REFUGEES IN AUSTRALIA: OF LORE, LEGENDS AND THE JUDICIAL PROCESS

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1 INTRODUCTION

Australia has had a long, but very mixed experience, with refugees. In one sense, it is country made of and by refugees. If most of the earliest white settlers came here in chains, many of those who followed were people either in flight from an hostile earlier existence or in search of a better future. This is not only true of the 650,000 'sponsored' refugees resettled in Australia since the end of World War II.[1] When refugees come to Australia through managed programs, Australians still prove very generous: witness the response given to the 4,000 fugitives from Kosovo given temporary safe haven in the country in 1999. On the other hand, Australia has seen very few 'real' refugees in the sense of persons in need of immediate protection arriving on our door step uninvited and unvisaed: what the law refers to first as asylum seekers and (after processing) as Convention refugees.[2] These asylum seekers and 'onshore' refugees have evoked a very different response, in particular when their mode of arrival is by boat.

Australia is party to the Convention relating to the Status of refugees and its attendant Protocol,[3] and as such is obliged not to 'refoule' or return refugees to a place where they would face persecution on one of the five Convention grounds.[4] It has also undertaken not to punish refugees who enter the country illegally.[5] The dilemma of on-shore refugee

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1 See Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) Fact Sheet No 2, available through the DIMIA website: http://www.immi.gov.au.html.

2 In the 12 year period of 1989 to 2001, some 25,294 non-citizens arrived in Australia by boat or by plane without permission. This represents a little fewer than 6 such arrivals per day.

3 'The Refugee Convention'. The Refugee Convention was done at Geneva on 28 July 1951. (See Aust TS 1954 No. 5, 189 UNTS No. 2545, 137). The Protocol was signed on 31 January 1967, and ratified on 13 December 1973. (See, Aust TS 1973 No. 37, 606 UNTS No. 8791, 267). The Convention covers events causing a refugee problem before 1 January 1951, while the Protocol extends the definition to events occurring after that date.

4 See the Refugee Convention, Arts 1A(2) and 33; and the Protocol, Art 1(A)(2). The Refugee Convention and Protocol combine to define a refugee as any person who:

> ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

5 See Refugee Convention, Art 31. See Guy S Goodwin-Gill 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations,

determinations is in the difficulties inherent in reconciling these refugee 'rights' with the sovereign power of the Australian government to control immigration into the country. Australia complies with its international legal obligations through its mechanisms for determining the 'refugee status' of non-citizens in Australia and does this (in the main) irrespective of mode of entry. It is a process, however, that can be deeply conflicted – most particularly when the determination system produces results that are at odds with the expectations of the politicians or of the general public.

This article explores the background to the judicial dramas over refugees and asylum seekers that have dominated the legal discourse in Australia in recent years. Wrought less by the refugees themselves than by our *reaction* to the phenomenon of fugitives on the move, these dramas provide an insight into the way Australians think about immigration control and its relationship with concepts of refugee protection.

The paper begins with a search for some explanations as to why the issue of asylum seekers and 'on-shore' refugees has caused friction between the government and the courts in Australia. I will argue that a combination of history, culture and geography has resulted in an extraordinary intimacy of political involvement in immigration control that has worked to the detriment of a balanced regime for refugee protection in Australia. The notion of international law conferring rights or entitlements on non-citizens who arrive without a visa or other authority to enter has been an anathema to politicians vested with the sovereign or prerogative' power to determine which non-citizens enter or remain in the country. For the courts, the political focus of the refugee status determination processes set the groundwork for inevitable clashes that were exacerbated by the vagaries of particular episodes of refugee flows into Australia.

Part 3 of the article explores briefly the development of an Australian jurisprudence on the status and entitlements of refugees. It will be my contention that the way the case law has developed in Australia reflects closely the political pressures that have been applied in this area. The jurisprudence is recent; it is generally fairly conservative; and it is domestic and textual in its focus, with relatively little attention paid to norms of international human rights law. Having said this, the central significance of the definition of 'refugee' contained in the Refugee Convention means that the Australian courts have inevitably drawn from (and fed their decisions into) the international refugee jurisprudence. Indeed, curial decisions on refugee status in Australia represent one of the most striking examples of 'globalisation' in public international law.

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available at www.unhcr.ch. (A comprehensive paper on the extent to which the Convention relating to the Status of Refugees does (and does not) permit state parties to detain and/or otherwise to penalise refugees and asylum seekers who enter a country without authorisation). See also, Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees – Revised, available through the UNHCR website. These conclusions were based on discussions centred on Professor Good-Win Gill's paper, together with written contributions that included a paper by Michel Combarnous for the International Association of Refugee Law Judges.

2 REFUGEE POLITICS, SOVEREIGNTY AND THE IMPACT OF THE 'NEW' ADMINISTRATIVE LAW

Australia's schizophrenic attitude towards refugees is often attributed to the culture of control that has always surrounded immigration to this country.[6] As one of the earliest parties to the Refugee Convention done at Geneva in 1951,[7] Australia was a key player in the post war movement to establish an international legal regime for the protection of refugees and of human rights more generally. However, our post war experience of refugees was both controlled and highly selective. It was not until the end of the conflict in Vietnam that Australia began to experience the arrival of asylum seekers in the form of boat people traveling without papers or other authority to enter the country. Geographical position and the fact that the country occupies an entire continent – sharing no land borders – has meant that Australia is one of very few countries with the ability to achieve near perfect control of immigration. Put another way, the notion that a sovereign nation should determine who enters or remains on its territory has long been seen in Australia as an achievable goal rather than empty rhetoric.

Australia received as asylum seekers very few of the thousands of boat people who fled Vietnam after the fall of Saigon.[8] The crisis nevertheless had a profound impact on the country. While the government volunteered to accept refugees from the conflict in numbers that would literally change the cultural face of the country, it also responded by instituting the first on-shore refugee determination system. In 1978, this represented no more than a series of extra-legislative arrangements to channel refugee claims through an advisory committee. This committee would recommend the grant or refusal of refugee status to the Minister in whom Parliament had vested a simple power to grant entry permits.[9]

The formalisation of refugee determination procedures in Australia occurred more than 20 years after Australia became a party to the Refugee Convention and some five years after it ratified the 1967 Protocol to the Convention.[10] During that period, refugee protection appears to have been an highly discretionary affair that was untrammeled by the niceties of any jurisprudence on the definition of refugee contained in Art 1(2) of the

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6 See Kathryn Cronin, 'A Culture of Control: An Overview of Immigration Policy-making' in J Jupp and M Kabala (eds), *The Politics of Australian Immigration* (AGPS, Canberra, 1993).

7 See above n4. Australia's accession to the Refugee Convention in 1954 brought the instrument into force.

8 In the late 1970s and early 1980s, small numbers of boat people arrived in northern Australia, fleeing the aftermath of the Vietnam War, which ended in 1975. Between 27 April 1976 and April 1981 2,087 Vietnamese arrived in Australia by boat, in addition to the 43,000 'selected' refugees Australia agreed to accept and resettle. See Mary Crock *Immigration and Refugee Law in Australia* (Sydney: The Federation Press, 1998), 127.

