, if they did not pass certain health standards, if they suffered from insanity, dementia or idiocy, if they had been convicted of a crime and sentenced to imprisonment for one year or more, or if they were a prostitute.[12]

Despite these provisions, illegal immigration was largely unknown in Australia during these early years, largely due to its geographical isolation and strict White Australia Policy.[13]

The state of the law, and the role of the courts, at this time, are illustrated by the saga which Egon Kisch endured.[14] Mr Kisch hailed from Czechoslovakia. He was a renowned foreign correspondent and peace activist. The year was 1934. Mr Kisch boarded the *SS Strathaird* (*Strathaird*) intending to travel from Marseilles to Australia to speak at anti-war rallies.

The Immigration Act gave the Minister power to make a declaration that a person was undesirable as a visitor to the Commonwealth. The declaration, relevantly, had to be based on the opinion of the Minister from information received from the government of the United Kingdom through official or diplomatic channels. The person in respect of whom such a declaration was made was a prohibited immigrant, and as a result was not permitted to enter Australia.

The Immigration Act also provided that the master of a vessel on which there was a prohibited immigrant was entitled to take reasonable measures to prevent that person entering Australia on the vessel.

Captain Carter sought to prevent Mr Kisch leaving the *Strathaird* when it berthed in Sydney on the basis that the Minister had made a declaration that Mr Kisch was an undesirable person to visit Australia.

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10 For example, see s3 Immigration Act 1901-1935 (Cth).

11 Section 7 Immigration Act 1901-1935 (Cth).

12 Section 3 Immigration Act 1901-1935 (Cth).

13 Andreas Schloenhardt, "Australia and the boat people: 25 years of unauthorised arrivals" (2000) 23(3) University of New South Wales Law Journal 33, 36.

14 *R v Carter; Ex parte Kisch* (1934) 52 CLR 221; *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234.

Mr Kisch sought the issue of a writ of *habeas corpus* in the High Court against Captain Carter. The case was argued on two grounds. First, it was contended that the power to make a declaration was unconstitutional, because it was not a law with respect to immigration. Second, it was argued that the Minister had not made a valid declaration under the Immigration Act because the grounds necessary to support the declaration did not exist.

The case was heard by Evatt J sitting alone. He rejected the constitutional argument, but upheld the argument based on the failure to comply with the provisions of the Immigration Act. His Honour found that, as a matter of fact, the declaration was not based on information received from the government of the United Kingdom through official channels. The Immigration Act made the declaration conclusive evidence of the opinion of the Minister. His Honour held that the Immigration Act did not make the declaration conclusive evidence of the existence of the information necessary for the formation of the opinion. His Honour held that the declaration was not conclusive on this aspect. On 16 November 1934, Evatt J therefore ordered the release of Mr Kisch.

A few days earlier, Mr Kisch had injured his leg. In obedience to the order of the Court, stewards from the *Strathaird* carried Mr Kisch on a chair onto the wharf at Circular Quay. There he encountered Customs Officer Wilson, who asked him to accompany him to Central Police Station. At Central Police Station, Officer Wilson, who had been born in Northern Scotland, dictated a passage of seventy words of Scottish Gaelic and asked Mr Kisch to write out the passage. Although a proficient linguist, Mr Kisch knew little or nothing of Scottish Gaelic. He declined to complete the dictation test.

Mr Kisch was then charged with being a prohibited immigrant. The Immigration Act provided that a person was a prohibited immigrant if the person failed to pass a dictation test of not less than fifty words in an European language directed by an officer. A magistrate convicted Mr Kisch of the offence and sentenced him to six months imprisonment. The decision was challenged in the High Court which held by a majority[15] that Scottish Gaelic was not an European language within the meaning of the Act. The majority construed "an European language" to mean " a standard form of speech recognised as the received and ordinary means of communication among the inhabitants in an European

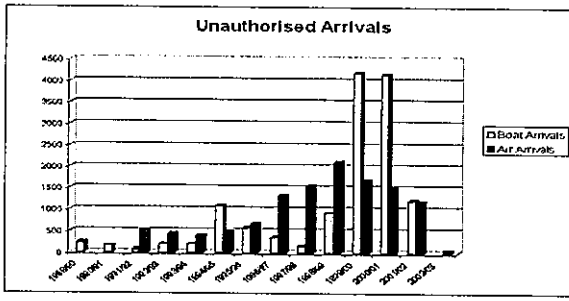
15 Rich, Dixon, Evatt and McTiernan JJ, Starke J dissenting.

community for all the purposes of the social body." The Court found that Scottish Gaelic was not such a language. Rich J said:[16]

> Census figures show that it is the speech of a rapidly diminishing number of people dwelling in the remoter highlands of Scotland, and the western islands. It is not the recognized speech of a community organized politically, socially or on any other basis. There are very few indeed who now use it as their only tongue and not many, comparatively speaking, who speak it in addition to English. No doubt it is a division of the Celtic branch of the Indo-European languages. It may excite the interest of scholars, and perhaps the enthusiasm of the descendants of the Gauls, but in ordinary practical affairs it plays no greater part than a local dialect might.

III A STATISTICAL SNAPSHOT

Before the circumstances by which mandatory detention came to be part of immigration law in Australia are discussed, it is useful to briefly outline the number of asylum seekers who have arrived in Australia over the years without authorisation, and how many of those have been detained pursuant to immigration detention policies and The Department publishes statistics concerning the number of unauthorised arrivals in Australia. From this information we find that, from 1989 to present, a total of 13,475 asylum seekers arrived in Australia by boat.[17] However, the numbers arriving have not been consistent over the years as is shown by the following table.



Sourced from the Department of Immigration and Multicultural Affairs, 'Fact sheet: 74. Unauthorised Arrivals By Air And Sea, 9 August 2002, <http://www.dima.gov.au>.

16 *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234, per Rich J at 241-2.

17 Department of Immigration and Multicultural and Indigenous Affairs, "Fact sheet: 74. Unauthorised Arrivals By Air And Sea, 9 August 2002, <http://www.dima.gov.au>.

It is interesting to contrast the above with the number of unlawful non-citizens in Australia whose visa has expired, or who had not complied with the conditions of their visa. As at 30 June 2001, there were 60,103 unlawful non-citizens (referred to by the Department as 'overstayers') in Australia.[18]

The Department does not provide current statistics concerning the number of asylum seekers who, having arrived in Australia without authorisation, were detained during the period from 1989 to present. However, information is available concerning the current make-up of persons in immigration detention. As at May 2002, the Department held only 1,184 unlawful non-citizens in detention centres[19] around the country.[20] Approximately 56% of the presently detained unlawful non-citizens arrived in Australia by boat without authorisation.[21] Of the detainees, 27.7% are Afghan, 13.2% are Iraqi, 7% are Iranian, 5.2% are Chinese

18 Department of Immigration and Multicultural and Indigenous Affairs, "Fact sheet: 86. Overstayers And People In Breach Of Visa Conditions, 8 November 2001, <http://www.dima.gov.au>.

19 These include the Maribyrnong Immigration Detention Centre (IDC) in Victoria, the Perth IDC, the Curtin Immigration Reception and Processing Centre (IRPC) and the Port Hedland IRPC in Western Australia, the Villawood IDC in New South Wales, and the Woomera IRPC and Woomera Residential Housing Project in South Australia.

20 Department of Immigration and Multicultural and Indigenous Affairs, "Fact sheet: 82. Immigration Detention, 7 May 2002, <http://www.dima.gov.au>.

21 Department of Immigration and Multicultural and Indigenous Affairs, "Fact sheet: 74a. Boat arrival details, 1 August 2002, <http://www.dima.gov.au>. Note, as at 3 July 2002, 705 unlawful non-citizens who arrived in Australia by boat were in detention. The statistic was produced by the authors from available information.

and 4.5% are Indonesian. Men make up 76.2% of the detainee population, women make up 14.4% and children make up 9.5%.[22]

IV AN EMERGING POLICY – FROM DISCRETIONARY TO MANDATORY DETENTION 1976 - 1994

A Overview

The following section deals with the legislative changes and some major issues faced by the courts as Australian immigration law developed from discretionary to mandatory detention of illegal immigrants, and in particular asylum seekers.

While detention has been a feature of Australia's immigration laws since federation, mandatory immigration detention is a more recent phenomenon. Mandatory immigration detention has developed as both policy and law in Australia in direct response to the arrival of asylum seekers through unofficial immigration channels.

The best-known group are those who arrived on Australia's northern shores in overcrowded, leaky vessels, from neighbouring Asian and Middle Eastern

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22 Table produced by authors from information obtained from the Department at www.immi.gov.au:

Detention Centres as at 5 July 2002	**Men**	**Women**	**Children**	**Total**
Maribyrnong IDC	45	7	10	62
Perth IDC	48	1	1	50
Port Hedland IRPC	115	7	11	133
Villawood IDC	364	106	16	486
Woomera IRPC	119	28	36	183
Woomera Residential Housing Project	0	3	7	10
Curtin IRPC	211	18	31	260
Total	*902*	*170*	*112*	***1184***
Percentages	*76.2%*	*14.4%*	*9.5%*	

countries, and who were often referred to as "boat people". The first group of such asylum seekers arrived in 1976. This group was predominantly from Vietnam. However, immigration detention only became a serious issue in Australia from 1989 when a number of boats carrying mainly Cambodian nationals, Sino-Vietnamese and Chinese nationals began arriving in Australia. During the decade that followed, detention of asylum seekers became an established feature of Australian immigration policy.

A survey of the period from 1976 to 1994 shows that the arrival of asylum seekers in Australia has been linked to worldwide refugee crises and failed humanitarian efforts in neighbouring countries. While the Australian government's strategy for dealing with asylum seekers in Australia has included prevention of the conditions giving rise to making people refugees, and disruption of people smuggling,[23] the following account shows that the Australian government has devoted considerable effort to preventing asylum seekers entering Australia, and to the introduction of legal and administrative mechanisms to detain, process and remove those that do manage to land in Australia.

