Tampa case: seeking refuge in domestic law+

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Introduction

On 8 September 2001, the Prime Minister announced that new legislation would be introduced to excise Christmas Island and Ashmore Reef from the 'migration zone' for the purposes of the *Migration Act 1954* (Cth) (the Act). The migration zone, at that time, referred, essentially, to Australian land and Australian ports (s 5).[1]

The purpose of the new legislation was to ensure that the arrival of a person at one of those Australian territories would no longer 'be sufficient grounds for application for status under the Migration Act' (Howard doorstop interview). This change arose out of the events of August last year in which 433 Afghan asylum seekers were rescued from a sinking boat in the seas north-west of Christmas Island by a Norwegian freighter, the MV *Tampa*. The Australian Government refused to allow the ship to bring the asylum seekers onto Australian land or into an Australian port (that is, into the migration zone). The Australian military boarded and took control of the ship ensuring that the rescued persons could not set foot on Australian soil. There was a stand-off, and the matter was 'resolved' by what is known as the 'Pacific Solution' (Howard interview on *Insiders*).

The Prime Minister, in proposing the new legislation, went on to say, 'there will still of course be our obligations under the Refugee Convention[2] and those obligations continue to be fully met by Australia' (Howard doorstop interview). The legislation came into effect on 27 September 2001 (*Migration Amendment (Excision from Migration Zone) Act 2001* (Cth)). Whether the Prime Minister was correct in what he said is a matter of debate. But what the events surrounding that incident and the subsequent litigation demonstrate, is that the Prime Minster's statement was, at the least, either

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1 The effect of a person's entering the migration zone (as a non-citizen) was that certain rights (including the right to apply for a protection visa) would accrue: see particularly s 189.

2 Convention relating to the Status of Refugees 1951.

insincere or mistaken. The Government took every step it could to avoid our obligations under the Refugee Convention.

This article, although in the nature of a case note, will not deal comprehensively with the legal issues that ultimately decided the case, as interesting as the issues are. The case boiled down to a question about whether the executive had any extra-statutory power to do what it did (that is, board and take control of the MV *Tampa* for the purpose of expelling it from Australian waters). The Court ultimately decided that it did have that power.[3]

My purpose is to examine the chronology of events against the legal background as it was thought to be. What it reveals is a government that, far from seeking fully to meet Australia's obligations to refugees under international law, was, at all times, intent on avoiding those obligations.

The law

International law

Australia ratified the Convention relating to the Status of Refugees 1951 (Refugee Convention) in 1954, and the Protocol relating to the Status of Refugees 1967 (Protocol) in 1973.

Article 33(1) of the Refugee Convention states the following:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article II(1) of the Protocol states the following:

> The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

Arguably a number of other conventions applied to the case: for example, United Nations Convention on the Law of the Sea 1982 (UNCLOS); the Vienna Convention

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3 The judgments in *Victorian Council of Civil Liberties v Minister for Immigration and Multicultural Affairs* (VCCL v MIMA) and *Ruddock v Vadarlis* are set out briefly below.

on the Law of Treaties; International Search and Rescue Convention 1979, and the International Convention on Safety of Life at Sea 1974 (SOLAS).

Domestic law

Australia's domestic legal machinery for fulfilling its obligations under the Refugee Convention was, at the time of the *Tampa* incident, contained in the *Migration Act 1958* (Cth) as amended by the *Border Protection Legislation Amendment Act 1999* (Cth). The *Migration Act* has been further amended, changing the legal effect of what happened during the *Tampa* incident.[4] In what follows, I will use 'the Act' to refer to the *Migration Act 1958* (Cth) as it was at the time of the *Tampa* incident.

The Act's object 'is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens' (s 4(1)). As noted by Black CJ, the Act 'provides for a very comprehensive regime' for this purpose (see *Ruddock v Vadarlis*: para 64). He also said[5] the following (see *Ruddock v Vadarlis*: para 44):

> ... the 'national interest' as contemplated by the provisions of the Act, includes recognition of Australia's protection obligations under the [Refugee] Convention ... matters as to which the Act makes elaborate provision.

As it turned out, the litigation did not turn on the application of the Act. Nevertheless, I take some time to review the important provisions, because it is essential for understanding why the Government took the particular steps it did.

Powers of detention

Powers to detain people and ships are provided for in ss 189, 245B and 245F of the Act. Those provisions distinguish between being 'in Australia', 'in Australian territorial waters' and 'in the migration zone'.