9 For a description of this process, see *id*, 127-8.

10 See above n 3.

Convention.[11] The significance of this is twofold. First, it can be seen that the existence of any formal procedures for the determination of refugee status in Australia is a relatively recent affair. Second, the system established in 1978 was predicated on a *politician* – the immigration Minister – having ultimate control over who was or was not a refugee. It will be my argument that the central involvement of politicians in the refugee determination process in Australia goes a long way towards explaining why refugees have come to be the source of so much angst in politico-legal circles. If immigration control was recognised as an incident of state sovereignty and a prerogative of government, the politicians understanding was (and still is) that control should be exercised by the *executive* arm of government and not by the courts.

Aside from the passions and predilections of politicians too intimately involved in the refugee determination process, there are other reasons why this area of law is so politically fraught. The central tenet of the Refugee Convention is that 'refugees', as defined, have certain rights. The most significant of these is the right not to be 'refouled' or returned to a country in which they face persecution by reason of one of the five Convention grounds. The challenge of refugee law is that the corresponding obligation on Australia not to refoule a refugee – although assumed voluntarily – arises by virtue of an international instrument. The Refugee Convention is discomforting for the government because the non-refoulement obligation can be seen as a norm imposed from 'outside' that conflicts with Australia's sovereign right to determine which non-citizens enter and remain in the country. There are other areas where Australian laws are shaped by international legal obligations. However, in most instances there are obvious elements of reciprocal gain in the compliance process: international trade or maritime law may be examples in point. While individual refugees have brought enormous benefits to Australia in point of fact, the idea of relinquishing sovereignty to accommodate the asylum seeker is not one that sits easily with the Australian ethic of immigration control.

It is my view that the central problem for judges charged with reviewing refugee decisions is that the Australian politicians have generally been unwilling to 'let go' of status determinations so as to allow the identification of Convention refugees to be a truly independent process based no more and no less than on the Rule of Law. From the very start there has been a tendency in immigration Ministers to personalise to themselves curial criticisms of refugee rulings. This may have been due in part to the rather arcane form of the relevant migration legislation – particularly during the 1980s when the *Migration Act* 1958 was characterised by sweeping powers vested in the Minister to grant or refuse 'entry permits'. The personalisation process may also owe something to the language of the administrative law codified as it was by the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). For example, when the High Court first came to rule on the interpretation of the word 'refugee' in 1989, it found that the misinterpretation of the law had rendered the decision made unlawful (inter alia) on grounds of 'reasonableness'.[12] That is, a decision that was so unreasonable that it could not have

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[11] See H Martin, *Angels and Arrogant Gods: Migration Officers and Migrants Reminisce 1945-85* (Canberra: AGPS, 1988).

[12] See *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, discussed below n 31.

been made by a reasonable person.[13] With a Minister who had 'owned' the decision legally and – one could surmise – emotionally, in putting his name to the appeal, the court's use of this head of review was tantamount to a ruling that the Minister was an unreasonable person.

In some respects the history of refugee law in Australia represents in microcosm the changes that occurred in administrative law with the seminal reforms of the 1970s. The formalisation of refugee determination procedures coincided with the creation of the Federal Court, the passage of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth); freedom of information legislation; and a modest restructuring of the *Migration Act* 1958 (Cth) that actually spelt out an entitlement to permanent residence to certain non-citizens who met the Convention definition of 'refugee'. It was only a matter of time before lawyers stepped in to displace the well-connected migration agents whose business in assisting migrants was based in political deal-doing rather than the law. It will be my contention that the inevitability of the clash between the Minister and the courts over refugees was heightened by particularities of Australia's experience with refugees.

From the perspective of my personal experience, the judicialisation of refugee law seems to have begun in earnest in 1985. Two cases were heard in that year – one in the Federal Court, the other in the High Court of Australia. In the Federal Court an application was made under the ADJR Act to stay the removal of a young Iranian man who was apprehended as an unauthorised arrival in immigration clearance at Melbourne airport. The man's brother and a solicitor had been waiting for the man to arrive on the other side of customs, with a partially completed application for refugee status. Mr Azemoudeh was placed on board a plane bound for Hong Kong. Wilcox J made legal history by ordering that the plane be returned to Australia on the grounds that the decision to remove the man was rendered unlawful by the failure to consider all matters relevant to the ruling.[14] The case was one of the first instances where the legal status of refugee was seen to be relevant to the lawfulness or otherwise of a ruling affecting an asylum seeker. It was a legally courageous decision because the prevailing wisdom was that immigration applicants – whether refugees[15] or otherwise – had no legal right to a hearing before being expelled or excluded from Australia. The rules of 'natural justice' did not apply to these people.[16]

The second case in 1985 was instituted to question the refusal of refugee status to a man who had fled to Australia from Irian Jaya at the height of the take-over of that country by Indonesia. Ran Rak Mayer sought to challenge the ruling by the Determination of Refugee Status (DORS) Committee which lead to a recommendation to the Minister against the grant of refugee status. The High Court ruled in that case that the processes of the DORS Committee could be reviewed along with the ultimate decision by the

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13 See *Administrative Decisions (Judicial Review) Act* 1977, s 5(2)(g).

14 See *Azemoudeh v Minister for Immigration and Ethnic Affairs* (1985) 8 ALD 281. In the event, the Minister did not comply with the order made, although Mr Azemoudeh was taken off the flight in Hong Kong and permitted to apply for refugee status there.

15 See *Simsek v Macphee* (1982) 148 CLR 636.

16 See *Salemi v Mackellar [No. 2]* (1977) 137 CLR 396.

Minister. The Court found that although the Committee was established outside of the legal framework of the Migration Act, its deliberations were part of a process of decision making that was made 'under an enactment' for the purposes s 3 of the ADJR Act.[17]

Mayer's case was followed one year later by *Kioa v West*,[18] the case that did more than any other to entrench the rules of procedural fairness as the cornerstone of administrative justice in Australia. The cumulative effect of these rulings was an explosion of migration cases in the Federal Court. In the space of five years, the Federal Court used the grounds of review in the ADJR Act to turn the notion of administrative discretion on its head. It pronounced unlawful decisions where the administrator had not taken into account matters that the court considered to be of central importance, or where the court considered that the individual involved had not been given an adequate hearing. Put simply, political disquiet with the migration jurisprudence from the 1980s explains the decision in 1989 to remove the broad discretions that had characterised the Migration Act 1958, replacing the simple powers with the complex matrix of Act and regulations with which we are now familiar.

In 1989 non-citizens seeking residence on family or employment related grounds gained a right to review of decisions before a tribunal empowered to taken oral evidence. In contrast, refugee status decisions were still being made on the papers, and behind closed doors: claimants had no right to an oral hearing on appeal. The tiny number of refugee claimants seeking protection in Australia in the 1980s may explain why the system for determining refugee status was largely left intact during this first and greatest revision of the migration legislation. However, as events were to unfold in and after 1989, there is also some evidence that the decision to leave refugees out of the administrative law reforms to the *Migration Act* 1958 was deliberate and politically significant.

As explored in the following section, 1989 was a watershed year in the development of an Australian jurisprudence on the definition of refugee. It was also a year that put refugees on the map of political and public consciousness in a way that had not been experienced previously. The year was dominated by stories of conflict and drama in the Asia Pacific Region. Cambodia was in turmoil with the defeat of the Khmer Rouge and the withdrawal of the Vietnamese under the auspices of a United Nations peace plan. In June, after months of euphoric reporting about the imminent demise of communism in China to the forces of the Pro-Democracy movement, the Chinese government instituted a brutal and comprehensive crackdown on its citizenry. In September the High Court delivered its ruling in *Chan Yee Kin,*[19] confirming that this particular fugitive from China

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17 In *Mayer v Minister for Immigration and Ethnic Affairs* (1985) 157 CLR 290, the Court recognised s 6A(1)(c) of the *Migration Act* 1958 as the source of the Minister's power to grant refugee status. It held (at 302) that refugee status decisions were judicially reviewable under the *ADJR Act* and that reasons for such decisions could be sought under s 13 of that act. The case confirmed the Minister's obligation to consider claims for refugee status and established that the standard governing the determination of refugee status was that set down in the Refugee Convention.