With detention increasingly used by the government as the primary method of dealing with asylum seekers, the courts have been concerned with lawfulness of detention. In the landmark case of *Lim v Minister for Immigration, Local Government and Ethnic Affairs*[24] (*Lim*), the High Court set limitations on the power of the executive to detain non-citizens in Australia and rejected the attempt by the legislature to remove the court's jurisdiction to release persons who are unlawfully detained.

B The Vietnamese Asylum Seekers

From 1976, Vietnamese asylum seekers who fled Vietnam following the end of the war began arriving in Australia by boat. By 1979, 2011 Vietnamese asylum seekers, including those fleeing the Sino-Vietnamese war,[25] had reached Australia

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23 Philip Ruddock MP, "Refugee Claims and Australian Migration Law: A Ministerial Perspective (2000) 23(3) University of New South Wales Law Journal 1, 3; Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Issues: Australia's Response* (2001).

24 (1992) 176 CLR 1.

25 Schloenhardt, above n13, 34; Department of Immigration and Multicultural and Indigenous Affairs, above n21.

in this way.[26] The arrival of these asylum seekers in Australia and surrounding countries[27] did not lessen following the United Nations resettlement program for refugees and displaced persons in South East Asia, developed in 1979 with Australia's involvement. More asylum seekers fled Vietnam than was anticipated, and many countries were not willing to take the excess numbers.[28]

Under the Migration Act 1958 (Cth) (Migration Act) in force at the time, a prescribed authority could order persons who entered Australia without a permit to be detained for up to 7 days.[29] Consequently, upon arrival, the Vietnamese asylum seekers were held in a form of loose detention along with other asylum seekers and persons who had been granted visas under Australia's humanitarian and refugee program.[30]

The public reaction against the unprecedented 'influx' of Vietnamese asylum seekers in Australia was significant and, despite Australia's participation in the Vietnam war, there was substantial debate as to whether they were genuine asylum seekers or not.[31] In an attempt to stem the flow of on-shore refugee claims which was anticipated from other Vietnamese asylum seekers, the Australian government signed bilateral agreements with Hong Kong, Indonesia and Malaysia by which they would take steps to prevent asylum seekers travelling to Australia, and, in return, Australia would take selected refugees from camps in those countries.[32]

The Australian government also regarded the existing immigration legislation as too limited to deal with the situation. Consequently, legislation was enacted providing for harsh penalties for masters of vessels who brought unauthorised immigrants to Australia, the detention of persons who did not hold, or who were

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26 McMaster, above n 8, 70.

27 See Henry Litton, "The Vietnamese Boat People Story: 1975-1999" (2001) 25(4) Alternative Law Journal 179.

28 Schloenhardt, above n 13, 34-5.

29 Section 38 Migration Act as amended by section 23 of the Migration Amendment Act 1979, No. 117 of 1979; Adrienne Millbank, "The Detention of Boat People" (2000-1) 8 Current Issues Brief.

30 Millbank, above n 29.

31 McMaster, above n 8, 70.

32 Schloenhardt, above n 13, 36.

not granted entry permits upon arrival, as well as new and enhanced powers to board, search, detain and forfeit vessels. This legislation, however, was of limited operation and ceased to operate 12 months after it came into effect.[33]

Nonetheless, when the Vietnamese asylum seekers visa applications were processed, most were found to be refugees and were granted permanent residence.[34]

C The Cambodian Asylum Seekers

Between November 1989 and January 1992, the second wave of asylum seekers arrived by boat in Australia. During that period, nine boats and 438 Cambodian, Vietnamese and Chinese nationals arrived in Australia.[35] This new wave also coincided in a marked increase in the number of offshore asylum applications arising from the end of the Cold War and associated disintegration of the Soviet Union, along with the Tiananmen Square massacre in Beijing in June 1989.[36] Although the number of asylum seekers that arrived was not large compared with the number of illegal arrivals by air during that period,[37] the arrivals nonetheless provoked a much stronger reaction from the Australian government and community than the reaction to the asylum seekers who had arrived a decade earlier.

The government reacted swiftly to the perceived invasion from the north and amended the Migration Act to provide that persons arriving by boat who were suspected of not holding an entry permit could be detained in custody until their vessel was returned or until such earlier time as an authorised officer directed.[38]

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33 Immigration (Unauthorised Arrivals) Act 1980 (Cth), No 112 of 1980.

34 Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared* (1989), 173.

35 Department of Immigration and Multicultural and Indigenous Affairs, above n21.

36 Schloenhardt, above n 13, 39, 42.

37 Ibid 42.

38 Section 88 Migration Act as amended by the Migration Legislation Amendment Act 1989 (Cth), No 59 of 1989. Crock notes that this detention provision was applied as though there was a requirement that asylum seekers be held in custody until their status as an illegal entrant was determined. However, the section is expressed as a discretionary provision (Mary Crock, "A Legal Perspective on the Evolution of Mandatory Detention" in Mary Crock (ed), *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993) 27-8).

Departmental policy provided that an application for a protection visa would now be subject to a preliminary assessment. If a claim was considered to be 'manifestly unfounded', entry into Australia could be refused, and new mandatory deportation provisions[39] came into operation. If a 'claim of substance' was identified, the claimant could be detained pending determination of the application.[40]

The mandatory deportation provisions created unforseen problems for asylum seekers who had arrived in Australia without a valid entry permit. A non-citizen who arrived without authorisation was not granted a temporary entry permit and pursuant to government policy was detained upon arrival. Such a person was automatically ineligible for a protection visa.[41] Consequently, a person who had a claim of substance could be subject to the strict mandatory deportation provisions. Concerns about *refoulement* of potential refugees led to a further amendment of the Migration Act to include an administrative device that required the Minister to check that potential deportees had not claimed refugee status before the Minister ordered their deportation.[42] Departmental policy provided that if a potential deportee had claimed refugee status, then a deportation order would not be made until that claim was determined. Nevertheless, concerns were raised that this procedure was unsatisfactory because there was no legal prohibition against the Minister making an order for deportation.[43]

While the power to detain was still theoretically discretionary at that stage, all the Cambodian asylum seekers were detained upon arrival and a large number

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39 Section 59 Migration Act. Deportation would occur after a total of 28 days had passed from the date of becoming an illegal entrant, not including any period where an application for an entry permit was being determined. See also s4 and s13 Migration Act.

40 James Crawford, "Australian Immigration Law and Refugees: the 1989 Amendments" (1990) 2 International Journal of Refugee Law 626.

41 Section 48 Migration Act .

42 Section 59(2) Migration Act was amended by the Migration Legislation Amendment (Consequential Amendments) Act 1989 (Cth) to provide that the Minister could only order the deportation of an illegal entrant after he/she had considered certain prescribed procedures, which were set out in Regulation 178 *Migration Regulations* (Cth). The prescribed procedures involve checks that the illegal entrant does not have any extant claims for a protection entry permit.

43 Crawford, above n 40, 633.

remained in detention for several years. Government policy on detention distinguished between authorised and unauthorised asylum seekers. Unauthorised entrants were detained. Because the Cambodians arrived by boat and their entry was not authorised, they were immediately detained. The government justified the continued detention of the Cambodians on the basis of its general power to detain non-citizens until their vessels were returned. This was despite the fact that the vessels no longer existed, having being burned by quarantine officials not long after they arrived.[44] Furthermore, major delays occurred in the processing of the Cambodian asylum seekers' protection visas, largely due to the unprecedented numbers of protection visa applications from Chinese students following the violent response to the student uprising in 1989. This situation created an obvious disconformity between the treatment of the Cambodians and particularly the Chinese students who had been studying in Australia.[45] The students were not detained and a substantial number were granted permanent residence visas in June 1990. It was at this point that the first concerns were raised about the possibility that Australia's policy of detaining and deporting asylum seekers might breach its international obligations under the Refugees Convention.[46]

The plight of the detained Cambodian asylum seekers was compounded following an amendment to the Migration Act in 1992, which attempted to prevent any chance that they would be released from detention.[47] These amendments introduced the first mandatory detention provisions into the Migration Act as described in the following section.

D The Introduction of Mandatory Detention – the Lim *Case*

Against this background, the circumstances of 35 Cambodians and one of their children, spurred the government into action. Twenty-two of these people arrived by boat in Australian territorial waters on about 27 November 1989. Thirteen arrived by boat in Australian territorial waters on about 31 March 1990. None of these people had permission to enter Australia. They were detained purportedly under the existing legislation.

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44 *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per Brennan, Deane & Dawson JJ at 21.

45 McMaster, above n 8, 73-7.

46 Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: achieving a balance between refuge and control* (1992).

47 Migration Amendment Act 1992 (Cth), No 24 of 1992.

Shortly after arrival they applied to the Minister for refugee status under the Refugees Convention. After a little over two years, the Minister rejected the applications. The asylum seekers applied to the Federal Court for judicial review of the decisions rejecting their applications for refugee status. On 15 April 1992, just over a week after the earliest application was made, O'Loughlin J set aside each of the decisions and remitted the applications for further determination by the Minister.

The applicants also applied to the Federal Court for orders for release from custody pending the reconsideration of their applications. They had been held in custody, by this time, for over two years. The hearing of the application for release from custody was fixed for 7 May 1992.

On 5 May 1992, Parliament passed the Migration Amendment Act 1992 (Cth) (the Amendment Act). The Amendment Act received Royal Assent on the following day, 6 May 1992. It was clearly designed to prevent the application to the court for release from custody from proceeding further.

