An Opportunity for Justice Goes Begging: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs**

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The Facts

The plaintiffs were Cambodian nationals who had arrived in Australia in two separate boats, the first on 27 November 1989 and the second on 31 March 1990. All had applied to the Minister for Immigration, Local Government and Ethnic Affairs ('the Minister') for refugee status, within the meaning of the 1951 *Convention and the 1967 Protocol relating to the Status of Refugees* ('the Refugee Convention') pursuant to the provisions of the *Migration Act 1958 (Cth)* ('the Act').

All of the plaintiffs had been detained by the Minister upon arrival and remained in detention. At the time of hearing, the first group was being held in Port Hedland, WA, and the second group was being held in Villawood, Sydney.

On 3–6 April 1992 the plaintiffs' applications for refugee status were all rejected by a delegate of the Minister. Applications by the plaintiffs pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) were immediately filed with the Federal Court of Australia. The applications challenged the decisions to refuse refugee status and the plaintiffs sought orders releasing them from custody and staying their removal from Australia.

On 15 April 1992, O'Loughlan J in the Federal Court in Darwin set aside each of the decisions rejecting the plaintiffs' applications for refugee status and ordered that the matters be referred back to the Minister's delegate for reconsideration.[1] The contested applications by the plaintiffs seeking release from custody were adjourned for hearing by O'Loughlan J in Melbourne on 7 May 1992.

On 5 May 1992, two days before the date set for the hearing of the release applications, Parliament passed the *Migration Amendment Act 1992*, which inserted a new Division 4B into the Act. The provisions contained a new definition of 'designated person', which covered those generally known as 'boat people' who had arrived in Australia between 19 November 1989 and 1 December

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* (1993) 110 ALR 97 (*'Lim's Case'*).

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1 On 13 April 1992 Immigration Minister Gerry Hand had ordered that each decision be withdrawn and that the 'final stages' of the decision-making process be carried out again because of an unspecified 'defect' in the decision-making process.

1992.[2] Section 54J expressed that it is in the 'national interest' that each designated person should be kept in custody until he or she leaves Australia or is given an entry permit, and

> [t]hrough a combination of sections[3], Div 4B [sought] to ensure that a designated person is kept in custody if already there, and is placed in custody if not, and is only released from custody if the person is removed from Australia...or given an entry permit.[4]

With an unambiguous "view to cementing the custody provisions"[5] s 54R read '[a] court is not to order the release from custody of a designated person."

The Federal Court proceedings were adjourned *sine die*, and the plaintiffs commenced proceedings in the High Court seeking declaratory and injunctive relief against the Minister and the Commonwealth.

The Issues

A case was stated by the Chief Justice[6], and two major questions of law were raised for consideration by the court:

(a) The principal argument by Counsel for the plaintiffs was that the relevant sections of Div 4B[7] constituted a usurpation by the Executive of the Commonwealth judicial power which s 71 of the Constitution vests in the courts. This argument was based upon the doctrine of separation of powers under Chapter III of the Constitution, and claimed that the enactment of the detention provisions by the Executive encroached the judicial power of the Commonwealth vested exclusively in the Courts.[8]

(b) It was also argued that the defendants were under a legal duty to decide the plaintiffs' applications for release from custody having regard to the Refugee Convention and the *International Covenant on Civil and Political Rights* ('ICCPR'), the latter instrument being incorporated into Schedule 2 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act'). It was argued that Div 4B was inconsistent with the provisions of the Refugee Convention and the ICCPR and HREOC Act and was therefore either invalid or should be read down to the extent of that inconsistency.

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2 s 54K.
3 ss 54L, 54M, 54N, 54P, 54Q and 54R.
4 (1993) 110 ALR 97 at 125 per Toohey J.
5 (1993) 110 ALR 97 at 125 per Toohey J.
6 Set out in the joint judgement of Brennan, Deane and Dawson JJ at 103-104.
7 Specifically, ss 54L, 54N and 54R.
8 See (1993) 110 ALR 97 at 113-115 per Brennan Deane and Dawson JJ.