18 (1985) 159 CLR 550.

19 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

did, indeed, meet the definition of refugee. Then, in November, the boats began to arrive – carrying fugitives first from Cambodia and later from China.

It is at this point that the political orientation of Australia's refugee determination system became both apparent and problematic. The overwhelming impression I have of this period is of the intimacy of the politicians involvement in every aspect of the emergent refugee 'problem' facing Australia. There was little or no sense of respect or reverence for a legal regime for the protection of refugees founded in independent (a-political) status adjudication. As time wore on, any notion of a national or institutional compassion for the dispossessed all but disappeared. Prime Minister Hawke shed public tears over the fate of the Chinese students in Tiannamen Square, vowing that no Chinese student in Australia would be forced to return home against their will.[20] A short time later, however, the Cambodian fugitives were told that Bob was 'not their uncle', and that they should return to Cambodia because the United Nations' peace plan had made it safe to return. Prime Minister Hawke and Foreign Minister Evans labeled the fugitives 'economic refugees'.

The Labor government's response to the Cambodian and Chinese boat people of the early 1990s set the course for the policies and institutional hostilities that continue to this day. This period also saw the emergence of an extensive network of refugee advocates in Australia. The hapless Cambodians were the subjects of a seemingly interminable number of applications for judicial review. They were at the heart of what has been described as the tit-for-tat legislative campaign that saw each major refugee 'win' in court met by 'remedial' legislation. One infamous example of this was the hurried introduction of the mandatory detention provisions[21] later challenged in *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs*.[22] Another was the legislation to cap any compensation payment to an asylum seeker detained unlawfully at one dollar a day.[23] Under the Ministries of Gerry Hand and Nick Bolkus, the asylum seekers were moved around Australia, often for no apparent purpose other than to place physical distance between the detainees and their lawyers. It was the era that saw the construction of the Port Hedland detention facility and the institution of 'incommunicado' detention for newcomers.[24]

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20 See Migration Regulations 1994, Sch 2, subcl 437, which created a special visa subclass for these people. See the discussion in Crock, above n 8, at 131.

21 The provisions were introduced when it became clear that O'Loughlin J in Adelaide was going to order the release of the Cambodian detainees on the ground that they were being held without lawful warrant. See 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* (Sydney: The Federation Press, 1993), 34.

22 (1992) 176 CLR 1.

23 See *Migration Amendment Act (No 4)* 1992 (Cth).

24 This practice continues today and means that boat (and plane) arrivals are taken into detention are screened by departmental officials to determine whether they 'engage Australia's protection obligations'. Only those deemed to have a valid claim for refugee status are permitted access to a lawyer. Individuals held during this screening process are kept apart from other asylum seekers who are having refugee claims assessed. The rationale is that separation is necessary to prevent the newcomers from being coached by longer term detainees. See Mary Crock 'A Sanctuary

If refugees were left out of the administrative reforms of the migration legislation in 1989, there is evidence to suggest that the decision to eventually grant asylum seekers access to oral appeals was forced on the government by the Courts. The old appeal system was based entirely on claimants reducing their cases to writing. In a number of instances, adverse decisions were challenged on the grounds that the failure to grant an oral hearing constituted a failure to accord natural justice or procedural fairness. In these cases, the Federal Court declined to accept that the rules of procedural fairness necessarily entailed a right to an oral hearing. Instead, the Court focussed on the nature of the 'hearing' given and on the question of whether, as a matter of fact, the claimant had been given a proper opportunity to present his or her case, and to answer this or that adverse, critical and significant matter. The courts professed not to be concerned with the modalities of the hearing process; just with the issue of whether the claimant had been 'heard'.[25] Faced with the degree of judicial scrutiny that flowed from easy access to court and the simplification of judicial review procedures, it was inevitable that practicalities would force the government to introduce oral hearings for refugee appeals.

It is my personal opinion that refugee law in Australia has never recovered from the process of brutalisation that occurred during the period of the late 1980s and early 1990s. The mentality of answering court actions with legislation has remained and intensified. The result has been an incremental hardening in laws and policies. On the one hand the changes have seen Australia drift ever further from the path of the good international citizen. In our continued insistence on a system of mandatory detention, in our abuse of the human rights of refugee children and of families, Australia has become increasingly blatant in its disregard for the norms of international human rights law. The changes have also had an effect, however, at a more immediate jurisprudential level. In 1989, the codification of migration laws saw an abrupt removal of the sweeping discretions that had characterised the legislation. Within the space of a few years, the power of lower level officials to respond flexibly and with humanity to individuals in situations of need was all but removed.[26]

The removal of general safety net provisions has ramifications at two levels. First, it has acted like a vortex to channel power back to the Minister and to no one else – increasing the personal power of the incumbent of that office to unprecedented levels. Second, it has meant that individuals facing serious personal problems if returned to their country of origin have had no option but to seek recognition as refugees. In simple terms, the definition of refugee in Australia in recent years has had much more protection work to do than is the case in other countries where a general discretion to grant residence of humanitarian grounds has been retained. It is difficult to quantify the impact, if any, that these developments might have had on the judicial review of refugee rulings. For judges

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Under Review: Where To From Here For Australia's Refugee and Humanitarian Program?' (2000) 23 *UNSWLJ* 246, 273-4.

25 See *Somaghi v Minister for Immigration and Ethnic Affairs* (1991) 31 FCR 100; *Heshmati v Minister for Immigration and Multicultural Affairs* (1991) 31 FCR 123; and *Chen Zhen Zi & Ors v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 83.

26 For more commentary on this point, see S Cooney, *The Transformation of Immigration Law* (Melbourne, BIPR, 1995).

imbued with the vision of curial review as a protective shield for the rights of the individual, it would be an interesting to study whether the narrowing of avenues for persons at risk has lead to a more expansive interpretations of refugee law in this country.

Refugee claimants in Australia have had the right to appeal negative status determinations to an 'independent' administrative tribunal since 1993. However, the change seems to have done little to diminish the government's micro-management approach to refugee protection. The present Minister has been very vocal in his criticisms of both the Refugee Review Tribunal and the Courts when rulings by either body conflict with his understanding of the law. As Shadow Immigration Minister in 1992, Mr Ruddock supported the first attempt to constrain the judicial review of migration decisions by referring specifically to the High Court's ruling in *Chan Yee Kin*. He said:

> When we look at the creative way in which the High Court of Australia got into the business of determining refugee claims, when it was always intended that these should be administrative matters dealt with by the government of the day, we can appreciate that the government by allowing the ADJR Act to continue in this area was creating a rod for its own back. It has always seemed to me and I have argued this strongly, that the role of the courts collectively in this area has brought about a significant problem for the government of the day.[27]

In 1997, Minister warned Refugee Review Tribunal members publicly that they should not expect their contracts to be renewed if they purported to 're-invent' the definition of refugee (by recognising that a woman victim of domestic violence could be a refugee).[28] (Unelected) judges interpreting the law in a manner contrary to the (elected) Minister's understanding have been charged with subverting the 'will of the people'.[29]

Attitudes such as this have inevitably placed the government at loggerheads with the courts in a country where the Rule of Law is founded in judicial exegesis of written text, legal precedent and principle that are not infrequently at odds with the understandings of individual politicians.