The Amendment Act introduced a new Division 4B entitled "Custody of non-citizens". The provisions required a designated person to be kept in custody. A designated person was a person who was on a boat in Australian territorial waters between 19 November 1989 and 1 December 1992, who was in Australia without an entry permit, and who had been given a designation by the Department. Section 54R provided that: "A Court is not to order the release from custody of a designated person." Thus, Division 4B, if valid, permitted the Department by administrative designation to require the compulsory detention of asylum seekers in the position of the 35 Cambodians under a regime in which no court could order their release from custody. The applicants commenced proceedings in the High Court seeking a declaration that certain provisions of Division 4B were invalid.[48]

For the purposes of Australian law, the validity of the legislation centrally depended on a constitutional issue. Federal Parliament is given power by the Constitution to make laws with respect to aliens. It was accepted that this law was a law with respect to aliens. However, all laws are required to conform to the requirements of Chapter III of the Constitution. Chapter III vests the judicial power of the Commonwealth in the Judiciary. The Constitution thereby reflects the doctrine of separation of executive and judicial powers. The accepted

48 *Lim*, above n 44.

interpretation of the Constitution is that the Executive is not permitted to exercise any part of the judicial power. Thus, the issue was whether the power to detain non-citizens provided by Division 4B allowed for an invalid exercise of judicial power by the Executive.

The Court relied on previous decisions which recognised that the aliens power authorised laws providing for the expulsion and deportation of aliens by the Executive, and also providing for the Executive to restrain an alien in custody in order to make the deportation effective. Brennan, Deane and Dawson JJ (with whom the remaining members of the High Court agreed[49]) said:[50]

> By analogy, authority to detain an alien in custody, when conferred in the context and for the purposes of executive powers to receive, investigate and determine an application by that alien for an entry permit and (after determination) to admit or deport, constitutes an incident of those executive powers. Such limited authority to detain an alien in custody can be conferred on the Executive without infringement of Ch III's exclusive vesting of the judicial power of the Commonwealth in the courts which it designates. The reason why that is so is that, to that limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth. When conferred upon the Executive, it takes its character from the executive powers to exclude, admit and deport of which it is an incident.

Their Honours then explained why the specific sections were valid:[51]

> Section 54L is the pivotal section of Div 4B. It requires that, subject to s 54Q, a 'designated person must be kept in custody' unless and until he or she is removed from Australia or given an entry permit. Section 54N requires that a designated person who was not in custody immediately after the commencement of Div 4B must be detained in custody even if he or she was 'a designated person who was held in a place described in paragraph 11(a) or a processing area before commencement and whose release was ordered by a court' (s 54N(2)). *In the light of what has been said above, the two sections will be valid laws if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for*

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49 *Lim* (Mason CJ at 10, Toohey J at 46, Gaudron J at 53 and McHugh J at 67), above n 44.

50 *Lim* (Brennan, Deane & Dawson JJ), above n 44, 32.

51 Ibid 32-33. Emphasis added by authors.

an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.

The powers of detention in custody which are conferred upon the Executive by ss 54L and 54N are limited by a number of significant restraints imposed by other provisions of Div 4B. Section 54Q effectively limits the total period during which a designated person can be detained in custody under Div 4B to a maximum total period of 273 days after the making of an application for an entry permit. For the purposes of that maximum period, time does not run while events beyond the control of the Department, such as delay in the supply of information or delay in court or tribunal proceedings, are preventing the finalization of the entry application. Section 54P(2) requires that a designated person be removed from Australia as soon as practicable after he or she has been in Australia for at least two months (or a longer prescribed period) without making an entry application. Section 54P(3) requires the removal of a designated person from Australia as soon as practicable after the refusal of an entry application and the finalization of any appeals against, or reviews of, that refusal. Those limitations upon the executive powers of detention in custody conferred by ss 54L and 54N go a long way towards ensuring that detention under those powers is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or to enable an entry application to be made and considered. Nonetheless, in circumstances where the facts of the present case demonstrate that Div 4B could authorize detention in custody for a further 273 days of persons who had already been unlawfully held in custody for years before the commencement of the Division, those limitations would not, in our view, have gone far enough were it not for the provision of s 54P(1).

Section 54P(1) sets the context in which the other provisions of Div 4B operate. It provides that an officer must remove a designated person from Australia as soon as practicable if the designated person asks the Minister, in writing, to be removed. It follows that, under Div 4B, it always lies within the power of a designated person to bring his or her detention in custody to an end by requesting to be removed from Australia. Once such a request has been made, further detention in custody is authorized by Div 4B only for the limited period involved, in the circumstances of a particular case, in complying with the statutory requirement of removal 'as soon as practicable'. It is only if an alien who is a designated person elects, by failing to

make a request under s 54P(1), to remain in the country as an applicant for an entry permit that detention under Div 4B can continue. In the context of that power of a designated person to bring his or her detention in custody under Div 4B to an end at any time, the time limitations imposed by other provisions of the Division suffice, in our view, to preclude a conclusion that the powers of detention which are conferred upon the Executive exceed what is reasonably capable of being seen as necessary for the purposes of deportation or for the making and consideration of an entry application. It follows that the powers of detention in custody conferred by ss 54L and 54N are an incident of the executive powers of exclusion, admission and deportation of aliens and are not, of their nature, part of the judicial power of the Commonwealth.

Brennan, Deane and Dawson JJ (with whom Gaudron J agreed on this issue) then held that s 54R, which prevented the courts from releasing persons from custody, was an invalid derogation from the judicial power. Their Honours said:[52]

> Section 54R provides that a court 'is not to order the release from custody of a designated person'. The operation of the section is limited to the extent that it does not purport to exclude a person to whom the Department has purportedly given 'a designation' from challenging his or her status as a 'designated person'. The section must, however, be read with s 54U which provides that a statement by a Departmental officer that the Department has given a person 'a designation described in paragraph (e) of the definition [of designated person]' is 'conclusive evidence' of that fact. Subject to the effect of that section, s 54R is inapplicable to a person who does not satisfy all of the six elements of the definition of a 'designated person'. On the other hand, if a person does satisfy all those elements and is a 'designated person' for the purposes of the Division, s 54R purports to direct the courts, including this Court, not to order his or her release from custody regardless of the circumstances.
>
> If it were apparent that there was no possibility that a 'designated person' might be unlawfully held in custody under Div 4B, it would be arguable that s 54R did no more than spell out what would be the duty of a court of competent jurisdiction in any event. If that were so, s 54R would be devoid of significant content. In fact, of course, it is manifest that circumstances could exist in which a 'designated person' was unlawfully held in custody by a person purportedly acting in pursuance of Div 4B. The reason why that is so is that the status of a person as a 'designated person'

52 Ibid 35-36. Emphasis added by authors.

does not automatically cease when detention in custody is no longer authorized by Div 4B. One example of such circumstances would be a case where a designated person continued to be held in involuntary custody notwithstanding that ss 54L and 54P had become inapplicable by reason of the provisions of s 54Q(1) or (2). Another would be a case where a designated person continued to be held in custody in disregard of a request for removal duly made under s 54P(1). Yet another would be a case where a designated person who had elected not to make an entry application continued to be held in custody against his or her will notwithstanding that the maximum period of two months prescribed by s 54P(2) had well and truly expired. In all of those cases, the person concerned would remain a designated person for the purposes of Div 4B (including s 54R) but could no longer be lawfully held in involuntary custody in Australia pursuant to the provisions of the Division. It is unnecessary to seek further examples. Once it appears that a designated person may be unlawfully held in custody in purported pursuance of Div 4B, it necessarily follows that the provision of s 54R is invalid.

Ours is a Constitution 'which deals with the demarcation of powers, leaves to the courts of law the question of whether there has been any excess of power, and requires them to pronounce as void any act which is ultra vires'. All the powers conferred upon the Parliament by s 51 of the Constitution are, as has been said, subject to Ch III's vesting of that judicial power in the courts which it designates, including this Court. That judicial power includes the jurisdiction which the Constitution directly vests in this Court in all matters in which the Commonwealth or a person being sued on behalf of the Commonwealth is a party or in which mandamus, prohibition or an injunction is sought against an officer of the Commonwealth (s 75(v)). *A law of the Parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid.* Moreover, even to the extent that s 54R is concerned with the exercise of jurisdiction other than this Court's directly vested constitutional jurisdiction, it is inconsistent with Ch III In terms, s 54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch

> III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.

The minority[53] upheld section 54R because they construed it to mean that the court could not release a person who was lawfully detained. Read in this way, the section did not prevent a court from enquiring into the lawfulness of the detention, and granting a remedy in the event that the detention was unlawful.

The applicants also argued that Division 4B was inconsistent with certain international obligations which Australia had assumed. Brennan, Deane and Dawson JJ said as to this argument:[54]

> It is unnecessary to do more than make brief reference to a number of submissions advanced on behalf of the plaintiffs in relation to alleged inconsistencies between Div 4B on the one hand and the provisions of some international treaties to which Australia is a party and Commonwealth legislation relating to those treaties on the other. First, it was argued that Div 4B is invalid or inapplicable to the extent that its provisions purport to remove, limit or exclude rights of the plaintiffs under the *Human Rights and Equal Opportunity Act*, the Human Rights Covenant set out in Sched 2 of that Act and the Refugee Convention and Protocol. The answer to that argument is that s 54T, which expressly provides that the provisions of Div 4B prevail over any other law in force in Australia, unmistakably evinces a legislative intent that, to the extent of any inconsistency, those provisions prevail over those earlier statutes and (to the extent - if at all - that they are operative within the Commonwealth) those international treaties. Next, it was submitted that the provisions of Div 4B were, to the extent of any such inconsistency, beyond the legislative power conferred upon the Parliament by s 51(xxix) of the *Constitution* with respect to external affairs. The answer to that submission is that, putting to one side the invalid and severable provision of s 54R and the arguably invalid provision of s 54U, the enactment of Div 4B was within the legislative power conferred upon the Parliament by s 51(xix) with respect to "aliens". Finally, it was submitted that the provisions of Div 4B should be read down to the extent necessary to avoid any such inconsistency and that the result of such a reading down would be that they did not make compulsory the detention in custody of the plaintiffs. We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a

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53 *Lim* (Mason CJ, Toohey and McHugh JJ), above n 44.