The Court's Findings

Constitutionality of Div 4B

The court was unanimous in its finding that the 'aliens' power conferred by s 51(xix) of the Constitution confers power on the Executive to detain an alien in custody for the purposes of receiving investigating and determining an application for an entry permit, and after determination, to admit or deport.[9] The court also found that in the current instance, the specific detention provisions introduced by ss 54L and 54N of Div 4B were valid, being an incident of the aliens power and not therefore infringing the judicial power of the Commonwealth.[10]

The Court differed in its interpretation of s 54R, which was the most controversial of the new provisions. A majority[11] held that because this provision could operate so as to require a court not to release a person even if 'unlawfully' detained by the Executive, it exceeded the legislative powers of the Commonwealth and was therefore invalid. However, Mason CJ, with whom McHugh J[12] and Toohey J[13] agreed, held that s 54R could be read down so as to regard it as merely a direction not to release a designated person *lawfully* detained in custody.[14]

The Court rejected the argument of counsel for the plaintiffs that Div 4B usurps the judicial power of the Commonwealth because it is a Bill of Pains and Penalties, that is, a law directed to a particular group of individuals which punishes those individuals without the procedural safeguards involved in a judicial trial.[15] The Court held that the object of the legislation is not to punish but to keep the plaintiffs under supervision and control.[16]

Detention of the Plaintiffs Prior to the Passage of Div 4B

Before the enactment of Div 4B in May 1992, the plaintiffs had been held in custody under s 88 of the Act, (and its predecessor s 36) which is headed 'Custody of prohibited entrant during stay of vessel in port'. A majority of the court[17] found that, in the two years or so between the arrival of the plaintiffs and the passage of Div 4B, they had in fact been held unlawfully. Their Honours interpreted s 88 to have a strictly 'temporary' operation, to enable a prohibited boat arrival to be held

9 (1993) 110 ALR 97 at 100 per Mason CJ, 117-118 per Brennan Deane and Dawson JJ, at 128 per Toohey J, at 137-138 per Gaudron J, at 143-144 per McHugh J.
10 (1993) 110 ALR 97 at 100 per Mason CJ, at 118-120 per Brennan Deane and Dawson JJ, at 131-133 per Toohey J, at 138-139 per Gaudron J, at 151 per McHugh J.
11 (1993) 110 ALR 97 at 120-122 per Brennan Dawson and Deane JJ (with whom Gaudron J agreed).
12 (1993) 110 ALR 97 at 146-147.
13 (1993) 110 ALR 97 at 132-133.
14 (1993) 110 ALR 97 at 101-103.
15 (1993) 110 ALR 97 at 148 per McHugh J.
16 (1993) 110 ALR 97 at 132 per Toohey J, at 149 per McHugh J.
17 (1993) 110 ALR 97 at 107-110 per Brennan Deane and Dawson JJ (with whom Gaudron J agreed), at 126-127 per Toohey J, at 143 per McHugh J. Mason CJ did not comment on this question.

in custody only during the stay of the vessel in port, in contemplation that the person would be put back on the boat upon its departure. In the present case, where the plaintiffs had been held in custody for over two years and their boats had been destroyed, their custody exceeded the temporary operation of s 88.

Relevance of the Refugee Convention and ICCPR

The Court rejected the contention that Div 4B is invalid or should be read down to the extent of any inconsistency with the Refugee Convention. The Court pointed out[18] that s 54T of the Act gave clear precedence to the Division if it is "inconsistent with another provision of this Act or another law in force in Australia". Having made this finding, their Honours did not have to go on to consider the wider question of whether either of these international instruments operates in Australian domestic law.

Comment

Lim's Case is a disappointing decision in which the High Court took a conservative line, accepting without question the Government's justification for the much-criticised policy of mandatory detention of undocumented boat arrivals. On the one hand, the court made it clear that the detention provisions would only be a valid use of the aliens power

> . . . if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable the application for an entry permit to be made and considered.[19]

Yet the court then went on to ignore the realities of the plaintiffs' situation in terms both of the 'length' of detention, which was well beyond the time necessary to consider the applications, and the Government's stated 'purpose' of the provisions, which was to deter other boat arrivals. In his second reading speech to the legislation, Minister Hand left no doubt as to the primary purpose of the new provisions:

> I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community. Their release would undermine the Government's strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. *The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.*[20]

The Court had before it evidence that at that time there were some 23,000 applicants for refugee status in Australia.[21] Yet their Honours failed to have