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27 See Commonwealth Parliamentary Debates, *Hansard,* House of Representatives, 16 December 1992, 3935.

28 See *The Canberra Times,* 27 December 1996, article and Editorial, at 14. At the time of the reappointment process in 1997, the recognition rate for refugee claims in the tribunal plummeted from 17% to less than 3%. See evidence supplied by Mr Mark Sullivan, Deputy Secretary of the Department, to the Senate Legal and Constitutional Legislation Committee. See that Committee's report: *Consideration of Migration Legislation Amendment Bill (No 4) 1997*, Minority Report, at 45-46.

29 See The Honourable P Ruddock, National Press Club, Canberra, 18 March 1998, at p 7 of the electronic transcript, available at <http://www.immi.gov.au/general/minspe18.htm>, in which he stated 'Only two weeks ago a decision to deport a man was overturned by the Federal Court although he had been convicted and served a gaol sentence for possessing heroin with an estimated street value of $3 million. Again, *the courts have reinterpreted and rewritten Australian law – ignoring the sovereignty of parliament and the will of the Australian people. Again, this is simply not on.*' (Emphasis added.)

3 THE DEVELOPMENT OF A REFUGEE JURISPRUDENCE IN AUSTRALIA

The challenge for the courts is plain. On the one hand, the legitimacy of any unelected judiciary is dependant on judges ensuring that they do not stray too far from the shared understandings and values of the polity. The 'dualist' vision of the intersection between international obligation and domestic law has permitted the courts to accommodate political sensitivities about many aspects of international human rights law: the ruling in *Chu Kheng Lim* upholding the legal validity of the first mandatory detention regime is an example in point. On the other hand, the cornerstones of refugee law are set by the terms of the Refugee Convention. Incorporated into Australian law either directly or by reference, the standards are now the subject of an elaborate international and an increasingly elaborate national jurisprudence. This body of law increases the pressures on the judiciary when faced with a Minister who is unabashedly assertive about his preferred interpretation of the Convention provisions.

Although reaching back little more than one decade, the jurisprudence on refugee law in Australia has now developed to the point of some sophistication.[30] From the perspective of an observer and some time participant in the evolution of the law in this area, four points stand out in the developing case law. First is the pragmatic, *reactive* approach taken by the courts; second, the narrow *textual* focus of many of the decisions; third, the lack of attention paid to broad norms of international law; and, finally, the (belated) intrusion of international jurisprudence into the judicial discourse on refugees.

It is beyond the compass of this article to examine the evolution of refugee law in Australia in any detail. However, there are a few key rulings that are deserving of mention. The first case in which the High Court considered in any detail the definition of 'refugee' contained in Art 1(2) of the Refugee Convention and Protocol was *Chan Yee Kin*[31]. This is the case that set the now famous 'real chance' test. The court confirmed that a individual must both show a *subjective* fear of persecution upon return to his or her country of origin and demonstrate that from an objective viewpoint that fear is 'well founded' – in other words that there be a 'real chance' of persecution if returned. The case was decided at the height of the dramas surrounding the repression in China of the pro democracy movement. I have argued that more than one aspect of the ruling suggests that the court was moved by the obvious plight of dissident Chinese nationals.[32] Another feature of the ruling, however, was the refusal by the Court to enter into detailed debates about the proper interpretation of the Convention definition. In the leading judgment, McHugh J dismissed suggestions of major difference between the interpretations that were preferred by Courts in England and North America. He offered the 'real chance' test as a distillation of the prevailing international jurisprudence on the ground that all the tests pointed to similar outcomes.[33]

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30 Ros Germov and Francesco Motta, *Refugee Law in Australia* (Oxford University Press, 2003).

31 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

32 See Mary Crock 'Apart from Us or a Part of Us? Immigrants' Rights, Public Opinion and the Rule of Law' (1998) 10 *IJRL* 49, 54-5.

33 See (1989) 169 CLR 379, 423-430. His Honour also ignored a divide that had opened in the Federal Court on the interpretation of the Convention: See *Gunaleela v Minister for Immigration*

If the ruling in that instance was adverse to the administration, in later cases judicial pragmatism lead to less expansive results for the refugee claimants. For example, in *Wu Shan Liang*,[34] the High Court roundly rebuked the Federal Court for scrutinising too closely the reasoning methods adopted by the Refugee Review Tribunal. The High Court rejected as heresy the notion that tribunal members who speculated about the *likelihood* of persecution fell into legal error because such a process implied a 'balance of probability' rather than a simple 'real chance' test.[35] The ruling reflected changes to the *Migration Act* 1958 that reduced the scope for judicial oversight of refugee decisions.[36] However, it also marked the beginning of a period when the public discourse on refugees was becoming more negative. Sympathy for the Chinese students was giving way to near hysteria about the continued arrival of boats from China – *Wu Shan Liang* was actually a class action brought on behalf of the asylum seekers from one such boat. Particular concerns were being raised about asylum seekers claiming to be fugitives from China's 'One Child' policy. The assertion that victims of this policy were refugees because they feared persecution by reason of their membership of a 'particular social group' – parents wishing to have more than one child – raised crude spectres of refugee law becoming the conduit for millions of fugitives from the world's most populous country flooding into Australia.[37]

The case law involving fugitives from China's One Child Policy shows an interesting divergence in judicial approach.[38] It is in these cases that the divide first becomes apparent between those judges who see the Refugee Convention as an instrument for the protection of human rights, and those who see the document as a creature of history and compromise created for the purpose of regulating and controlling refugee flows. The legislative response to the cases also demonstrates vividly which of these two approaches has been preferred by the government.

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and Ethnic Affairs (1987) 15 FCR 543, 563-64 and *Sinnathamby v Minister for Immigration & Ethnic Affairs* (1986) 66 ALR 502.

34 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) CLR 259.

35 See *Mok Guek Bouy* (1994) 55 FCR 375, where the Full Federal Court held that the real chance test did not allow the RRT to engage in a process of weighing up evidence with a view to determining the likelihood of future persecution. It found that the use of expressions such as 'I give greater weight to' suggested that the Tribunal was assessing refugee claims on the 'balance of probabilities'.

36 Section 22A of the Migration Act was amended to provide that: 'If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing that the person is a refugee'. The effect was to change the determination of refugee status from a process based on an objective test to a subjective (opinion based) ruling.

37 See, for example, Editorial, *Sydney Morning Herald*, 26 February 1997, 14; Padraic McGuiness, 'Illegal Immigrants Cost us Dearly in Legal Aid', *Sydney Morning Herald* 27 February 1997, 15. See also below, n42.

38 See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225. For critiques of the decision, see Pene Mathew 'Conformity or Persecution: China's One Child Policy and Refugee Status' (2000) 23 *UNSWLJ* 103; and Catherine Dauvergne 'Chinese Fleeing Sterilisation: Australia's Response Against a Canadian Backdrop' (1998) 10 *IJRL* 77.