54 *Lim* (Brennan, Deane & Dawson JJ), above n 44, 37.

Commonwealth statute which accords with the obligations of Australia under an international treaty. The provisions of Div 4B which require that, in the circumstances which presently exist, the plaintiffs be detained in custody are, however, quite unambiguous.

On this argument Toohey J said:[55]

Once it is accepted that ss 54L and 54N are a valid exercise of the power to detain aliens pending their deportation, the plaintiffs' reliance on the Convention, the Protocol and the Covenant in the case stated is somewhat obscure. The defendants argued that the plaintiffs did not allege any particular breach of the Covenant and it should not be assumed that there had been any. But the plaintiffs said that they relied upon Art 9 of the Covenant which is set out in Sched 2 to the *Human Rights and Equal Opportunity Commission Act*, in particular Art. 9(1) and (4). Article 9(1) reads:

> 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

Article 9(4) reads:

> 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

However, s 54T of the Act gives clear precedence to Div 4B if the Division 'is inconsistent with another provision of this Act or with another law in force in Australia'. If ss 54L and 54N are valid laws of the Parliament, their contents prevail over the *Human Rights and Equal Opportunity Commission Act* and any relevant provision of the Schedules thereto. The plaintiffs have not demonstrated that the Convention or the Protocol has any specific bearing on their pending applications for release from custody. Had they done so, questions may have arisen for consideration as to the operation of the Convention and the Protocol in Australian municipal law, but again s 54T of the Act would have prevailed.

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55 *Lim* (Toohey J), above n 44, 51.

And McHugh J said:[56]

The HRC Act was enacted pursuant to s 51(xxix) of the *Constitution* - the external affairs power. It gives partial effect to the Covenant. The plaintiffs contend that Div 4B, if valid, would constitute a breach of Australia's obligations pursuant to the Covenant and would have the result that the HRC Act would not conform to the Convention because it could no longer apply to designated persons. The plaintiffs then contend that the HRC Act, as impliedly amended by the enactment of Div 4B, would no longer be regarded as appropriate to giving effect to Australia's obligations pursuant to the Convention and would therefore be invalid. It must follow, according to the argument of the plaintiffs, that the Amendment Act was not validly enacted because there was no express or implied intention in the Amendment Act to repeal the HRC Act.

To dispose of this argument, it is not necessary to determine whether the enactment of Div 4B constitutes a breach of Australia's obligations under the Convention. The entry into a treaty by Australia does not change the domestic law. The validity of legislation enacted by the Parliament (other than some legislation enacted pursuant to s 51(xxix)) does not depend on it being consistent with a Convention to which Australia is a party. If any inconsistency between the Amendment Act and the provisions of the HRC Act exists, the Amendment Act prevails. There is no principle of statutory interpretation which requires a later Act to be consistent with an earlier enactment. Given that Parliament cannot bind its future legislative power, it would be unconstitutional for such a principle of statutory interpretation to be adopted. Moreover, there is no principle of statutory interpretation that an Act is invalid if it has the unforeseen consequence of repealing an earlier Act.

Independently of these general considerations, however, Parliament has made it clear that Div 4B is to be operative regardless of its effect on earlier enactments. Section 54T provides:

> 'If this Division is inconsistent with another provision of this Act or with another law in force in Australia, whether written or unwritten, other than the Constitution:
>
> (a) this Division applies; and
>
> (b) the other law only applies so far as it is capable of operating concurrently with this Division.'

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56 *Lim* (McHugh J), above n 44, 74-75.

> In any event, the Amendment Act does not have the effect of rendering the HRC Act invalid. It is not the case that a law which gives effect to Australia's obligations under a treaty can only be supported by s 51(xxix) if it gives effect to all obligations under that treaty. As long as the legislation can reasonably be regarded as appropriate for implementing the provisions of the treaty, it will be valid. Regardless of the effect of the Amendment Act, the HRC Act can still reasonably be so regarded.

While the High Court found that the Cambodian asylum seekers were lawfully detained under Division 4B of the Migration Act, the saga of the Cambodian asylum seekers did not end there. In the course of coming to this decision, the High Court determined that the detention prior to the enactment of Division 4B had been unlawful. However, shortly after the decision in the *Lim* case, the Australian Parliament passed further amendments to the Migration Act[57] which retrospectively "extinguished the right of the Cambodians to damages for false imprisonment and set the rate of damages payable to a designated person for wrongful detention at one dollar a day"[58].

Several Cambodian asylum seekers instituted proceedings in the High Court challenging the validity of these amendments in *Ly Sok Pheng v Minister for Immigration, Local Government and Ethnic Affairs*. Shortly afterwards, the Australian government introduced legislation into Parliament that intended to repeal the dollar-a-day legislation and the proceedings were adjourned. Consequently, the proceedings were adjourned, and it is presumed, ultimately discontinued once the legislation came into effect[59].

The power of the court to release designated persons who had been in detention for 273 days was exercised in 1993 by the Federal Court in *Xin v Minister for Immigration and Ethnic Affairs (No 1)*[60] and *Xin v Minister for Immigration and Ethnic Affairs (No 2)*[61]. Those cases concerned a Chinese detainee, who was a designated person for the purposes of the Migration Act, who claimed that he had been in detention for periods totalling 273 days and was

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57 Migration Amendment Act (No 4) 1992 (Cth), No 235 of 1992.

58 McMaster, above n 8, 83.

59 Section 6 Migration Legislation Amendment Act (No 6) 1995 (Cth), No 102 of 1995.

60 (1993) 116 ALR 329 (Neaves J).

61 (1993) 116 ALR 349.

therefore entitled to be released pursuant to the Migration Act. As the applicant had been in detention from 18 January 1992 until the date of the hearing on 6 August 1993, a period well in excess of 273 days, the case largely turned on the application of certain exclusion periods to the 273 days. His Honour found in favour of the applicant and made a declaration that he be released from detention on reporting conditions. The Full Federal Court[62] and the High Court[63] both dismissed appeals by the Minister from the original decisions.

E The Policy Reasons Given in Support of Mandatory Detention

Since 1992, the Australian federal government has maintained an official policy of compulsorily detaining non-citizens who arrive in Australia without authorisation[64]. Mandatory detention of unauthorised arrivals, it is said, ensures the integrity of Australia's migration program, and in particular that the universal visa system, is upheld. In evidence to the Joint Standing Committee on Migration in 1994, the Department explained:[65]

> If you build a system which requires individuals to present to the Australian Government in advance of arrival – through one form or another – to seek approval for entry and if the system says that not following that requirement will be ignored on arrival, that undermines our universal visa system.

In an information paper released in 2001, the Department stated that detention is designed to achieve a number of public policy objectives, including to provide that:[66]

> [1] detainees are readily available during processing of any visa applications, and, if applications are unsuccessful, ensuring they are available for removal from Australia; [2] detainees are immediately available for health checks which are a requirement for the grant of a visa; [and 3] unauthorised arrivals do not enter the Australian community until their identity and status has been properly assessed and they have been granted a visa.

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62 *Minister for Immigration and Ethnic Affairs v Xin* (1993) 118 ALR 603.

63 *Minister for Immigration and Ethnic Affairs v Xin* (1994) 69 ALRJ 8.

64 Department of Immigration and Multicultural Affairs, *Unauthorised Arrivals and Detention* (2001) 8.

65 Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (1994) 109.

66 Department of Immigration and Multicultural and Indigenous Affairs, above n20.

Other policy reasons for detention suggested by the Department include the "assessment of character and security issues ... providing asylum seekers access to appropriate services for the processing of refugee applications, and helping them through the culture shock of coming to a new country".[67]

V MANDATORY DETENTION AS A KEYSTONE OF AUSTRALIA'S MIGRATION PROGRAMME 1994 - PRESENT

A Expanding the Scope of Mandatory Detention

In September 1994, the detention regime under the Migration Act was radically changed and the first general mandatory detention provisions came into operation.[68] To a large extent, the changes form the basis of the current detention regime under the Migration Act. There were four changes of particular note.

First, there was a general reform of the various designations by which persons became eligible for detention. For example, persons formerly described as illegal entrants and over stayers were now all termed 'unlawful non-citizens' and were subject to the same detention provisions. This change was directed at criticisms about the distinction made between those people who arrived in Australia unlawfully and those people who became unlawful after they arrived here.[69]

Second, a discretionary bridging visa was introduced allowing the release of certain eligible non-citizens from detention pending the grant of a visa or deportation. To be eligible for this visa, non-citizens have to be immigration cleared or fall within a prescribed class of persons.

The third major change was the removal of the discretionary component of the detention provisions. Under the new regime, the Minister and his officers have a duty to detain all unlawful non-citizens who are either in Australia, or who are suspected of trying to enter Australia.

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67 Department of Immigration and Multicultural Affairs, above n 64, 8-9.

68 Migration Reform Act 1992 (Cth), No 184 of 1992; Migration Laws Amendment Act 1993 (Cth), No 59 of 1993. Section 2 of the Migration Reform Act 1992 (Cth) provides that the main provisions of the Act commence on 1 November 1993. Section 2 of the Migration Laws Amendment Act 1993 (Cth) provides that certain amendments contained in the Migration Reform Act 1992 (Cth) commence on 1 September 1994.

69 Joint Standing Committee on Migration, above n 65, 203.

Finally, there was no longer a time limit on the length of detention to which an unlawful non-citizen could be exposed. The Migration Act clearly specifies that the only reasons for releasing an unlawful non-citizen from detention are if they are removed, deported, or granted a visa. Of course, following *Lim*, this does not prevent the release by a court of persons found in fact to be unlawfully detained.