Section 189 deals with the power to detain unlawful non-citizens who are either *in*, or are *seeking to enter, the migration zone*. In the case of an unlawful non-citizen who is *in* the migration zone, the section requires an officer to detain such a person (s 189(1)). An officer must also detain any person who is *in Australia* (but outside the

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4 See the *Border Protection (validation and Enforcement Powers) Act 2001* (Cth) and the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth).

5 In the context of the question whether the Act was intended to 'cover the field' to the exclusion of any residual executive power.

migration zone) whom he or she reasonably suspects is seeking to *enter the migration zone*, and would, if *in the migration zone*, be an unlawful citizen (s 189(2)).

The Act also confers powers with respect to the boarding and detention of foreign ships and the detention of people on them. If a foreign ship is *within Australia's territorial sea*, a commander of a Commonwealth ship may request, for the purposes of the Act, to board the foreign ship (s 245B(2)). Such a request must be complied with unless there is reasonable excuse (s 245B(10)). If such a ship (one, with respect to which a request to board has been made under s 245B) is *in Australia* and is suspected of being involved in a contravention of the Act,[6] an officer may detain the ship (s 245F(8)). If a ship is so detained an officer may detain any person on board and cause the person to be brought into the *migration zone* (s 245F(9)).

Rights in detention

Once a person is detained under the Act, the person is in 'immigration detention' (s 5). A consequence of immigration detention is the entitlement to certain rights, including the right to legal advice and the right to apply for a protection visa (s 256).

Geographical application of the Act

The operation of these provisions clearly depends on the geographical location of the foreign ships or persons in question. What do they mean? First, 'Australia' is not defined. However, s 18A of the *Acts Interpretation Act 1901* creates a general presumption that 'Australia' includes Christmas Island and the Cocos (Keeling) Islands, but not other external Territories. Section 7(1) of the Act, on the other hand, makes it clear that the Act extends also to the Territories of the Coral Sea Islands and Ashmore and Cartier Islands.

Being 'in Australian territorial waters' means being within the boundary of Australia's Territorial Sea, which extends to 12 nautical miles from the territorial baseline (UNCLOS: arts 3-5). Beyond the territorial sea is the contiguous zone.

The 'migration zone' is a purely domestic legal construct. Section 5 restricts the zone (essentially) to any land that is part of Australia (including its Territories), and any internal waters including the sea within any Australian port.

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6 The bringing of the asylum seekers into Australian territorial waters by the MV *Tampa* contrary to instructions may have amounted to a contravention of s 229 of the Act (North J: para 145).

Section 5(1) of the Act limits the meaning of 'Australia' in the phrases 'enter Australia', 'leave Australia' and 'remain in Australia' to mean the migration zone. However, s 6 makes it clear that this limited meaning does not extend to the phrases 'in Australia', or 'to Australia'.

For asylum seeking purposes, the effect of these geographical zones appears to be that a precondition for applying for a protection visa is the presence of the applicant *in Australia* (s 36). Presumably, 'Australia' here carries its wider meaning to include the Territories and territorial waters. However, a person's *right* to apply for a protection visa is far more restricted. For this purpose, 'Australia' carries its narrow meaning to include only the migration zone (which excludes territorial waters). For non-citizens entering Australia unlawfully (without a visa), the right to apply for a protection visa depends on first being detained, either because the person is *in*, or is *seeking to enter*, the *migration zone* (s 189), or because the person is aboard a foreign ship that has been detained by virtue of s 245F and is being brought into the migration zone.

In relation to unlawful non-citizens who turn out to be refugees, the Act appears to be at odds with international law. According to the Refugee Convention, Australia must not expel refugees from *Australia*. In international law, 'Australia' includes its territorial waters (UNCLOS: art 5). As soon as asylum seekers enter (either legally or illegally) Australia's territorial waters, we are obliged to assess their claims for refugee status before expelling any of them (Refugee Convention: art 33). Whether a refugee is in the migration zone or not, or is in detention or not, is immaterial. The distinction between a person's being *in* Australia and being *outside* Australia may be relevant to our refugee obligations, but the difference between being 'in Australia', 'in Australian territorial waters' and 'in the migration zone' is not. However, as we will see, the Government, at the time of the *Tampa* incident, must have considered these distinctions to be extremely important in relation to the asylum seekers on board the ship.

The incident

Rescue

On Sunday 26 August 2001, Coastwatch sighted a fishing boat in distress approximately 80 nautical miles northwest of Christmas Island. The boat was not in Australia — it was beyond the contiguous zone and in the exclusive economic zone.