18 (1993) 110 ALR 97 at 122-123 per Brennan Deane and Dawson JJ, at 133-134 per Toohey J, at 151-152 per McHugh J.
19 (1993) 110 ALR 97 at 118 per Brennan Deane and Dawson JJ.
20 Australia, Parliament, House of Representatives *Parliamentary Debates* 5 May 1992, 2372 (emphasis added).
21 See (1993) 110 ALR 97 at 189 per McHugh J.

regard to the glaring inconsistency in the Government's argument that it was necessary to detain several hundred unauthorised boat arrivals for long periods in order to consider their applications and ensure their removal whilst another 22,000 or more applicants were allowed to remain in the community on reporting conditions. Most of these 22,000 had arrived in Australia by aeroplane, many having allowed their short-term visas to expire so that they too were 'illegals' at the time they sought asylum. However, the Government never sought to detain the vast majority of these people.[22]

In finding that the detention power in Div 4B was limited to what was "reasonably capable of being seen as necessary for the purposes of deportation or to enable an entry application to be made and considered",[23] the Court placed great reliance upon two so-called limiting provisions: ss 54Q and 54P.

Section 54Q purported to limit detention of designated persons to a period of 273 days, but included a sting in its tail whereby the 273 day "clock" stopped whenever the matter was beyond the control of the Department of Immigration. This included any time that the matter was before a court or tribunal. Given that at the time of these proceedings some of the plaintiffs had been in detention for around 860 days (which was not taken into account in the calculation), plus an additional 90 days' detention to allow for any remittance of the case back to the Department,[24] and given that all plaintiffs had applications before the Court, therefore stopping the clock, the possibility of the 273 day limit acting as a realistic brake on detention was remote indeed.

Section 54P provided that a Departmental officer must remove a designated person from Australia "as soon as practicable" if that person asks the Minister in writing to do so. In its interpretation of this section, the Court once again failed to give adequate recognition to the realities facing the plaintiffs. This particular group of asylum seekers had fled a country universally recognised at the time as having one of the most appalling human rights records in history.[25] Yet the Court placed great weight upon s 54P as a limiting factor in detention as it was within the power of any detainee to bring his or her detention to an end by requesting the Minister to be removed from Australia (and as a corollary, be returned to Cambodia).[26] McHugh J went so far as to suggest that, in refusing to return home to Cambodia, this group was actually 'acquiescing' to its own detention.[27] The fact that a large number of this group have since been recognised as refugees by the Australian Government speaks volumes as to the reality of their 'choice' to return

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22 Note however that the Government also has a policy of mandatory detention for aeroplane arrivals who seek asylum but hold no valid travel documentation - see also *Vilbert Bet Khoshabeh* v *Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, Ryan J, 10 November 1993).

23 (1993) 110 ALR 97 at 118 per Brennan Deane and Dawson.

24 Introduced by the *Migration Amendment Act (No 4) 1992* (Cth).

25 See eg Amnesty International *Cambodia: Human Rights Concerns July to December 1992* (February 1993).

26 See eg Brennan Deane and Dawson JJ at 119.

27 (1993) 110 ALR 97 at 150.

home; indeed one only has to read the daily newspapers to get a picture of the still precarious situation in Cambodia.

The majority's finding that the odious s 54R ("[a] court is not to order the release from custody of a designated person") was invalid came as little comfort to the plaintiffs, since the upholding of validity of ss 54L and 54N ensured that once an applicant came within the definition of "designated person", then he or she was bound to remain in custody until removed from Australia or granted an entry permit.

One aspect of the judgement which has caused a flurry of subsequent legislative activity from the Government was the finding by a majority that prior to the passage of Div 4B, the plaintiffs had in fact been detained illegally, firstly under s 36 and later under s 88. This finding raised the possibility of action by the plaintiffs against the Minister for illegal detention, and in December 1992 applications claiming damages were lodged in the High Court. In a fascinating and shameful series of legislative amendments designed initially to limit any order for damages to one dollar per person per day[28] and later attempting to extinguish any claim for damages whatsoever by retrospectively validating the pre-Div 4B detention provisions[29] the Government has revealed the depths to which it is prepared to stoop to deny compensation to this group of asylum seekers.[30]

There is no doubt that the primary purpose of the Government's policy in detaining unauthorised boat arrivals is deterrence. The policy is without any empirical basis, and is predicated upon a 'gut' feeling fanned by populist notions of Asian hordes swamping Australia, best summed up in the words of Senator Jim McKiernan:

> If the refugee assessment procedure was changed, Australia would be inundated and boats filled with people, who can afford the fare and the bribes that go with it, will land on our shores by the score.[31]