B The Afghan Asylum Seekers

The mandatory detention provisions of the Migration Act came under scrutiny again in 1999 when Australia received its greatest number of unauthorised asylum seekers yet.[70] From January 1999 to August 2001, approximately 10,361 asylum seekers of predominantly Middle Eastern origin arrived on Australia's shores by boat.[71]

The government responded by introducing amendments to the Migration Act.[72] This time the amendments focused on deterring those persons who profited from trafficking in migrants by creating new offence provisions. However, the amendments went further than that. They modified the government's pre-existing obligations to provide unlawful non-citizens with visa and refugee status information, or access to legal advisors by providing that such assistance need only be extended if express requests were made.[73]

The government took further initiatives beyond legislative changes. As the numbers of asylum seekers arriving in Australia showed no signs of slowing, the Prime Minister established a special Task Force on Coastal Surveillance to report on ways of better managing Australia's coastline and preventing further asylum seekers from arriving. On the basis of the recommendations in the report, border protection legislation was passed which amended the Migration Act to create a legal framework for various measures aimed at preventing and deterring the arrival of further asylum seekers.[74]

As a final measure to deter asylum seekers from seeking refugee status through unlawful channels, the government amended the Migration Regulations

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70 Schloenhardt, above n 13, 52.

71 Department of Immigration and Multicultural and Indigenous Affairs, above n 21.

72 Migration Legislation Amendment Act 1999 (Cth), No 89 of 1999.

73 Schloenhardt, above n 13, 52.

74 Border Protection Legislation Amendment Act 1999 (Cth), No 160 of 1999.

1994 (Cth) (Migration Regulations) to create a new category of temporary protection visas. In contrast to those who applied successfully for asylum from offshore and became entitled to permanent protection visas, asylum seekers who arrived in Australia without authorisation were only entitled, if successful, to temporary protection visas. The temporary protection visa lasts for three years, when the refugee's continuing status is reviewed by the Department. Furthermore, under the temporary protection visa the refugee's entitlements to welfare benefits and family reunification are restricted.[75]

In August 2001, the issue of detention of asylum seekers was raised in the highly publicised litigation concerning the *MV Tampa*.

C The MV Tampa Litigation

On Sunday 26 August, a 20 metre wooden fishing boat with 433 people on board was sinking in the Indian Ocean about 140 km north of Christmas Island. A Norwegian container vessel, the *MV Tampa* (*Tampa*), licensed to carry no more than 50 people was on its way from Fremantle to Singapore. The Australian authorities asked the Captain of the *Tampa*, Captain Rinnan, to rescue the people on board the sinking fishing boat. He did so, and headed towards Indonesia. Several of the rescuees threatened to jump overboard if he did not change course for Christmas Island, which is part of the territory of Australia. He acquiesced.

The Australian government ordered the *Tampa* to remain outside Australian territorial waters. The Australian government asked the Administrator of Christmas Island to close the port, Flying Fish Cove, and ensure that no boats attempted to reach the *Tampa*. The government, despite requests from Australian lawyers to contact the rescuees, failed to facilitate contact.

Captain Rinnan became concerned for the health of a number of the rescuees and the welfare of his crew. On Wednesday 29 August, he defied the Australian authorities and headed towards Christmas Island into Australian territorial waters. In response the *Tampa* was boarded by 45 Special Armed Services troops. They took control of the vessel.

On Thursday 30 August, the Norwegian Ambassador went aboard the *Tampa* and was handed a letter from the rescuees. The rescuees mainly came from Afghanistan and Iraq and the letter, in effect, asked for asylum under the Refugees Convention.

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75 Migration Amendment Regulations 1999 (No 12) (Cth), No 243 of 1999.

The following day proceedings were commenced in the Federal Court[76] in Melbourne against the Commonwealth of Australia, the Minister for Immigration and Multicultural Affairs, The Attorney General, and the Minister for Defence by a lawyer concerned about the fate of the rescuees and by the Victorian Council of Civil Liberties. The hearing of the case continued over the weekend. In the course of the hearing the Prime Minister announced the 'Pacific Solution' whereby the government intended that the rescuees would be dispersed to Nauru and New Zealand, and their refugee claims would be assessed in those places. They would not be permitted to land in Australia.

In the proceedings, the central claim of the applicants was for an order in the nature of *habeas corpus* requiring the respondents to bring the rescuees to Australia. It was contended that the rescuees were detained without lawful authority on board the *Tampa*.

The respondents argued that the rescuees were not detained because they were free to go anywhere other than towards Australia. The respondents also contended that the Executive retained a prerogative power to expel non-citizens and to detain them for that purpose. The respondents throughout emphasised that the government acted entirely outside the statutory regime concerning non-citizens. It was contended that the migration legislation was never brought in to play. Rather, the Executive had a power to detain, in the circumstances, outside the statutory provisions.

Leave to intervene was granted to Amnesty International (Amnesty) and to the Human Rights and Equal Opportunity Commission (HREOC). These organisations adopted the arguments of the applicants, but also contended that the rescuees were being held in arbitrary detention contrary to Article 9 of the ICCPR. They argued that the detention was inappropriate, unjust and unreasonable in the circumstances of the case because it was for an indeterminate period, and it was without legitimate purpose. As the detention was not authorised by statute, the rescuees were entitled to be released.

The primary judgment was handed down on 11 September 2001 at about 2.15pm, Australian EST. It turned out that, at the very time, terrorists were readying themselves to destroy the World Trade Centre towers in the attack which has dominated world concerns since.

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76 *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

The primary judgment concluded that relief in the nature of *habeas corpus* should be granted, and that the respondents should bring the rescuees ashore in Australia. First, it was decided that the circumstances amounted to detention by reference to the cases concerning *habeas corpus* and false imprisonment. Second, it was decided that the Executive had no independent surviving prerogative power to detain non-citizens for the purpose of expulsion in view of the comprehensive provisions contained in the Migration Act on this subject. These provisions alone empowered the Executive to detain unlawful non-citizens. The Migration Act did not provide the authority to detain the rescuees because the government purposely relied on the prerogative powers and ensured that the provisions of the Migration Act were not brought into operation.

The matter was taken on appeal immediately, and heard within two days. Less than a week later the Full Court handed down its decision.[77] The Chief Justice wrote an extensive judgment and would have dismissed the appeal on the grounds relied upon in the primary decision. French J also wrote an extensive judgment which concluded, contrary to the primary decision, that the rescuees were not detained on the *Tampa*, and that, in any event, the executive power contained in section 61 of the Constitution empowered the Executive to prevent the entry of non-citizens and do all things necessary to effect such exclusion, and the provisions of the Migration Act had not abrogated any of that power. Beaumont J agreed with French J, and added some further comments. In the result, the appeal was allowed by a majority.

As to the function of the Refugees Convention in the circumstances of the case, French J said:[78]

> Australia has obligations under international law by virtue of treaties to which it is a party, including the Refugee Convention of 1951 and the 1967 Protocol. Treaties are entered into by the Executive on behalf of the nation. They do not, except to the extent provided by statute, become part of the domestic law of Australia. The primary obligation which Australia has to refugees to whom the Convention applies is the obligation under Article 33 not to expel or return them to the frontiers of territories where their lives or freedoms would be threatened on account of their race, religion, nationality, or membership of a particular social group or their political opinions. The question whether all or any of the rescuees are refugees has

77 *Ruddock v Vadarlis* (2001) 110 FCR 491.

78 Ibid 545.

> not been determined. It is questionable whether entry by the Executive into a convention thereby fetters the executive power under the Constitution, albeit there may be consequences in relation to the processes to be applied in the exercise of that power or relevant statutory powers - Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273. In this case, in my opinion, the question is moot because nothing done by the Executive on the face of it amounts to a breach of Australia's obligations in respect of non-refoulement under the Refugee Convention.

An application for special leave to appeal to the High Court was heard and refused on 27 November 2001.[79]

Shortly following these proceedings, the Migration Act was amended again.[80] These amendments confirmed the legality of the government's actions concerning the *Tampa*, formalised the arrangements made under the 'Pacific Solution' for future use and introduced further obstacles in the way of applications for protection by asylum seekers.

The amended Migration Act declared certain places to be an 'excised offshore place' and therefore excluded from Australia's migration zone for the purposes of the Migration Act. The places included Christmas Island, Ashore and Cartier Islands, Cocos (Keeling) Islands, any Australian sea or resources installation, and any other prescribed area.[81] Persons who enter Australia at an excised offshore place after the excision time (2pm on 8 September for Christmas Island) without a visa are designated as an 'offshore entry person'.[82] Migration officers are empowered to take any offshore entry person from Australia to any country in respect of which the Minister has made a declaration that that country will process visa applications.[83] This provision formalised the process undertaken in the

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79 *Vadarlis v Minister for Immigration and Multicultural Affairs* (unreported, High Court of Australia, M93/2001, 27 November 2001).

80 Migration Amendment (Excision from Migration Zone) Act 2001 (Cth), Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Cth).

81 Section 5(1) Migration Act.

82 Section 5(1) Migration Act.

83 Section 198A Migration Act.

'Pacific Solution' for future use. Furthermore, any visa application made by an offshore entry person who is in Australia is deemed to be invalid.[84]

Taking effect on 27 September 2001, the Border Protection (Validation and Enforcement Powers) Act 2001 (Cth) provided that any action taken by the Commonwealth between 27 August and 27 September 2001 in relation to the *Tampa* and certain other vessels is taken for all purposes to have been lawful. Furthermore, no proceedings may be instituted in respect of such action.

D The Features of Mandatory Detention in Australia

It is worth reviewing the detention regime in Australia as it now stands. The Migration Act provides that non-citizens must be detained in the following circumstances.[85]

- First, where an unlawful non-citizen, being a non-citizen who does not hold a valid visa, is suspected of seeking to enter Australia.
- Second, where a non-citizen in Australia is suspected of being an unlawful non-citizen because their visa has expired or has been cancelled.