The MV *Tampa*, a Norwegian container ship which was in the vicinity on its way to Singapore, responded to a call from Australian Search and Rescue to render assistance to the distressed fishing boat. The MV *Tampa* was carrying cargo and a crew of 27, and was licensed to carry no more than 50 people. Despite having been told that the fishing boat contained only 80 people, the Captain of the MV *Tampa* rescued and took on board all 438 people from the sinking boat. Shelter was provided in five empty containers on the deck. The Captain asked the Australian Coast Guard where the 'rescuees' should be taken, but the reply was that they did not know. The Captain then headed for Indonesia, but, when several rescuees threatened to commit suicide if they were not taken to Christmas Island, the Captain turned the ship around and headed for Christmas Island. Indonesia was some 12 hours away from the rescue site, whereas Christmas Island was two.

Government denies responsibility and makes threats

When the MV *Tampa* had come within roughly 13 nautical miles of Christmas Island, but before it had entered Australian territorial waters, the Australian authorities requested the Captain to change course for Indonesia. The authorities accompanied the request with threats of criminal charges and massive fines. At this point, the owners of the MV *Tampa* engaged a solicitor.

This 'request' was the first in a series of attempts by the Australian Government to avoid Australia's obligations under the Refugee Convention. The clear intention was to prevent the rescuees (which were then thought to be Afghan asylum seekers) from entering Australian territory, because, once they did enter, Australia would have an obligation to assess their status and not to eject any that turned out to be refugees (Refugee Convention: art 33(1)).

The request also showed a clear intention to push the responsibility for the asylum-seekers onto either Norway or Indonesia,[7] neither of which clearly had any responsibility for the rescuees. Norway, as the flag state of the rescuing ship, was not responsible for providing asylum to the rescuees. Neither did Indonesia have a responsibility, as was claimed. Although Indonesia was the state in whose international search and rescue zone the people were found, the relevant

7 Mr Farmer, the Secretary of the Department of Immigration and Multicultural Affairs (DIMA) gave evidence that the Government's policy (determined at the highest level) was that responsibility for the rescuees was not with Australia but with Indonesia and Norway (statement accompanying reasons for judgment, *VCCL v MIMA*: para 4).

international law (International Search and Rescue Convention 1979) is silent on who has responsibility for those rescued.[8]

Government makes further requests and threats

The following day, on 27 August, the solicitor for the shipping company sent a fax to the Department of Immigration and Multicultural Affairs (DIMA), indicating that the Captain had determined not to go to Indonesia. The MV *Tampa* had itself become legally unseaworthy. It was overloaded by hundreds of people, some of whom were unwell and many of whom were agitated. Those people were accommodated in cargo containers, with inadequate toilet facilities. There was insufficient food, water and medical supplies to sustain the passengers and crew. Sailing to Indonesia across open seas would, in the Captain's view, expose the ship, its crew and passengers to potential dangers. The fax requested assistance and/or instructions in relation to discharge of the passengers.

The Captain could have expected immediate assistance from Australia.[9] Moreover, under international law, Australia is obliged to assist a ship in distress, which is what the MV *Tampa* had now become.[10] Instead, the response from 'the Australian Government at the highest level' (*VCCL v MIMA*: para 21) was to request the Captain not to approach Christmas Island and to keep the ship where it was, at least 13.5 nautical miles from the island, outside Australian territorial waters. The Administrator of Christmas Island was instructed to close its port, and to ensure that no boats attempted to reach the MV *Tampa*. Neither assistance, nor instructions regarding discharging the passengers was given.

The instruction to remain outside Australian waters, and the closure of the port, was to ensure, again, that no asylum seekers could enter Australia or the migration zone, and thereby avail themselves of the right to apply for a protection visa.

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8 See Fonteyne J cited in Forbes 2001. Fonteyne argues that Australia had primary responsibility. According to international practice the captain is entitled to disembark those rescued at the next convenient port of call (which was Christmas Island).

9 Michael White argues that, according to traditional maritime and international humanitarian law, the Captain of the MV *Tampa* could reasonably have expected Australia immediately to relieve the ship of those rescued (White 2001).

10 The law of the sea suggests Australia had a clear duty to allow the *Tampa* to disembark on Christmas Island (Fonteyne 2002: 18).

At 11.30am another fax was sent from the MV *Tampa*. It stated that the medical situation on board was critical: four people on board were unconscious, one had a broken leg and three women were pregnant. It made a further request for assistance and stated that if the situation 'was not addressed immediately people [would] die shortly'. The Captain called the Royal Flying Doctor Service, but that Service did not regard the situation as requiring evacuation.