In *Applicants A and B v Minister for Immigration and Ethnic Affairs,*[39] Sackville J concentrated in his first instance judgment on the human impact of the Chinese policies and on the ease with which dissentients could be identified (and penalised) as members of a group within Chinese society. That case involved a Chinese couple who fled to Australia when the wife fell pregnant without first gaining the requisite permission. Giving birth very shortly after arriving in Australia, both the wife and husband claimed that they would be forcibly sterilised if returned to their village of origin. His Honour ruled that sanctions of forced abortion and sterilisation did amount to 'persecution', even though the policies were of general application.[40] He also ruled that the couple's fears of persecution were 'by reason of' their membership of a particular social group. The government responded to the judgment by immediately introducing into Parliament amending legislation stipulating that the fertility control policies of foreign governments cannot be used to found a claim that a person belongs to a particular social group for the purposes of making out a claim for refugee status.[41] Labor Senator McKiernan urged passage of the Bill with warnings that Australia may have to institute an interdiction program to forestall an invasion by would-be Chinese parents. He said:

> I would anticipate that hundreds of thousands of people from China and some other Asian countries will shortly be making plans to get to Australia. They will hear, if they have not already heard, that the numbers are in the Senate to defeat the Bill… Turning boats, that carry illegal migrants to Australia, around at sea, may be the only way to stop the flood gates opening and protect Australia in the long run.[42]

The amending legislation was never put to a vote – in large measure because Sackville J was overruled on appeal. The Full Federal Court[43] and, later, a majority in the High Court held that the couple did not meet the Convention definition of refugee because 'social group' could not be defined solely by a shared fear of persecution - there had to be some *other* cognisable factor through which persons external to a group could identify the group as such. The appeal judges – with the notable exceptions of Brennan CJ and Kirby J – preferred a structured, almost mechanistic reading of the Refugee Convention definition of refugee. Although obscurities in the textual definition were identified, these were resolved through a detailed exploration of the historical background to the 1951 Convention and that instrument's *travaux preparatoires* (preparatory works). On this basis, the majority concluded that the 1951 Convention was never intended to cover all persons in situations of need, justifying its own restrictive interpretation of the instrument.[44] On the other hand, both Kirby J and Brennan CJ examined the Preamble to the Convention and preferred to focus on the instrument's overriding humanitarian

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39 (1994) 127 ALR 383.

40 This finding was upheld by the High Court, although the Full Federal Court held against the applicants on this point: *Minister for Immigration and Ethnic Affairs v Respondents A and B* (1995) 57 FCR 309.

41 Migration Legislation Amendment Bill (No 3) 1995 (Cth), cl 2.

42 Senator McKiernan, 'Interdiction may have to be considered', Media Release, 2 March 1995.

43 *Minister for Immigration and Ethnic Affairs v Respondents A and B* (1995) 57 FCR 309.

44 See, for instance, (1997) 142 ALR 331, 351, and 369-70 per McHugh and Gummow JJ respectively.

purpose. Against this background, their Honours found congruence between the definition of a refugee and the applicant's situation.[45]

Put simply, the judges who have attempted to shape their interpretation of the Refugee Convention so as to conform to the human rights spirit of the instrument have been in the minority.[46] The 'One Child policy' cases aside, there have been other instances in which the High Court has chosen to eschew a human rights approach so as to restrict the reach of Convention protection in Australia. One notable example is the Court's refusal to recognise as refugees fugitives from countries in the grip of civil war, where it is not possible to identify any form of civil government or formal 'state'.[47] These cases also demonstrate the second 'trend' apparent across Australia's refugee jurisprudence: the tendency to focus on text rather than context. In *Ibrahim*'s case, Gummow J in the majority devotes considerable energy to divining the intent of the original drafters of the Refugee Convention, concluding that the instrument was not designed to assist victims of general unrest or anarchy.[48] The majority preferred what is described as the 'accountability' theory of refugee law, formulated by the House of Lord in *Adan v Secretary of State for the Home Department*[49], Lord Lloyd of Berwick said:

> [W]here a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show what [counsel for the Secretary of State for the Home Department] calls a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare. (emphasis added)[50]

On this view, the Refugee Convention is conceptualised as a device for overcoming the failure by a (specified) state to protect its nationals. The opposing view of the 'protection' theorists is that the instrument is designed first to protect persons in need who do not have the protection of any state.[51]

The tendency in the Australian Courts to focus on text rather than context is reflected more broadly in a tendency to concentrate very much on relevant domestic legislation to

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45 Similar divisions emerge in the case of *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574, with McHugh and Gummow JJ again emphasising the limited scope of the Convention, and Kirby J stressing its humanitarian objects.

46 See Crock, above n 32.

47 See *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 175 ALR 585.

48 See Id, paras 136-143.

49 [1999] 1 AC 293.

50 [1999] 1 AC 293, 311. (Lord Goff of Chieveley, Lord Nolan, and Lord Hope of Craighead agreed.)

51 See the reasoning adopted by Gaudron and Kirby JJ. Compare also James C Hathaway, *The Law of Refugee Status* (Toronto, Butterworths, 1991), p 124; and T Alexander Aleinikoff, 'State – Centred Refugee Law: From Resettlement to Containment', (1992) 14 *Michigan Journal of International Law* 14 at 121. See also Daniel J Steinbock, 'The Refugee Definition as Law: Issues of Interpretation' in F Nicholson and Patrick Twomey, *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge, Cambridge University Press, 1999), chapter 1; and Susan Kneebone, 'Moving Beyond the State: Refugees, Accountability and Protection', in Susan Kneebone (ed) *The Refugee Convention: Fifty Years On* (Dartmouth Press, 2003), chapter 11.

the exclusion of norms of international law. It is neither possible nor perhaps desirable to 'prove' that this tendency reflects domestic political pressures brought to bear on the courts. Having said this, it is in the most politically charged refugee cases that the trend towards juridical introspection is most marked. In the early 1990s, the controversy surrounding the Cambodian boat people came to a head in litigation brought with the assistance of public interest advocates to challenge both the initial refusals to grant refugee status and the decisions to hold the asylum seekers in detention. As noted earlier, the early skirmishes in the Federal Court lead to the hasty passage of the first mandatory detention provisions in the *Migration Act* 1958 – which lead in turn to the constitutional challenge to the provisions in *Chu Kheng Lim.*[52]

The High Court upheld the Constitutionality of the detention laws by focussing narrowly on the alienage of the detainees; the nominal temporal constraints placed on detention; and the breadth of the power in the Constitution to legislate with respect to aliens. The status of the detainees as asylum seekers rates no mention. No reference is made to the constraints imposed by the Refugee Convention on the detention of 'refugees'. For the refugee lawyer, there is special irony in the central finding that the detainees were not being held illegally because they were free to go 'home' at any time of their choosing: they were 'voluntary' detainees. The broader norms of international human rights law were dismissed as non-binding, if not irrelevant to the determination of the litigation. Article 9(1) of the International Covenant on Civil and Political Rights prohibits the 'arbitrary' detention of any person. In spite of Australia's signature and ratification of this instrument, it was of no assistance to the Cambodians because of the Australian Parliament's failure to enact the relevant provisions into the domestic laws of the country.[53]

The extent to which the High Court's reading of the legality of the first mandatory detention laws was at odds with international law emerged when the Cambodians took their case to the UN Human Rights Committee. In A v Australia, that Committee rejected the argument that detention sanctioned by Parliamentary process cannot be 'arbitrary'.[54] Preferring to focus on the circumstances surrounding detention and the possibilities for release, it rejected the fiction that asylum seekers can be 'voluntary' detainees. The Committee made the simple point that the detainees would plainly and obviously 'go home' if such a course were safely open to them. The very essence of the status of refugee is that refugees cannot 'go home' without risking persecution.[55]

The detention jurisprudence from the UN Committee did not prevent the Australian Courts from adhering to the same personal choice fictions when faced with the most recent – and most politically explosive – incident involving asylum seekers and refugees.