Unlawful non-citizens detained under these provisions must be held in immigration detention[86] until they are removed, deported or granted a visa.[87] Also, an unlawful non-citizen who arrives in Australia on board a vessel used in connection with the commission of an offence, and who is detained under these provisions, may be held in immigration detention while the Minister considers whether or not to prosecute that person for the offence, and for such period that the prosecution entails.[88] A more limited form of detention applies to any non-citizen whom it is suspected holds a visa that may be cancelled on the basis, inter alia, that the non-citizen provided incorrect information, or for non-compliance with the conditions of the visa. Under this provision, non-citizens may be detained for a maximum of four hours at any one time.[89]

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84 Section 46A Migration Act.

85 Section 189 Migration Act.

86 Section 5 Migration Act.

87 Section 196 Migration Act.

88 Section 250 Migration Act.

89 Section 192 Migration Act.

In respect of unlawful non-citizens in detention who did not hold a valid visa when they entered Australia, immigration officials are not required to advise them of their right to apply for a visa or when they will be released from detention. Furthermore, the Minister is not obliged to provide them with an application form for a visa, the opportunity to apply for a visa, or access to legal advice concerning an application for a visa.[90]

Unlawful non-citizens may otherwise avoid detention if they are granted a bridging visa. A bridging visa is a temporary visa[91] that remains in force until a substantive visa is granted to the non-citizen, or for 28 days following notification that a substantive visa has been refused.[92] A bridging visa may only be granted to an eligible non-citizen[93] who satisfies certain criteria under the Migration Regulations. To be an eligible non-citizen, a non-citizen must be either immigration cleared, or fall within a prescribed class of persons, or be determined by the Minister to be an eligible non-citizen.[94] This definition precludes unlawful non-citizens who did not hold a valid visa when they first arrived in Australia because they would have been refused immigration clearance.[95] The categories of eligible non-citizens who are not immigration cleared, which are aimed at children, aged and persons with special needs are 'very limited in practice'.[96]

Not only is detention unavoidable for unlawful non-citizens who arrive in Australia without authorisation, those persons are also liable for the costs of their detention and removal.[97] This general provision does not appear to exempt those persons who are later found to be genuine refugees or who are granted a

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90 Section 193 Migration Act.

91 Section 37 Migration Act.

92 R50.511 Migration Regulations.

93 Section 73 Migration Act.

94 Section 72(1) Migration Act.

95 Section 172; Note - unlawful non-citizens who are not immigration cleared may be eligible for other specific types of temporary visas (ie Border (Temporary) (Class TA) Visa).

96 Human Rights and Equal Opportunity Commission, *Those who've come across the seas* (1998) 20.

97 Division 10 Migration Act.

substantive visa. Detention costs are approximately $120 per day per person.[98] Such costs may be passed on, if the Minister decides, to the owner of a vessel that brought the non-citizens to Australia.[99] Furthermore, the Migration Act creates an offence for owners of vessels that bring non-citizens into Australia who do not have a visa or right to enter, carrying a penalty of up to $10,000.[100] Persons who arrange for groups of non-citizens who do not have visas to travel to Australia are liable to imprisonment for a maximum of 20 years.[101]

The Migration Act specifically provides that unlawful non-citizens detained under the Migration Act may not be released from detention by a court unless they have made a valid application for a visa, *and* have been granted a visa.[102] Of course, following *Lim*, the Court still has power to order the release of persons detained unlawfully. However, for unlawful non-citizens, the bar has been lifted yet again. Apart from the question of whether the requirements of the Migration Act and the Migration Regulations have been satisfied with respect to the lodgement of visa applications, the Migration Act deems that applications made by unlawful non-citizens while they are in specified 'excised offshore places'[103] in Australia are invalid.[104]

Finally, courts are precluded by the Migration Act from determining that a non-citizen is entitled to the grant of a visa. Under the new judicial review regime introduced to the Migration Act on 2 October 2001,[105] if a court finds that a decision of a relevant Tribunal not to grant a visa to a non-citizen under the Migration Act was made without jurisdiction, it can only make a declaration that the decision is null and void.[106] The result is that the decision whether or not to

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98 Section 208 Migration Act.

99 Section 213 Migration Act.

100 Section 229 Migration Act.

101 Section 232A Migration Act.

102 Section 196 Migration Act.

103 Section 5(1) Migration Act.

104 Section 46A Migration Act.

105 See Part 8 Migration Act.

106 *Awan v Minister for Immigration, Multicultural and Indigenous Affairs* [2002] FCA 594, 192; *Boakye-Danquah v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 438, 72.

grant a visa to the non-citizen lies solely with the Department, and on review by the Refugee Review Tribunal.

E Indefinite Detention – the Al Masri Case

Detention pending removal was considered in the recent case of *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs*[107] (*Al Masri*). The applicant was a Palestinian detainee who, having been refused a protection visa by the Refugee Review Tribunal, determined to take the application no further and applied in writing to the Minister to be sent back to Palestine. Section 198(1) of the Migration Act provides that an officer must remove "as soon as reasonably practicable" an unlawful non-citizen who asks to be removed. Efforts were made by the Department to arrange for the applicant's return to Palestine. However, Israel, Jordan and Egypt all refused to allow the applicant permission to transit through those countries into Palestine. The result was that the applicant remained in detention eight months after his request to be removed. Consequently, he applied to the Federal Court for the issue of a writ of *habeas corpus* on the basis that his continued detention was unlawful.

The case was argued as a matter of statutory construction. Section 196(1) of the Migration Act relevantly provided that an unlawful non-citizen must be kept in detention until he or she is removed. The applicant argued that the power to detain is impliedly limited to a reasonable time and terminates when there is no reasonable likelihood of removal. Sections 196(1) and 198 therefore do not permit indefinite detention.

The Minister argued that the length of detention is irrelevant to the lawfulness of the detention. The only relevant question to be determined is whether the detention is for the authorised purpose, namely, the purpose of removal.

Merkel J held that the apparently unlimited power to detain in s 196 had to be read together with s 198 and the result was that detention is only to be until removal as soon as reasonably practicable. His Honour relied on the judgment of Woolf J *R v Governor of Durham Prison; Ex parte Hardial Singh*[108] which was an application for release from detention pending deportation. Merkel J cited the following passage from his Lordship's judgment:[109]

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107 [2002] FCA 1009 (Unreported, Merkel J, 15 August 2002).

108 [1984] 1 WLR 704.

109 *Al Masri* (Merkel J), above n 107, 25.

> ...as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time. ...

Merkel J also relied on the decision of the Supreme Court of the United States in *Zadvydas v Davis*[110] (*Zadvydas*) which, in similar circumstances, and in a 5-4 decision denied that the Attorney General had power to detain a deportee indefinitely where no country would accept the deportee. *Zadvydas* was a constitutional case which turned on the due process requirement of the Fifth Amendment. Merkel J concluded:[111]

> Accordingly, in my view ss 196(1)(a) and 198 are to be construed as authorising detention only for so long as:
>
> - the Minister is taking all reasonable steps to secure the removal from Australia of a removee as soon as is reasonably practicable;
> - the removal of the removee from Australia is 'reasonably practicable', in the sense that there must be a real likelihood or prospect of removal in the reasonably foreseeable future.
>
> If a court is satisfied that the Minister is not taking 'all reasonable steps' or that removal is 'not reasonably practicable' the implicit limitations on the detention power will not have been complied with or met and continued detention of the removee will no longer be authorised by the Act.

His Honour found that there was no real likelihood of the applicant's removal in the reasonably foreseeable future and ordered that the applicant be released.

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110 533 US 678 (2001).

111 *Al Masri* (Merkel J), above n 107, 38-9.

The Minister instituted an appeal from this decision. The appeal was held on 2 October 2002, and the decision is reserved.

It is interesting to note the comments made by Merkel J about the status of an unlawful non-citizen in Australian law. His Honour was dealing with the question whether the applicant's status as an unlawful non-citizen provided a discretionary reason to refuse relief by way of an order for release. He said:[112]

> 60. ... while it is literally correct to describe the applicant as an 'unlawful' entrant and an 'unlawful non-citizen' that is not a complete description of his position. The nomenclature adopted under the Act provides for the description of persons as 'unlawful non-citizens' because they arrived in Australia without a visa. This does not fully explain their status in Australian law as such persons are on-shore applicants for protection visas on the basis that they are refugees under the Refugees Convention.
>
> 61. The Refugees Convention is a part of conventional international law that has been given legislative effect in Australia: see ss 36 and 65 of the Act. It has always been fundamental to the operation of the Refugees Convention that many applicants for refugee status will, of necessity, have left their countries of nationality unlawfully and therefore, of necessity, will have entered the country in which they seek asylum unlawfully. Jews seeking refuge from war-torn Europe, Tutsis seeking refuge from Rwanda, Kurds seeking refuge from Iraq, Hazaras seeking refuge from the Taliban in Afghanistan and many others, may also be called 'unlawful non-citizens' in the countries in which they seek asylum. Such a description, however, conceals, rather than reveals, their lawful entitlement under conventional international law since they early 1950's (which has been enacted into Australian law) to claim refugee status as persons who are 'unlawfully' in the country in which their asylum application is made.
>
> 62. The Refugees Convention implicitly requires that, generally, the signatory countries process applications for refugee status of on-shore applicants irrespective of the legality of their arrival, or continued presence, in that country: see Art 31. That right is not only conferred upon them under international law but is also recognised by the Act (see s 36) and the Migration Regulations 1994 (Cth) which do not require lawful arrival or presence as a criterion for a protection visa. If the position were otherwise many of the protection obligations undertaken by

112 Ibid 60-3.

signatories to the Refugees Convention, including Australia, would be undermined and ultimately rendered nugatory.

63. Notwithstanding that the applicant is an 'unlawful non-citizen' under the Act who entered Australia unlawfully and has had his application for a protection visa refused, in making that application he was exercising a 'right' conferred upon him under Australian law. As he is entitled to do under the Act, the applicant has now requested his removal and the Minister is obliged to remove him but, in the circumstances of the present case, the Minister is no longer entitled to detain the applicant pending his removal.