Government brings in the military

On the bases both of concerns for the safety of the crew and passengers, and the fact that assistance had not been provided within 48 hours, the Captain sailed the MV *Tampa* into Australian territorial waters, anchoring about four nautical miles from Christmas Island. Within two hours, 45 Special Armed Services (SAS) troops boarded the *Tampa*. They invited the Captain to sail out of Australian waters with the rescuees on board. The Captain declined to do so on the basis that the ship was unseaworthy and that it was not legally permitted to carry the passengers. The SAS then remained on board, and took control of all movements of people to and from the ship. Certain people, including the insurer's representatives, the media, and lawyers were denied access. Australian navy vessels were stationed nearby.

The Government's third 'avoidance' strategy was more extreme. The use of armed troops was to ensure, this time, that the ship and its passengers did not come within Australia's *migration zone*. The Government clearly thought that this would prevent any obligations arising under the *Migration Act*. But the ship was now *in* Australia; it could be argued that, if our obligations to the potential refugees had not previously arisen, they surely had by now.[11]

Under domestic law, the presence of unlawful non-citizens in Australian waters would require the detention of any such person reasonably suspected of seeking to enter the migration zone (s 189(2)). Once detained, the person would be in 'immigration detention' and the right to apply for a protection visa could be invoked.[12] It could hardly be argued that the rescuees were not seeking to enter the migration zone, or that no Commonwealth officer had a reasonable suspicion of that. But that is exactly what the Government argued in the later litigation (see *VCCL v MIMA*: para 160).

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11 Our obligations under art 33 of the [Refugee] Convention arose, at the latest, as soon as the boat carrying the asylum seekers entered Australian waters, despite the existence of the migration zone (Fonteyne 2001:18).

12 The applicants relied on this argument, and the one in the following paragraph in the later litigation.

In any event, s 245F would also appear to operate. The presence of a foreign ship within Australian waters, which had arguably contravened the Act,[13] would empower the Commonwealth to board the MV *Tampa*, to detain those on board, and to bring them into the migration zone.[14] And again, once in detention, the rescuees could apply for asylum. But, of course, s 245F of the Act was the last thing the Government wanted to invoke, for obvious reasons. The ingenious argument used by the Government (in the later litigation) was that they had *no power* to detain the ship or its occupants under s 245F, because that power is conditional on first issuing a request to board the ship under s 245B(2) (see *VCCL v MIMA*: para 148). There had been no request by a commander of a Commonwealth ship as required, because the SAS boarded the MV *Tampa* from two smaller boats, neither of which was flying the ensign as required by the definition of a Commonwealth ship under s 5 of the Act.

Government tries to pass legislation

But if the Government did not have the power to board and detain the ship under the *Migration Act*, where was the authority for the SAS's boarding and taking control of the ship? The Government's initial answer to that was to enact some retrospective legislation to give it the power. The Border Protection Bill 2001, which was introduced into Parliament by the Prime Minister that evening (29 August 2001), was unashamedly '*Tampa* specific'. It aimed 'to put beyond doubt the domestic legal basis for actions taken in relation to foreign ships within the territorial sea of Australia' (Hancock *Bills Digest* 2001). It would permit the use of reasonable force to detain the ship and to direct it to be taken outside the Territorial Sea (ss 4-5). It would prevent judicial review of directions or enforcement action (s 8).[15] It would prevent visa applications while the direction was in force (s 9). And it would validate, retrospectively, any action by the Government in relation to the detention and ejection of the ship and its passengers from Australian waters (ss 2-5).

Early the next morning the Bill was rejected in the Senate.[16] The failure of the Government to validate its behaviour by emergency legislation, and its

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13 The bringing of the asylum seekers into Australian waters against instructions may have amounted to a contravention under s229 of the Act.

14 These were the arguments used by the applicants before North J. They sought (among other things) an order for mandamus, compelling the Government to detain the asylum seekers under s 189 and to bring the asylum seekers into the migration zone pursuant to s 245F(9). They failed because of lack of standing.

15 Other than in the High Court in its original jurisdiction.

16 A new Act, the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) was eventually passed and assented to on 27 September last year. Its provisions are not quite as draconian as the original Bill,

unwillingness to rely on powers available to it in the *Migration Act*, left open the question of just what power it had, if any, to do what it did.

Litigation commences

The next day (31 August 2001), the Victorian Council of Civil Liberties Incorporated (VCCL) and Mr Eric Vadarlis, a solicitor, filed applications in the Federal Court of Australia against the Minister for Immigration and Multicultural Affairs, the Attorney General, and the Minister for Defence. Amnesty International Limited and the Human Rights and Equal Opportunities Commission were granted leave to intervene. The applications are set out below. Briefly they sought injunctions restraining the Government from acting beyond its power in detaining the ship and expelling it from Australian waters. In the alternative, they sought orders for mandamus to compel the Government to act according to obligations arising under the *Migration Act*.