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52 *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.

53 See Mary Crock, "Climbing Jacob's ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia" (1993) 15 *Syd L R* 338.

54 *A v Australia* Communication No 560/1993, UN Doc CCPR/C/59/560/1993 (30 April 1997). On this case, see Poynder, 'Human Rights: *A v Australia*: Views of the UN Human Rights Committee dated 30 April 1997', (1997) 22(2) *Alt LJ* 149.

55 On this point, see *Amuur v France* (1996) 22 EHRR 533, discussed below.

In spite of an initial victory before a single judge of the Federal Court,[56] challenges made to the government's actions in the *Tampa* Affair also failed because of the 'domestic' focus of the courts. The (public interest) applicants were acknowledged as having standing to bring an action for orders in the nature of *habeas corpus* so as to seek the release of the *Tampa* rescuees.[57] However, the government's refusal to allow any access to the persons taken on board the *Tampa* meant that the applicants were unable to gain instructions from the rescuees for the purpose of mounting a legal challenge under the *Migration Act* 1958 (Cth).[58] Most significantly, the Full Federal Court held that the applicants had no standing to seek a writ of mandamus to compel the Minister to act in accordance with the law.

Even though the applicants had standing to question the detention of the Afghans taken in by the *Tampa*, it did not follow automatically that the writ of habeas corpus would run. The remedy was dependent on the applicants demonstrating that these people were being detained and that their custody was unlawful. In the Full Federal Court, the majority held against the applicants on both these counts. French J, with whom Beaumont J agreed, relied on the reasoning of the High Court in *Chu Kheng Lim*.[59] Again - and just as counter-intuitively as in the earlier case – the court held that the Tampa asylum seekers were not being 'detained' at law because they were free to travel anywhere they wished (except to Australia).[60] Both North J at first instance and Black CJ on appeal disagreed strongly with this characterisation of events. In a persuasive dissent, Black CJ examined the manner in which the European Court of Human Rights treated the same issue in

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56 The advocates succeeded at first instance before North J in the Federal Court, who held that the asylum seekers were being detained by the Australian authorities in circumstances where there was no basis in Australian law for the action being taken. See *Victorian Council for Civil Liberties and Ors v Minister for Immigration, Multiculturalism and Indigenous Affairs* (2001) 110 FCR 452. (Hereafter *VCCL v MIMIA*)

57 The Federal Court, both at first instance, and on appeal, acknowledged that the liberty of the person is a human right of such fundamental importance that any person has the right under the Common Law to challenge the legality of another's detention. See *Victorian Council for Civil Liberties and Ors v Minister for Immigration, Multiculturalism and Indigenous Affairs* (2001) 110 FCR 452, 469; and *Ruddock v Vadarlis* (2001) 110 FCR 49 at 509 per Black CJ; and at 518 per Beaumont J. See also *Waters v Commonwealth of Australia* (1951) 82 CLR 188 at 190; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 per Gleeson CJ and McHugh J at 600, Gummow J at 627 and Kirby J at 652-3; and *Clarkson v R* [1986] VR 464 at 465-6.

58 The Applicants' substantive claim was based on an argument that the *Migration Act* 1958 operated to require the landing of the rescuees. Eric Vardarlis asserted that the status of the rescuees as unlawful non-citizens meant that they had to be taken into immigration detention within Australia pursuant to s 189 of that Act. In the alternative, the Victorian Council for Civil Liberties argued that s 245F required the government to bring the rescuees to the mainland of Australia, where they would then be entitled to lodge formal claims for refugee status pursuant to s 36 of the Act. See *Ruddock v Vardarlis* (2001) 110 FCR 491 at 506-507. Eric Vardarlis also argued that the refusal to allow him access to the rescuees constituted a breach of his implied constitutional freedom of communication. He sought an injunction and mandamus to allow him to give legal advice to the rescuees. See *VCCL v MIMA* at 489-490; and *Ruddock v Vardarlis* (2001) 110 FCR 491 at 530.

59 See *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1. For an account of this case, see Mary Crock 'Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia' (1993) 15 *Sydney Law Review* 338-356.

60 *Ruddock v Vardarlis* (2001) 110 FCR 491 at 548.

Amuur v France.[61] That case involved four Somali asylum seekers who were kept for 20 days in the transit zone of Paris-Orly airport. The argument was made that the asylum seekers were not detained because they could have left at any time by agreeing to return to Syria, from whence they had traveled to France. The Court said:

> The mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty…Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.[62]

The *Tampa* judgments are redolent with political stresses operating on the presiding judges. North J[63] at first instance was the only judge to acknowledge that the group in question most probably included Convention refugees as most were from Afghanistan, where the feared Taliban were still in power.[64] Yet the judge chose the neutral term of 'rescuees' to describe Tampa's hapless human cargo. Dissenting in the Full Court, Black CJ agreed with the substance of North J's rulings. However, his carefully reasoned judgment sticks closely to legal principle, assiduously avoiding any emotive descriptions of the people behind the action. In contrast, the second majority judgment - by Beaumont J - is replete with a sense of urgency, heightened perhaps by the unmentioned spectre of the terrorist attacks in America that occurred on the same day that North J handed down his ruling. Beaumont J affirmed as preeminent the government's power to determine which non-citizens could enter and remain in Australia, underscoring passages and words. His conclusion – that an alien has no **right** to enter Australia – is placed quite literally in bold print. The effect is to emphasize and re-emphasize the *outsider* status of the rescuees. The word 'alien' appears no less than 27 times in the 30 paragraphs of his judgment.

Perhaps the greatest evidence in the *Tampa* litigation of the political pressures at play, however, are the *obiter dicta* comments of French J on the question of whether the government's actions were rendered unlawful by the fact that there was no legislative basis for what occurred. His Honour suggested that the nature of the executive power conferred on the government under the Australian Constitution may be such that legislation was not needed to render lawful any actions taken to protect Australia's

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61 (1996) 22 EHRR 533.

62 (1996) 22 EHRR 533, at 558. See *Ruddock v Vardarlis* (2001) 110 FCR 491, at 510 (per Black CJ).

63 His Honour said: 'It is notorious that a significant proportion of asylum seekers from Afghanistan processed through asylum status systems qualify as refugees under the Convention relating to the Status of Refugees (1951) (the Refugees Convention). Once assessed as refugees, this means that they are recognised as persons fleeing from persecution in Afghanistan. While such people no doubt make decisions about their lives, those decisions should be seen against the background of the pressures generated by flight from persecution.' See *VCCL v MIMA* 110 FCR 452 at para [67].

64 Most of the Tampa rescuees were Afghani nationals. Before the US intervention in Afghanistan lead to the defeat of the ruling Taliban in late 2001, over 80% of Afghan asylum seekers in Australia were gaining recognition as refugees. Of the 130 Tampa asylum seekers accepted by New Zealand, all but one were recognised at first instance as refugees and offered permanent resettlement.

borders.[65] Amidst the flurry of legislative change on 26 September 2001, French J's comments did not go unnoticed by government drafters. The amendments to the *Migration Act* 1958 included a new s 7A which confirms the power of the Executive to act outside of any legislative authority. The new section reads:

> The existence of a statutory power under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders.