Senator McKiernan (surprisingly given his public stance on the boat people) sat subsequently as Chairman of the Joint Standing Committee on Migration which was asked to report on the appropriateness of the policy of detention and (unsurprisingly) reported in favour of the policy.[32]

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28 *Migration Amendment Act (No 4) 1992* (Cth).
29 *Migration Amendment Bill (No2) 1994* (Cth) and *Migration Amendment Bill (No 3) 1994* (Cth).
30 On 22 June 1994 the Senate Scrutiny of Bills Committee had issued an Alert Digest (No 10 of 1994) describing *Amendment No 2* as "trespass[ing] unduly on personal rights and liberties", and the Opposition had undertaken to oppose the legislation. At the time of writing Immigration Minister Bolkus had vowed to proceed with the Bill, and the action for damages has been listed for hearing before the High Court in April 1995.
31 'Refugee Row: MPs oppose Churches' in *West Australian* 21 April 1992.
32 Joint Standing Committee on Migration *Asylum, Border Control and Detention* AGPS February 1994.

The High Court's decision in *Lim* stands in marked contrast to the progressive and liberal views which it had recently espoused in relation to Native Title[33] and freedom of communication in the political advertising cases.[34] One cannot help but feel that, whilst the Court was prepared to be progressive on social issues in dealing with Australia's own citizens, the rules were different when dealing with 'aliens'. In the words of McHugh J, quoting with approval Latham CJ in *Polites v Commonwealth*:[35]

> . . . Parliament can make laws imposing burdens, obligations and disqualifications on aliens which could not be imposed on members of the community who are not aliens... 'The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications'.[36]

In giving precedence to the detention provisions of Div 4B over our international human rights obligations, the Court was merely applying the current common law principle that international instruments signed by Australia do not automatically become a part of Australian domestic law, and it is only where 'an issue of uncertainty' arises that judges may seek guidance from these principles.[37] Thus Toohey J was able to state that:

> We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a 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*.[38]

This is a sobering reminder of the fact that however far human rights advocates feel the acceptance of international norms has been advanced in recent years by Australia's accession to various instruments and recognition of the complaints mechanisms of others,[39] where the Government wishes to act in complete disregard of these norms, as is the case with the continuing policy of detaining asylum seekers,[40] there is very little which can be done to challenge this policy. Whilst a Communication claiming arbitrary and prolonged detention of a

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33 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

34 *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 1992) 177 CLR 1.

35 (1945) 70 CLR 60 at 69.

36 (1993) 110 ALR 97 at 144.

37 See *Commonwealth v Tasmania* (1983) 158 CLR 1; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Dietrich v The Queen* (1992) 177 CLR 292; *Teoh v Minister for Immigration* (1994) 121 ALR 437. See also M Kirby 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View From the Antipodes' (1993) 16(2) *University of New South Wales Law Journal* 363.

38 (1993) 110 ALR 97 at 123 (emphasis added).

39 Including Australia's signing of the First Optional Protocol to the ICCPR in December 1991, and its recognition in January 1993 of the individual complaints mechanisms in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Convention on the Elimination of all Forms of Racial Discrimination.*

40 The Federal Government's own legal adviser, the Attorney-General's Department, has acknowledged that in some instances the continued detention of asylum seekers in Australia is in breach of Article 9 of the ICCPR. See Submission by the Attorney-General's Department, Joint Standing Committee on Migration *Inquiry Into Detention Practices* Submissions Volume 3, S851 (August 1994).

detained Cambodian in breach of Article 9 of the ICCPR is currently with the UN Human Rights Committee pursuant to the First Optional Protocol, the determination of such complaints can take years and the available remedies are extremely limited.[41]

Ultimately, it cannot reasonably be said that the High Court in *Lim's Case* was wrong in its application of the law — the Court was simply very conservative in its preparedness to accept the Government line on detention of asylum seekers in the face of a clear political agenda which has prolonged a continuing and abhorrent abuse of human rights. There was an opportunity for the Court to be as pro-active in this area of social injustice as as it had recently been in other areas. It is a pity that the Court didn't take this opportunity, and boat people continue to be locked up by an increasingly hostile and unrepentant Government.

41 See N Poynder 'Marooned in Port Hedland' (1993) 18(6) *Alternative Law Journal* 272 at 274.