That evening Justice North granted an interlocutory order restraining the respondents, until the next day, from taking steps to remove the MV *Tampa* from Australian territorial waters. He adjourned the matter until 11.00am on the following morning, Saturday 1 September 2001.

Government 'bribes' other countries to take the responsibility?

That morning, the Prime Minister made an announcement revealing that an agreement had been made with the Governments of New Zealand and Nauru (Howard Press Conference). New Zealand had agreed to process 150 of the asylum seekers, and Nauru had agreed to accommodate the rest, while they were being processed. The asylum seekers would be trans-shipped through a third country, Papua New Guinea. This is the agreement known as the 'Pacific solution'.

Agreements were sought with other countries too. Indonesia was approached, but refused (Fry 2002: 22). A request for East Timor to accommodate the asylum seekers was also refused. It was the day of that country's first election (Wilkinson and Marr 2001: 15). By October, in relation to other asylum seekers, the Australian Government had sought similar agreements with the governments of Papua New Guinea, Fiji, Kiribati, Tuvalu and Palau (Fry 2002: 24).

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but it does retrospectively validate the Government's actions with respect to the *Tampa*, and it also restricts judicial review with respect to those actions.

The attempt to transfer our refugee responsibilities onto tiny Pacific Island nations (and similarly vulnerable nations) raises serious ethical issues (Fry 2002: 25). The Australian Government took advantage of Nauru's dire economic (and political) circumstances at the time. In return for taking in the asylum seekers, Australia offered economic assistance beyond that which would normally be provided.[17] That was something that Nauru, as desperate as it was, could not refuse (*Fiji's Daily Post*, 27 October 2001: see Fry 2001: 26). A member of the Nauruan Parliament likened the deal to prostitution (Fry 2001: 26). Mahendra Choudry, the leader of the Labor Party in Fiji, said, of the offer of money to Fiji, that it was 'tantamount to offering a bribe' (Fry 2001: 26).

Government refuses a request from the UNHCR

The Prime Minister repeatedly stated that it was communicating with relevant international officers to come to a satisfactory solution. Apparently the United Nations High Commissioner for Refugees (UNHCR) requested the Australian Government to process the rescuees on Christmas Island, but the request was refused (White 2001). That refusal would be a breach of art II(1) of the Protocol, which requires parties to co-operate with the Office of the UNHCR (see White 2001).

By the evening of Sunday 2 September 2001, the parties (after mediation) announced an agreement in principle that would allow the asylum seekers (after almost a week on board the MV *Tampa*) to be transferred to HMAS *Manoora* (an amphibious troop ship with extensive accommodation and medical facilities). The agreement stipulated that none of the rescuees would be required to leave HMAS *Manoora* until the determination of the litigation and any appeal. Furthermore, the legal status of the rescuees was to be preserved during the agreement; no legal consequences relevant to the case would flow from the transfer of the passengers to HMAS *Manoora*.

VCCL v MIMA — the case at first instance

Applications

The applications to the Federal Court were as follows:

(1) Mr Vadarlis, sought an injunction and order for mandamus to allow him to give legal advice to the rescuees;

(2) The VCCL and Mr Vadarlis sought an order for mandamus to compel (pursuant

17 The Prime Minister agreed to pay Nauru A$20 million (Williams 2001: 20).

to obligations under the *Migration Act*) the respondents to bring the detainees into the migration zone and to allow them to apply for protection visas;

(3) Both applicants sought an injunction restraining the respondents from removing the MV *Tampa* from Australian territorial waters; and

(4) Both applicants sought a writ of *habeas corpus* (order for release) to stop the unlawful detention of the detainees on board the MV *Tampa*.

Justice North delivered his judgment on 11 September 2001. He found against the applications in relation to claims (1) to (3). The applicants succeeded in relation to (4) and North J ordered the rescuees to be released and brought to mainland Australia.

Legal advice

Mr Vadarlis claimed that he was unable to give legal advice to the asylum seekers because the respondents had prevented him from communicating with them. He based his claim for relief on the implied constitutional right to freedom of communication. The facts that no communication was possible between the asylum seekers and persons off the ship,[18] that access to the ship was restricted, and that the rescuees were not allowed to leave the ship (except to leave Australian waters) were not disputed (statement of agreed facts *VCCL v MIMA*: para 35).