In referring to 'persons', s 7A makes no distinction between citizens and foreigners.

The refugee story in Australia undoubtedly reached a very low point in 2001. However, it is another thing to see the *Tampa* judgments as representative of the trend in Australian refugee jurisprudence. A longer term view of the refugee cases during the 1990s suggests that the courts in Australia are becoming increasingly familiar with both the terms of the Refugee Convention and Protocol and with comparative international jurisprudence on these instruments. In cases where political pressures have not been so pressing, the tendency has been for the Australian courts to move with the international trends, even where to do so has placed them at loggerheads with the government.

The High Court's treatment of the 'One Child policy' and domestic violence cases are examples in point. Both involved situations where the Minister had made it very plain as to how he preferred the law to be interpreted. However, in both instances, the passage of time and events eventually operated to reduce or remove the element of public angst about the issues involved.

While the first cases involving fugitives from China's One Child policy excited a great deal of controversy, it quickly became apparent that the country was not being flooded with refugee parents from China. On the other hand, the Australian public showed a degree of discomfort when presented with evidence that a failed refugee claimant returned to China in a heavily pregnant state was either forced or coerced into having an abortion upon her return.[66] In April 2000, the High Court affirmed that children born in contravention of China's One Child policy - known as 'hei haizi' or 'black' children – can be refugees.[67] Outside their country of origin, faced with fines and other penalties restricting access to education and other public services, 'black' children were recognised by the High Court as belonging to a particular social group. The court ruled that this grouping was sufficient to render the children refugees because of the immutability of the factors predetermining the (persecutory) treatment that the children would receive. One

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[65] *Ruddock v Vardarlis* (2001) 110 FCR 491 at 543-544. Given his Honour's findings on the detention point, these comments probably constitute obiter dicta.

[66] The woman was known as 'Ms Z'. Her case was both the subject of an inquiry instituted by the Minister for Immigration and Multicultural Affairs personally, (a report was eventually prepared by Mr Tony Ayres, former Secretary of the Department of Defence), and spawned the most extensive Senate inquiry ever conducted into the operation of Australia's refugee and humanitarian processes: Senate Legal and Constitutional References Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Processes*, June 2000

[67] *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 201 CLR 293.

irony of the court's ruling in *Chen Shi Hai* is that the child in question came to Australia on the same boat as the ill-fated pregnant Chinese woman. In the woman's case, not only was her pregnancy insufficient to gain her protection in Australia. She was also returned to China with an older daughter born out of wedlock in Australia – a child who was indisputably a 'black' child in China. If the mother did not meet the stringent test for refugee status set by the High Court, there is every indication that her little daughter *was* a Convention refugee.

In *Khawar*'s case the High Court again adopted an expansive interpretation of the Convention definition of 'refugee' to recognise that a Pakistani woman fleeing domestic violence could be a refugee.[68] On this occasion the Court held that women in Pakistan could constitute a cognisable social group. The court further held that the (systemic) failure of the Pakistani government to intervene so as to protect women in Pakistan from domestic violence was sufficient to convert the serious harm they suffered into 'persecution' for the purposes of the Refugee Convention.

While it is possible to read the decisions in *Chen Zi Hai* and *Khawar* in strict doctrinal terms that are consistent with the earlier rulings in *Applicants A and B* and *Ibrahim,* the outcomes in the cases are dramatically different. In both *Chen Shi Hai* and *Khawar* the Court's interpretation of the words of Art 1(2) was neither inevitable nor incontrovertible – a fact brought out strongly by the Minister in his rather vigourous objections to the two rulings. However, the decisions are in line with the way other courts around the world are dealing with similar cases, as well as with academic writings on the subject of women and refugee status.[69] In this respect, the cases are a sharp reminder that the legal regime for the protection of refugees has an international aspect to which courts all around the world are inevitably paying heed.

This point is also made by the recent Federal Court decision of *Al Masri*.[70] In that case, it was held that the mandatory detention of a failed asylum seeker pending removal will be unlawful if there is no real likelihood or prospect of removal in the reasonably foreseeable future.[71] In reaching this conclusion, both the trial judge and the Full Federal Court referred to international authorities for guidance in construing legislation providing

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68 *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 187 ALR 574.

69 For example, the critiques made about the gendered nature of the definition, summarised most recently and comprehensively in H Crawley, *Refugees and Gender: Law and Process* (Bristol, Jordan, 2001); K Walker, 'New Uses of the Refugees Convention: Sexuality and Refugee Status', in Kneebone (ed), above n 51, chapter 10.

70 *Minister for Immigration and Multicultural Affairs v Al Masri* [2003] FCAFC 70 (15 April 2003).

71 While the issue of Constitutional validity was canvassed by the Court, the case was ultimately decided on the basis of statutory construction. After examining the language and context of the relevant provisions, the Court held that Parliament 'did not turn its attention to the curtailment of the right to liberty in circumstances where detention may be for a period of potentially unlimited duration and possibly even permanent', but rather had proceeded on the assumption that detention would come to an end through the combined operation of ss 196 and 198. See *Minister for Immigration and Multicultural Affairs v Al Masri* [2003] FCAFC 70 (15 April 2003), at para [120].

for administrative detention and the curtailment of fundamental rights and freedoms.[72] The Full Court's construction of the relevant provisions was also informed by the principle that s 196 should be interpreted in conformity with established rules of international law and with Australia's treaty obligations - the most important of which is Article 9(1) of the International Covenant of Civil and Political Rights.[73]

4 REFUGEES AND THE RULE OF LAW

The phenomenon of people taking flight and seeking refuge from natural disaster or man-made strife is as old as human history itself. Neither is there anything new in people responding with hostility and suspicion to the stranger at the door. Why else would so many of the world's religions seek to correct this human response by injuncting believers to welcome the stranger; and to give succor to the lonely and the dispossessed? Asylum seekers who present as boat people seem to occupy a special place in the pantheon of threats to national security around the world. Perhaps it is because boats can carry larger numbers of people than it is possible to smuggle onto the heavily regulated aeroplanes. Perhaps the arrival of unauthorised boats evoke in our deepest psyche primordial fears of invasion and devastation. Australians are not unique in reacting with alarm to the phenomenon of boat people. The so-called 'Pacific Solution' and 'Operation Relex' were modeled closely on the US program for 'interdicting' boat people from Haiti during the 1980s and 1990s.[74] The arrival or even the threatened arrival of water-born asylum seekers has evoked legislative responses in even the most avowedly 'refugee friendly' countries.[75] At the same time, there is a sense in which Australia's response to refugees has been out of the ordinary.

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72 This included the so called *Hardial Singh* principles (named for *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704) - that any power to detain is 'impliedly limited to a period which is reasonably necessary for that purpose', The Courts also cited cases following *Hardial Singh* such *as Liew Kar-Seng v Governor in Council* [1989] 1 HKLR 607; *Re Phan Van Ngo and ors* [1991] 1 HKLRD 499*; Re Wasfi Mahmood* [1995] Imm AR 311; *Klinsman v Secretary for Security & Anor* [1999] HKLRD (Yrbk) 430; *R (on the application of I) v Secretary of State for the Home Department* [2002] EWCA Civ 888; *R (on the application of Vikasdeep Singh Lubana) v The Governor of Campsfield House* [2003] EWHC 410; and *R v Secretary of State for the Home Department; ex parte Saadi* [2002] 4 All ER 785 at 793. The United States Supreme Court decision of *Zadvydas v Davis* 533 US 678 (2001) was also considered.