VI DIVERSE VIEWS AS TO WHETHER AUSTRALIA'S MANDATORY DETENTION LEGISLATION CONFORMS TO INTERNATIONAL LAW

A Overview

In the Australian courts, mandatory detention of asylum seekers has been litigated by reference to claims for the issue of writs of *habeas corpus* (*Tampa*), or by reference to the constitutional question whether legislation conferred judicial power on the Executive (*Lim*), or by reference to questions of statutory construction (*Al Masri*).

At least during the time when the more recent cases have been litigated, there has been an established and growing jurisprudence concerning international human rights obligations which impact on the situation of asylum seekers in detention. Australia has been criticised on the basis that the mandatory detention regime is in breach of international conventions and international customary law.

Some of these criticisms are described in this section. Reference is also made to the responses from the government to the criticisms. Despite this body of jurisprudence, international legal obligations have not figured in the domestic litigation, save for brief references such as in *Lim* and *Al Masri* set out earlier in this paper. The absence of these considerations in the Australian decisions is starkly illustrated by the contrast in the way in which the matter was considered by the Human Rights Committee in *A v Australia.*[113]

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113 Human Rights Committee, *A v Australia*, Communication No 560/1993: Australia. 30/4/97 (CCPR/C/59/D/560/1993).

B View of the Human Rights Committee - A v Australia

The applicant in this communication was one of the plaintiffs in the *Lim* case heard by the High Court. It will be recalled that the High Court dealt with the matter as a constitutional question, namely, whether the Executive was impermissibly exercising judicial power. Having failed in that litigation, the applicant submitted a communication to the Human Rights Committee claiming to have been a victim of violations by Australia of, inter alia, Article 9, paragraphs 1 and 4 of the ICCPR. Article 9, paragraph 1 provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such provisions as are established by law.

Article 9, paragraph 4 provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The applicant, a national of Cambodia, arrived in Australia by boat in November 1989. Shortly afterwards he applied for refugee status. His application was first rejected in April 1992. He commenced judicial review proceedings in the Federal Court, and also proceedings seeking his release from custody. It will be recalled from the recitation of the facts in *Lim* that the Australian Parliament passed the new Division 4B of the Migration Act two days before the application for release was to be heard. The High Court gave judgment in Lim in December 1992 with the result that the applicant remained in custody. At the time of the communication to the Human Rights Committee the applicant had been in detention for about four years.

The Human Rights Committee found that the detention was arbitrary within the meaning of Article 9, paragraph 1. It said:[114]

> 9.2 ... the Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to

114 Ibid 9.2 – 9.4.

justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these ground are sufficient to justify indefinite and prolonged detention.

9.3 The Committee agrees that there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4 The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the mean of article 9, paragraph 1.

The Human Rights Committee also found that the detention involved a breach of Article 9, paragraph 4. On this subject it said:[115]

9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act of 5 May 1992; after that date, the domestic courts retained that power with a view to ordering the release of a person if they found the detention to be unlawful under Australian law. In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a 'designated person' within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of

115 Ibid 9.5.

ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is 'unlawful' either under the terms of domestic law or within the meaning of the Covenant. As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a 'designated person' within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

C *View of the United Nations High Commissioner for Refugees*

One function of the Executive Committee of the United Nations High Commissioner for Refugees program (EXCOM) is to advise the High Commissioner on his or her protection function. The conclusions published by EXCOM represent an important body of opinion on the obligations of states under the Refugees Convention.

As early as 1986, EXCOM published Conclusion 44 relating to the obligations concerning detention in the light of Article 31 of the Refugees Convention.[116] The conclusion included the following:[117]

> [I]n view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order;

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116 Executive Committee, United Nations High Commissioner for Refugees, *Detention of Refugees and Asylum Seekers*, (No. 44 (XXXVII) – 1986).

117 Ibid.

In 1998 EXCOM published Conclusion 85 which included the statement that the Committee:[118]

> Deplores that many countries continue routinely to detain asylum-seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention;

Australia was a member of EXCOM in both 1986 and 1998.[119]

In February 1999, the UNHCR published "Revised guidelines on applicable criteria and standards relating to the detention of asylum seekers".[120] In the introduction it is said that the detention of asylum seekers is, in the view of UNHCR, inherently undesirable especially for vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.

Guideline 3 provides that the detention of asylum seekers may be resorted to for the reasons set out in EXCOM Conclusion 44 "as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law".[121] Those norms and principles are contained in the main human rights instruments including Article 9, paragraph 1, of the ICCPR. Guideline 3 also states:[122]

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118 Executive Committee, United Nations High Commissioner for Refugees, *Conclusion on International Protection,* (No 85 (XLIX) – 1998).

119 *Addendum to the Report of the United Nations High Commissioner for Refugees* (General Assembly, Forty-first session, Supplement No.12A, A/41/12/Add.1, 13 January 1987); *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-ninth session* (General Assembly, Fifty-third session, Supplement No.12A, A/53/12/Add.1, 5-9 October 1998).

120 UNHCR Revised Guidelines On Applicable Criteria And Standards Relating To The Detention Of Asylum (1 February 1999).

121 Ibid.

122 Ibid.

Detention of asylum-seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country.

D *View of the Human Rights and Equal Opportunity Commission*

HREOC is an Australian statutory body, one of the functions of which is to examine whether Australian legislation conforms to Australian's human rights obligations.

On 11 May 1998, HREOC published a major report entitled "Those who have come across the seas" of HREOC's enquiry into many aspects of the detention of unauthorised arrivals in Australia.[123] Following a very comprehensive examination of international human rights law, HREOC made the following findings and recommendations on this aspect of its enquiry:[124]

The Commission finds

- The detention regime in the Migration Act violates the ICCPR and CROC and is therefore a breach of human rights under the HREOC Act.
- The mandatory detention regime under the Migration Act places Australia in breach of its obligations under ICCPR article 9.1 and CROC article 37(b). The ICCPR and CROC require Australia to respect the right to liberty and to ensure that no-one is subjected to arbitrary detention. If detention is necessary in exceptional circumstances then it must be a proportionate means to achieve a legitimate aim and it must be for a minimal period. The detention regime under the Migration Act does not meet these requirements. Under current practice the detention of unauthorised arrivals is not an exceptional step but the norm. Vulnerable groups such as children are detained for lengthy periods under the policy. In some instances, individuals detained under the Migration Act provisions have been held for more than five years. This is arbitrary detention and cannot be justified on any grounds.
- The Migration Act does not permit the individual circumstance of detention of non-citizens to be taken into consideration by courts. It does not permit the

123 Human Rights and Equal Opportunity Commission, above n96.

124 Ibid 52-54.

reasonableness and appropriateness of detaining an individual to be determined by the courts. Australia is therefore in breach of its obligations under ICCPR article 9.4 and CROC article 37(d) which require that a court be empowered, if appropriate, to order release from detention.

- To the extent that the policy of mandatory detention is designed to deter future asylum seekers, it is contrary to the principles of international protection and in breach of ICCPR article 9.1, CROC articles 22(1) and 37(b) and human rights under the HREOC Act.

The Commission recommends

R3.1 In accordance with international human rights law the right to liberty should be recognised as a fundamental human right. No-one should be subjected to arbitrary detention. The detention of asylum seekers should be a last resort for use only on exceptional grounds. Alternatives to detention, such as release subject to residency and reporting obligations or guarantor requirements, must be applied first unless there is convincing evidence that alternative would not be effective or would be inappropriate having regard to the individual circumstances of the particular person. A detailed model for conditional release is set out in Chapter 16.

R3.2 The grounds on which asylum seekers may be detained should be clearly prescribed in the Migration Act and be in conformity with international human rights law. Where detention of asylum seekers is necessary it must be for a minimal period, be reasonable and be a proportionate means of achieving at least one of the following legitimate aims

- to verify identity
- to determine the elements on which the claim to refugee status or asylum is based
- to deal with refugees or asylum seekers who have destroyed their travel and/or identifications document to mislead the authorities of the state in which they intend to claim asylum and
- to protect national security or public order.

The detention of asylum seekers for any other purpose is contrary to the principles of international protection and should not be permitted under Australian law.

R3.3 Detention is especially undesirable for vulnerable people such as single women, children, unaccompanied minors and those with special medical or psychological needs. In relation to children article 37(b) of CROC states that the

arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Children and other vulnerable people should be detained, even as permitted by R3.2, only in exceptional circumstances. For children, the best interest of the individual child should be the paramount consideration.

R3.4 Detention should be subject to effective independent review. Review bodies should be empowered to take into consideration the individual circumstances of the non-citizen including the reasonableness and appropriateness of detaining him or her. Review bodies should be empowered to order a person's release from detention. The lawfulness of detention should be subject to judicial review. Migration Act sections 183, 196(3) and 72(3) so far as they provide that the Minister's discretion is personal and non-compellable should be repealed.

E Views of Some Scholars

In relation to the *Tampa* litigation, Professor Hathaway has noted:[125]

> Perhaps most significantly, Australia was also at this point [when the Tampa entered Australian territorial waters] prohibited from imposing limits on the freedom of movement of the refugee claimants unless able to justify the restrictions. Under Art. 31(2) of the Refugee Convention, authorities are allowed to detain refugees only for reasons generally agreed to be justified, including the need to satisfy themselves of an asylum seeker's identity, or to determine whether or not he or she presents a security risk to they asylum state. The refugee must, of course, submit to all necessary investigations of his or her claim to protection, and file whatever documentation or statements are reasonably required to verify the claim to refugee status. But once any such prerequisite obligations have been discharged, the refugee's presence has been regularized in the receiving state, and refugee-specific restrictions on freedom of movement must come to an end. This critical international legal limitation on the right of states to detain refugees appears not even to have been considered in adjudicating the application for habeas corpus in the Federal Court.