Mr Vadarlis asserted that both he and the rescuees were entitled to the implied right of freedom of communication. North J rejected his argument with respect to the rescuees' rights. He referred to *Cunliffe v Commonwealth of Australia* in which it was held that the right does not apply directly to aliens (Brennan J: 335-6). Mr Vadarlis, on the other hand, is entitled to the implied freedom of political communication as a lawyer giving advice on migration matters to aliens (*Cunliffe* Mason CJ: 298-9, Deane J: 335-7 and 341, Toohey J: 378-9 and 384, and Gaudron J: 387-9). However, the right did not require the respondents to facilitate his communication with the rescuees (*VCCL v MIMA*: 166). As to whether Mr Vadarlis was entitled to an order for the removal of the respondent's obstacles in the way of his communicating with the rescuees, North J's tentative view was that he was so entitled (*VCCL v MIMA*: 167). In the end, he did not have to decide the issue, because he ordered that the rescuees be released.

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18 He had telephoned the MV *Tampa* to give legal advice to the rescuees, but the Captain would not put him through to them.

The right of any person (whether a citizen or an alien) to know his legal rights is fundamental. For the Government to stand in the way of that right, when the people concerned are asylum seekers (where their legal status could mean the difference between life and death) was shameful. The Government's denial of communication between the rescuees and the Australian people is significant in another respect. As Lynch and O'Brien argue, it served to deny the rescuees their humanity; it was calculated to prevent the Australian people from connecting with the asylum seekers and thus empathising with their plight (Lynch and O'Brien 2001: 217-18).

Obligations under the Migration Act

The VCCL and Mr Vadarlis contended that the respondents had obligations, under ss 189 and 245F(9) of the Act, to bring the detainees into the migration zone and to allow them to apply for protection visas. They sought orders for mandamus to enforce those obligations. The general nature of these arguments was dealt with earlier.[19] Neither argument succeeded because the applicants lacked standing.[20]

It is interesting that the Government acted confidently as if the Act mattered greatly to the situation. It took steps to prevent the rescuees coming into territorial waters. When that failed, it took more extreme steps, to prevent the rescuees coming into the migration zone. It wanted the rescuees out of Australian waters as soon as possible. Knowing that the Act might not allow it to detain and expel the rescuees without also recognising their rights, the Government tried to pass legislation to allow it to do so. When that failed, and the matter came to court, they pleaded a non-statutory prerogative power (see below). Just to be on the safe side, before the matter came to court, the Prime Minister had already proposed new legislation that would make it all legal retrospectively. All of this was predicated on the assumption that the Act and its construct of the migration zone, was of great significance.

In the end, it did not matter. The Government did not rely on its provisions and the applicants could not because they lacked standing. The question remains whether the Act's migration zone, as it was then, and as it is now, really has any bearing on Australia's legal obligations to refugees. Dr Fonteyne argues that it does not. Our obligations under the Refugee Convention, arise, at the latest, as soon as an asylum seeker enters Australian territorial waters (Fonteyne 2002: 18). That was so for the asylum seekers on the *Tampa*, despite the purported exclusion of the territorial waters

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19 See above under the heading 'Government brings in the military'.

20 The judge relied on the High Court's decision in *Australian Conservation Foundation Incorporated v The Commonwealth.*

from the migration zone (Fonteyne 2002: 18):

> For a state's obligations, whether customary or treaty-based, apply to its entire territory, as determined by international law, and the 1982 UN Convention on the Law of the Sea confirms that territorial waters are an integral part of the state's territory A state, furthermore, cannot escape its treaty obligations by the mere expedient of passing incompatible legislation (Vienna Convention on the Law of Treaties).

The Government must surely have known this. After all, it took steps to keep the asylum seekers out of Australian waters. On its way to Port Moresby, the *Tampa* was reprovisioned from outside the territorial waters abutting Darwin (Howard doorstop interview). The Prime Minister was at pains to tell us that 'at no stage did this latest vessel [the *Aceng*][21] reach Australian *territorial waters* ... and as a result questions of application for asylum status do not arise' (Howard doorstop interview). And yet, seconds later, he told us about his plans to excise Christmas Island from the *migration zone* so that arrival there would not be sufficient to found an application for asylum (Howard doorstop interview). It is not clear what to make of these statements.

Power to expel

The applicants sought an injunction restraining the respondents from removing the MV *Tampa* from Australian territorial waters. The respondents did not rely on any statutory power to do what they did (because the only statutory power available to them was in the Act: ss 189 and 245F). Therefore, they argued that the removal of the ship (and the asylum seekers) from Australian territorial waters was a valid exercise of its *prerogative* power. The question for the Court was whether such a prerogative power existed. Although the applicant's claim failed for a lack of standing. North J found in their favour with respect to the supposed prerogative power. He thought that, if such a prerogative power ever existed, it was abrogated by the very comprehensive regime provided for in the Act (*VCCL v MIMA*). I deal with this aspect of the claim in more detail when discussing the judgment on appeal (below).