73 See discussion at paras [138]-[155] of the judgment.

74 The United States has also enacted different legal regimes for persons detained away from its mainland territories. For an account of these, see Karen Musalo, Jennifer Moore and Richard Boswell *Refugee Law and Policy: Cases and Materials* (Carolina Academic Press, 1997), Ch 12. One notable feature of the US legislation is the provisions reducing or removing altogether the right of non-citizens apprehended in this way to access America's administrative law systems. See *Refugee Act* 1980, Pub L No 96-212, 94 Stat 107 (1980), 8USC para 1253(h) (1988), amending para 243(h) of the *Immigration and Nationality Act*. Note that moves were also made to restrict the access of illegal entrants to appeal and judicial review mechanisms. See *Illegal Immigration Reform and Immigrant Responsibility Act* 1996; and Karen Musalo, Lauren Gibson, Stephen Knight & Edward Taylor, 'The Expedited Removal Study: Report On The First Three Years Of Implementation Of Expedited Removal', (2001) 15 (1) *Notre Dame Journal of Law, Ethics & Public Policy* 130-145.

75 In 1999, rumours that a boat was making its way to New Zealand spurred the enactment of immigration detention laws: See *Immigration Act* 1987 (NZ), s 128(13B), and the discussion in

The extraordinary side of the refugee story in Australia has little to do with either numbers or modes of arrival. It has everything to do with the law or, rather, with the intersection of Australia's legal institutions in their dealings with refugees. There is a sense in which refugees have threatened to bring Australia's judicial system to its knees, both literally and juridically. By the end of 2001, the High Court was becoming overwhelmed by applications for judicial review lodged by failed refugee claimants.[76] At the same time, refugee cases in the High Court have been at the centre of gargantuan struggles between the government and the judiciary. On the one side is a government intent on stifling the judicial review of refugee decisions on the ground that the determination of protection matters should lie with the Executive and with elected politicians rather than with the unelected judiciary. On the other side are judges imbued with the notion that the courts stand between the individual and administrative tyranny; and that refugee decisions must be made in accordance with the Rule of Law. In 2003, the battle ceased to be a fight over 'Protection' – be it protection of borders or protection of human rights. The fight was all about control, and about the balance of power between Parliament, the executive and the Judiciary within the compact that is the Australian Constitution.

The clash of international and domestic law, with the perceived conflicts between 'rights' to protections and sovereign powers to control immigration, suggest that refugees will continue to be a source of debate and controversy in Australia as in other parts of the world. The clashes between the executive and judicial arms of government in Australia in refugee cases may have brought little international credit on the country. On occasion, they have also threatened the very fabric of the Rule of Law in Australia embodied as this is in the principle that the judiciary alone is vested with the power to make final determinations on questions of law. In *Chu Kheng Lim* the one point on which the High Court refused to compromise was the constitutionality of a provision that purported to exclude the ability of any court to review the legality of immigration detention. One decade later, the same Court has refused to countenance a broader attempt to oust the curial review of migration decisions.

The Solicitor General, Bennett QC, presented the Minister's interpretation of the privative clause inserted into the Migration Act 1958 in October 2001 to the High Court on 4 September 2002. He argued that the effect of the new provisions was to render immune from challenge any interpretation placed on the Refugee Convention, provided

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Roger Haines QC 'An Overview of Refugee Law in New Zealand: Background and Current Issues' paper presented to Inaugural Meeting of International Association of Refugee Law Judges, 10 March 2000. Available at http://www.refugee.org.nz/IARLJ3-00Haines.html. On instances in which Canada has responded to with unusual defensiveness to boats carrying asylum seekers, see Judith Kumin 'Between Sympathy and Anger: How Open Will Canada's Door Be?' in US Committee for Refugees *World Refugee Survey* 2000, available at: www.refugees.org/world/articles/wrs00_sympathy.htm.

[76] Between 1998-1999 and 1999-2000, applications to the High Court had increased from 65 to 128. By early 2002, there were more than 4000 applicants involved in class actions before the High Court. See Mary Crock and Ben Saul, Future Seekers: Refugees and the Law in Australia (Sydney: The Federation Press, 2002) at 63.

that the Minister acted in 'good faith'. Gleeson CJ saw that the Minister's reading of the clause in question would have enucleated the power of the Court to question or otherwise review the Executive's understanding of substantive refugee law. His Honour brought out this fact by invoking as an example the High Court's ruling in *Khawar*:

> GLEESON CJ: What if, instead of granting a visa to a person who is an alien, he (the Minister) refuses to grant a visa to a person who is a refugee within the meaning of the Refugees Convention?
>
> MR BENNETT: The question then would be whether it was a bona fide exercise of the power.
>
> GLEESON CJ: Suppose the reason he refuses to grant the visa is that he has an erroneous understanding of the meaning of the language of the Refugees Convention?
>
> MR BENNETT: Then, your Honour, it is not challengeable. He is given that power. That is not within the Hickman exception rule.
>
> GLEESON CJ: Is another way of saying that that he is given power to make a conclusive decision as to the question of law involved in the true construction of the Refugees Convention?
>
> MR BENNETT: No, your Honour. That, we would submit, is not a correct characterisation of what he is doing. The effect of that clause, read with the Hickman clause, is that so long as the Minister bona fide attempts to apply what the section requires and so long as one is within the other limitations, then he may make the decision either way and he is empowered to do so.
>
> GLEESON CJ: Take the case that we had recently involving a question of whether women could be a particular social group. Suppose the Minister decides that it is impossible for women to be regarded as a particular social group within the meaning of the Refugees Convention. Does that not amount to the Minister making a conclusive and incontestable decision about a matter of law?
>
> MR BENNETT: No, your Honour, because the Minister is not ultimately deciding a question of law; the Minister is deciding whether to grant a visa and he is making a bona fide effort to apply a criterion which he may apply wrongly. [77]

Insofar as the Solicitor General was suggesting that the High Court would not be at liberty to make the ruling that it did in *Khawar* under the privative clause regime, one can sense the affront to the Chief Justice. In the result, the High Court was unanimous in its rejection of the Minister's arguments on the effect of the privative clause. Although it upheld the provisions as constitutional, the Court ruled that the clauses simply had no application in cases where decisions are affected by fundamental legal errors that infringe against 'inviolable limitations' or other matters that define the jurisdiction of a decision maker. It is my personal view that the ruling will operate to ensure the continued – intimate – involvement of the courts in determining the correct interpretation of the Refugee Convention and Protocol.

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[77] See Plaintiff S157 of 2002 v The Commonwealth of Australia S157/2002 (4 September 2002), at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/hca/transcripts/2002/S157/5.html?query=title+%28+%22s157%22+%29.

The importance of the Courts maintaining their role as interpreters and defenders of the law in the area of refugee protection cannot be overestimated. The Courts may not be able to prevent the political posturing and even manipulation that has characterised the political discourse surrounding refugees and asylum seekers in Australia. However, they are in a unique position to at least moderate the impact of the politicisation process on the refugees themselves. In the area of refugee law, the Australian judiciary can, quite patently, be the last bastion against executive tyranny for the dispossessed and reviled. At risk is life, liberty and the Rule of Law – not just for the refugee, but for all of us.