Quite apart from the question whether the detention of the rescuees violated the Refugees Convention, it has been observed that the *Tampa* incident may have

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125 James Hathaway, "Refugee Law is not Immigration Law" (2002) World Refugee Survey 38, 42. Emphasis added by authors.

involved other breaches of conventional international law. Thom[126] argues that principle of *non-refoulement* applies from the moment asylum seekers present themselves for entry. There is thus an obligation not to reject an applicant at the border. This obligation applies despite any attempts by the States to keep aliens technically or legally outside the territory of the State. Further, at least where a State exercises its jurisdiction by taking control of a ship, whether in territorial waters or not, the State is bound to abide by the principle of *non-refoulement.* Thom argues that Australia was obliged after the SAS boarded the *Tampa* to give the rescuees access to Australian processing procedures. He also argues that the failure to permit access to Australian asylum procedures violated the principle of non-penalisation in Article 31 of the Refugees Convention.

F View of the Australian Government

The Australian government indicated its position on a number of the criticisms raised above in a paper prepared for the UNHCR Global Consultations process.[127] Key to its position is the view that Article 31 paragraph 2 of the Refugees Convention preserves "the right of States to impose restrictions on illegal entrants, provided they are considered 'necessary', and until their status in the country is regularised or they obtain admission to another country".[128] Therefore, while the Australian government "supports the recognition of the right to liberty, as articulated in international instruments such as the ICCPR, and considers that no one should be subjected to arbitrary detention ...[and views] prolonged or indefinite detention as undesirable",[129] it nonetheless considers its reception and detention arrangements as consistent with international law.

Its position is explained as follows:[130]

> The administrative detention of illegal entrants pending the decision whether to remove them or grant them a visa to enter or stay is consistent with Australia's entitlement under international law to determine whom it admits to its territory. It is

126 Graham Thom, "Human Rights, Refugees and the MV Tampa Crisis" (2002) 13 Public Law Review 110.

127 Department of Immigration and Multicultural & Indigenous Affairs, *Interpreting the Refugees Convention – an Australian contribution* (2002).

128 Ibid 152.

129 Ibid 162.

130 Ibid 163-5.

required by legislation passed by the Australian Parliament [the Migration Act], has been held as lawful and non-punitive in Australian jurisprudence [the Lim decision], and represents an appropriate balance between pursuing legitimate public policy objectives and considering the interests of those adversely affected.

...

The Australian Government in its response to the Committee in relation to A v Australia did not accept that the detention was arbitrary, nor that Australia had provided insufficient justification for his detention. It was noted that the Committee had not indicated what, in its view, would be considered sufficient justification for Mr A's detention nor at what point in time the detention of Mr A became arbitrary.

In the view of the Australian Government, Australia's obligation under Article 9.4 of the ICCPR is to provide for review of the lawfulness of detention in the Australian domestic legal context. The Government took the view that:

The obligation on State parties is, in accordance with the actual words of Article 9.4, to provide for review of the lawfulness of detention. In the view of the Australian government, there can be no doubt that the term 'lawfulness' refers to the Australian domestic legal system. There is nothing apparent in the terms of the Covenant that 'lawful' was intended to mean 'lawful at international law' or 'not arbitrary'. Elsewhere in the Covenant where the term 'law' is used, it clearly refers to domestic law ... Furthermore, the use of 'unlawful' in Article 9.4 contrasts with the meaning and use of 'arbitrary' in other provisions of the Covenant ... nor is there anything in the *travaux préparatoires*, the General Comments of the Committee ... or the works of the commentators to support the Committee's view that 'lawfulness' in Article 9.4 is not limited to mere compliance with domestic law.

In regard specifically to the Refugees Convention, in the Government's view the public policy grounds for detaining illegal entrants, when considered in combination and against Australia's particular circumstances, are sufficiently compelling to be considered 'necessary' for the purposes of Article 31(2).

The objectives which underlie the policy of detaining illegal entrants, including those who subsequently apply for asylum, are to:

- ensure that illegal entrants do not enter the Australian community except in specified circumstances, until any claims for asylum have been properly assessed and found to justify entry;

- ensure detainees' availability for removal should they have no right to be granted a visa to stay in Australia; and
- thus contribute to maintaining the integrity of Australia's migration and humanitarian programs.

The policy ensures the effective management of illegal entrants while identity, health character, national security and any protection issues are explored, and their availability for removal from Australia if they have no grounds to stay. If a person is determined to be a refugee and owed protection by Australia, and the person and any accompanying family members fulfil the conditions for grant of a visa, they are immediately released.

Deterrence is not the central or dominant objective or reason for the mandatory detention provisions. However, to the extent that mandatory detention is perceived internationally to indicate Australia's determined and effective pursuit of the above objectives, some level of deterrence would be an understandable outcome among potential illegal entrants who lack bona fide claims to asylum, and those engaged in secondary movement for non-protection related motives.

As far as the potential refoulement of asylum seekers is concerned, the Australian government's position is that "while the Refugees Convention provides a definition of the term 'refugee', it does not give to a person who falls within the definition any right to enter or remain in the territory of a Contracting State".[131]

VII THE FAILURE OF AUSTRALIAN COURTS DEALING WITH DETENTION CASES TO TAKE INTO ACCOUNT INTERNATIONAL HUMAN RIGHTS LAW AND THE REASON FOR THIS APPROACH

In the last sentence of the passage from Professor Hathaway extracted at 5.5, he refers to the failure of the Court in the *Tampa* litigation to address the limitation of detention imposed by Article 31 paragraph 2 of the Refugees Convention. Against the background of these views that the mandatory detention regime in Australia contravenes international law, the question arises why the Australian courts have not considered the impact of international law in cases concerning mandatory detention.

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131 Ibid 46.

In the *Tampa* litigation, Amnesty and HREOC were both granted leave to intervene. Both filed written submissions which detailed allegations of a number of violations of the ICCPR, the CROC, and the Refugees Convention. For instance, in relation to the detention of the rescuees, both Amnesty and HREOC contended that such detention was in breach of international law. Both argued, *inter alia*, that the detention was arbitrary and violated Article 9 paragraph 1 of the ICCPR.

At first instance it was unnecessary to determine these issues because the court held that an order for release should be made in any event.

In the Full Court, the central issue determined by the majority was the power of the Executive to refuse entry to the rescuees outside the provisions of the Migration Act. French J referred briefly to the role of the Refugees Convention on this issue.[132] But, on the legality of the detention, Professor Hathaway's observation is pertinent. Developments in the law are, of course, incremental. At the conclusion of each stage of development, further issues are revealed for consideration at the next stage. It may be that Professor Hathaway's observation points to another question. Is the executive power which was recognised by the majority affected by the Executive act of entering into treaties alleged to have been violated? If there is inconsistency in the acts of the Executive, is the matter justiciable?

The fact that these questions remain unaddressed perhaps reflects something of the role of international law in the present Australian legal system. As to the effect of treaties, Mason CJ and Deanne J said in *Minister for Immigration and Ethnic Affairs v Teoh*:[133]

> It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.

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132 See paragraph VC above.

133 (1995) 183 CLR 273 at 286-7.

In 1999, in *Nulyarimma v Thompson*[134] (*Nulyarimma*) a majority[135] held that genocide was not a crime in domestic law in Australia in the absence of legislation passed by the Australian Parliament. This is so even though, as Wilcox J said:[136]

> I accept that the prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogable obligation by each nation State to the entire international community. This is an obligation independent of the Genocide Convention. It existed before the commencement of that Convention in January 1951, probably at least from the time of the United Nations General Assembly resolution in December 1946. I accept, also that the obligation imposed by customary law on each nation State is to extradite or prosecute any person, found within its territory, who appears to have committed any of the acts cited in the definition of genocide set out in the Convention. It is generally accepted this definition reflects the concept of genocide, as understood in customary international law.

And his Honour continued:[137]

> However, it is one thing to say Australia has an international legal obligation to prosecute or extradite a genocide suspect found within its territory, and that the Commonwealth Parliament may legislate to ensure that obligation is fulfilled; it is another thing to say that, without legislation to the effect, such a person may be put on trial for genocide before an Australian court.

Merkel J held that the offence of genocide was an offence under domestic law without the need for domestic legislation.

VIII CONCLUSION

What then is the picture revealed of the way courts have dealt with mandatory detention in Australia.

Returning to the question posed at the commencement of this paper, namely, whether Australian courts have dealt with immigration detention issues in isolation from the 'main stream', we see that the 'main stream' is the body of

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134 (1999) 96 FCR 153.

135 Wilcox and Whitlam JJ.

136 *Nulyarimma* (Wilcox J), above n134, 18.

137 Ibid 20.

international human rights law contained in the Refugees Convention, ICCPR, and CROC. These norms are the 'main stream' because they carry the assent of most of the nations of the world, and they embody standards of acceptable civilised conduct. In the case of detention, importantly, they directly address the issues which should determine the legitimacy of detention. If those standards are litigated the courts will address whether the detention is appropriate or not according to the standards prescribed, rather than with seemingly tangential questions such as whether the detention is properly the function of the Executive or the Judiciary.

In Australia, the 'main stream' has not yet reached the billabong. The billabong is filled with local debates about the meaning of legislation or of the precise ambit of the constitutional separation of powers. In a good year, it may be that the 'main stream' will flood and fill the billabong.

In the meantime, the Australian legal system lacks entrenched protections against arbitrary detention and other violations of fundamental human rights. So far the debate in Australia over a bill of rights has not produced any results. It may be that the onward march of globalisation will engulf the Australian legal system and cause movement towards a direct acceptance of international human rights standards into Australian law. In due course, the Australian legal system will no doubt recognise that sovereignty is a changing concept, and that the mature exercise of sovereign power involves the acceptance of international human rights norms as a part of the domestic law of Australia.