Order for release

The applicants sought a writ of *habeas corpus*[22] (order for release) to stop the unlawful

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21 The *Aceng* was another Indonesian fishing boat rescued in the days after the *Tampa* incident. The rescuees were trans-shipped to HMAS *Manoora* and taken to Nauru.

22 'Habeas corpus is a remedy directed to the relief of a person's detention without lawful authority' (Black CJ *Ruddock v Vadarlis*: para 71). The modern term for it is an 'order for release'.

detention of the detainees on the MV *Tampa*. Their application succeeded. First, there was no doubt that the applicants had standing in relation to this claim. Second, the nature of the control exercised by the SAS troops over the ship was such as amounted to a detention (*VCCL v MIMA*: para 17). The respondents could show no lawful authority for that detention. For obvious reasons, the respondents chose not to rely on the power to detain the ship and its passengers under ss 245B and 245F of the Act. North J found that no prerogative or other power for the detention existed. He therefore ordered that the rescuees be released and brought to the mainland (*VCCL v MIMA*: para 20).

Ruddock v Vadarlis — the case on appeal

The respondents (the MIMA et al) appealed to the Full Court of the Federal Court of Australia, which heard the appeal as a matter of urgency. The Court delivered judgment on 18 September 2001. By a two to one majority, North J's decision was overturned.

There were two questions on appeal (*Ruddock v Vadarlis* French J: para 162):

(1) Did the executive power of the Commonwealth authorise and support the expulsion of the rescuees from Australia and their detention for that purpose?

(2) If there was no such executive power, were the rescuees subject to a restraint attributable to the Commonwealth and amenable to *habeas corpus*?

Executive power

It was important for the Government to show it had a non-statutory power to expel the rescuees and detain them for that purpose. Did it have a *prerogative* power? The executive power of the Commonwealth derives from s 61 of the Constitution. It extends to 'the execution and maintenance of [the] Constitution and of the laws of the Commonwealth' (Constitution s 61), and embraces the prerogative powers accorded to the Crown at common law (*Barton v Cth* Mason J: 498). Blackstone described the prerogative as 'the discretionary power of acting in the public good where the positive laws are silent' (*Laker Airways* Lord Denning: 705). The principle of parliamentary sovereignty dictates that a particular prerogative power may be abrogated by statute by express words or by necessary implication (*Ruddock v Vadarlis* French J: para 184).

After considering the cases, Justices Beaumont and French held that the Executive

retained a common law prerogative power to expel unlawful aliens (including asylum seekers) and to detain them for that purpose. Chief Justice Black held there was no such power (as North J had held). On their reading of the cases, the authority for such a power was weak, and, in any case, if one had existed, it had been abrogated by the *Migration Act 1954* (Cth). Black CJ agreed with North J in finding that the Act 'provides for a very comprehensive regime' (*Ruddock v Vadarlis*: para 64). He said, further, (para 64):

> The conclusion to be drawn is that Parliament intended that in the field of exclusion, entry and expulsion of aliens, the Act should operate to exclusion of any executive power derived otherwise than from powers conferred by Statute.

French J (with whom Beaumont J agreed) thought otherwise, on the basis that the Act did not evince 'a clear and unambiguous intention to deprive the Executive of the power to prevent entry into Australian territorial waters of ... non-citizens intending to land on Australian territory' (*Ruddock v Vadarlis*: para 201).

What is troubling about this decision is the discretion it vests in the executive. The problem was well expressed by Lynch and O'Brien (2001: 217):

> The substantive effect of their Honours' judgment is to vest in the Government a broad discretion to choose when, and for whom, to invoke the operation of the Act. There appears to be no impediment to the Government making a policy decision to grant rights under the Migration Act to people of one race while detaining and expelling, under the imprimatur of its parallel common law prerogative, those of another.

Was there a restraint amenable to habeas corpus?

Having found that the Government had the power necessary to detain and expel the asylum seekers, the *habeas corpus* point was moot. If the Commonwealth had the power to detain, there could be no unlawful detention. However, the issue of whether there ever had been a detention amenable to the writ of *habeas corpus* was canvassed by their Honours. Justices Beaumont and French found there had been no such detention. Chief Justice Black, like North J, found that there had.

Justice French (with whom Beaumont J agreed) expressed the question as whether there was a restraint on the freedom of movement of the rescuees. He rejected the trial judge's view that the combination of factors amounted to a total restraint of the rescuees' liberty. He was persuaded by the idea that the rescuee's movements were not totally restricted. The rescuees were free to go anywhere except to Australia. Having neither the right, nor the freedom to travel to

Australia, no relevant restraint could be attributed to the Commonwealth (paras 213-214).

Black CJ asked the question 'whether the rescued people were, in a real and practical sense, detained by the Commonwealth' (para 77). It was argued that the rescuees had three means of egress open to them: (1) to leave on the MV *Tampa*; (2) to leave with any other person prepared to take them; or (3) to leave pursuant to the Nauru/NZ arrangements (para 79). Black CJ found none of them constituted a reasonable means of escape (paras 80-84). Proposition (1) was simply not feasible. The Captain would not, and could not (legally), leave Australian waters with the rescuees on board. Proposition (2) was highly unlikely from a practical point of view. The rescuees could only leave by boat. Access to the ship by unauthorised boats was strictly controlled by the SAS. The rescuees had no access to communication with people off the ship. Proposition (3) was also unreasonable: 'The Nauru/NZ arrangement was merely a continuation of control or custody by the appellants in another form' (para 84). Black CJ agreed with North J that the combination of factors represented a total restraint: 'the Government was committed to retaining control of the fate of the rescuees in *all respects' (VCCL v MIMA*: para 17).

Retrospective legislation

On 18 September 2001 the MIMA introduced the Border Protection (Validation and Enforcement Powers) Bill 2001. It became the *Border Protection (Validation and Enforcement Powers) Act 2001* on 27 September 2001. The Act's long title reads as follows:

> An Act to validate the actions of the Commonwealth and others in relation to the MV *Tampa* and other vessels, and to provide increased powers to protect Australia's borders, and for related purposes.

The effect of it is to make any Commonwealth action taken between 27 August 2001 and 27 September 2001, in relation to the MV *Tampa*, lawful when it occurred (ss 5-6). The Act also prevents any proceedings (criminal or civil) being taken in any court[23] in respect of that Commonwealth action (s 7).

The Bill was introduced into Parliament on the day the Full Court's judgment was handed down. The inescapable inference is that the Government was going to seek

23 Except in the High Court under its original jurisdiction (Constitution: s 75).

to validate its actions regardless of what the decision of the Full Court might be.

Conclusion

I began by suggesting that the Prime Minister's assertion that Australia's obligations under the Refugee Convention would continue to be fully met was either insincere or mistaken. The zeal with which the Government pursued its object of ensuring that none of the fundamental rights would be accorded to the asylum seekers suggests insincerity.[24] The steps taken by the Government were significant: it twice made threats, it tried to transfer responsibility to other countries, it tried to pass emergency legislation, it used military force, it refused a request from the UNHCR, it appealed against a Federal Court decision, it used significant public funds to secure agreements for other nations to take the responsibility, and, finally, it passed special legislation.

On the other hand, the apparent confidence of the Government in its ability to avoid responsibility for the asylum seekers by recourse to legislation or discretionary policy smacks of ignorance. Our duties to entertain the claims of asylum seekers, and not to expel refugees are legally binding:

> We unquestionably have 'mortgaged' our sovereign discretion since 1954 by taking on binding international obligations through ratification of the 1951 Geneva Convention on the Status of Refugees (Fonteyne 2001).

Perhaps the Government's problem is neither insincerity nor ignorance simpliciter, but rather a deep jurisprudential misunderstanding of the nature of law about refugees. The rhetoric of humanitarianism,[25] used widely in this context, is misplaced. As Catherine Dauvergne argues, we should not use humanitarianism as a stand-in for justice: 'humanitarianism is not a standard of obligation, as justice would be, but rather charity' (Dauvergne 1999: 620). The danger is that humanitarianism, which 'defines a morality of beneficence and bestowal rather than

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24 The Government admitted during the course of proceedings that 'the focus (in the handling of the MV *Tampa*) was on ensuring that none of the fundamental rights accorded to non-citizens under the *Migration Act 1958* (Cth) accrued to the asylum seekers' (*VCCL v MIMA* Transcript of hearing 2 September 2001: 170-1) (see Lynch and O'Brien 2001: 218).

25 The Government consistently referred to the issue in these terms: for example 'We have achieved a humanitarian outcome ...We are the second most generous country in the world after Canada on a per capita basis and that will remain' (Howard press conference 2001).

equality and justice' obscures the legal imperative of refugee law (Dauvergne 1999: 622). Refugee law, unlike immigration law generally, is about rights and obligations. Rights and obligations are matters of law and justice; they are not matters for discretionary policy based on our willingness, from time to time, to be humanitarian. ●

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