TREATIES AND THE INTERPRETATION OF STATUTES: TWO RECENT EXAMPLES IN THE MIGRATION CONTEXT

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1 Introduction

It has been generally accepted that treaties and other international instruments require legislation to alter the rights and obligations of persons under Australian domestic law, if not domestic or municipal law generally.[1] However, this does not mean that treaties have no influence at all on Australian municipal law unless enacted into domestic law by statute. Treaties have had, and continue to have, effects on Australian law in a number of other ways. An interesting example of a modern qualification to the rule which establishes the need for legislation relates to the use of treaties and instruments to interpret ambiguous legislation, especially in the light of the presumption that Parliament normally seeks to legislate consistently with Australia's international obligations.

In this article, I propose to examine two recent cases in which treaties were used in the interpretation of statutes. First, in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*,[2] the Full Federal Court unanimously dismissed the Minister's appeal from the orders of Merkel J, who had released the respondent from immigration detention pending his removal from Australia. The Court noted that the appeal involved consideration of important questions in the application of common law principles to the interpretation of statutes where fundamental rights and freedoms are involved. Second, in *B & B v Minister for Immigration and Multicultural and Indigenous Affairs*,[3] the Full Family Court gave judgment in an appeal concerning the relationship between the welfare jurisdiction of the Family Court and the power of the Minister to detain unlawful non-citizen children.

2 Background

It has been accepted for most of the history of the High Court that treaties can be used as an aid to the interpretation of statutes in certain circumstances.[4] What is not yet clearly resolved is exactly when an international instrument may be used in this way: it is unclear whether an ambiguity in the statute is necessary, or whether there is in fact a greater role for treaties in relation to the interpretation of any statute.

In the earlier days of Mason CJ's period on the High Court, his Honour took a very narrow approach to the use of international conventions as an aid to statutory interpretation. In two cases, *D & R Henderson v Collector of Customs for NSW*[5] and *Yager v R*,[6] he required both ambiguity in the language of the statute in question and that the statute be intended to give effect to the convention which is to be called in aid of interpretation.

It was only in 1992, in *Dietrich v R*,[7] that the High Court first acknowledged a role for treaties in the interpretation of legislation not intended to implement the treaty in question. This was

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the beginning of a broader approach to the use of treaties by the Court, although the Court's adoption of this approach in *Dietrich* was less than wholehearted. Mason CJ and McHugh J, in discussing the position in the United Kingdom, stated that:

> [I]t is 'well settled' that, in construing domestic legislation which is ambiguous, English courts will presume that Parliament intended to legislate in accordance with its international obligations.[8]

However, it is unclear from the judgment whether Mason CJ and McHugh J considered this principle to be 'well-settled' in Australian law. Clearly, though, the principle referred to is not confined to statutes which are directed at the implementation of an international convention, but is directed at all statutes, as a general canon of statutory interpretation. Ambiguity, however, is still required. This was somewhat broader than the earlier, restricted view taken by Mason CJ.

Dawson J's judgment in *Dietrich* was not of much greater assistance. He stated that:

> There is authority for the proposition that, in the construction of domestic legislation which is ambiguous in that it is capable of being given a meaning which either is consistent with or is in conflict with a treaty obligation, there is a presumption that Parliament intended to legislate in conformity with that obligation.[9]

Again, there is no real indication whether Dawson J considered that approach to be correct. And, again, ambiguity in the legislation is required before the presumption comes into play, although his Honour's view of ambiguity seems to have been a reasonably wide one.

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[10] the plaintiffs were Cambodian nationals who had arrived by boat in Australia in 1989 and 1990 and who had been detained in custody since their arrival, pending determination of their applications for refugee status. In April 1992 the applications were rejected. In the Federal Court, the plaintiffs obtained an order setting aside this decision; they also sought an order that they be released from custody pending re-determination of their applications, but this aspect of the proceeding was adjourned. Prior to the return of their application for release, the Federal government passed the *Migration Amendment Act* 1992 (Cth) which, *inter alia*, purp orted to prohibit any court from ordering the release from custody of anyone of a defined class of persons which included the plaintiffs. The plaintiffs challenged the validity of the legislation. One of the bases of the challenge was the inconsistency of the amendments with international legal commitments undertaken by Australia, in particular the Convention relating to the Status of Refugees 1951 and its 1967 Protocol, and the International Covenant on Civil and Political Rights ('ICCPR'). Section 54T of the *Migration Act* 1958 (Cth) provided that the amendments were to apply despite inconsistency with any other Australian law other than the Constitution. Members of the High Court regarded s 54T as adequate to preclude recourse to international law:

> [Section] 54T ... unmistakably evinces a legislative intent that, to the extent of any inconsistency, those provisions prevail over those earlier statutes and (to the extent - if at all - that they are operative within the Commonwealth) those international treaties.[11]

One of the important *obiter dicta* which arose in *Minister for Immigration and Ethnic Affairs v Teoh*[12] concerned the extent to which treaties can affect the interpretation of statutes. Mason CJ and Deane J[13] took a broad approach to this issue, in contrast to the House of Lords, which has taken a narrower view of the extent to which treaties can affect the interpretation of legislation.[14] Their Honours noted that it is a principle of statutory interpretation that if a statute or legislative instrument is ambiguous, the courts should interpret it in a manner that is consistent with Australia's international obligations.[15] This rule, they noted, is based on the principle that 'Parliament, prima facie, intends to give effect to Australia's obligations under

international law'. They went on to explain how this principle must lead to a broad reading of the concept of ambiguity, stating:

> It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the preceding paragraph [that ambiguous statutes should be interpreted in accordance with Australia's international obligations] should be stated so as to require courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. That is indeed how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.[16]

In the case of *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*, McHugh and Gummow JJ stated that the rules of statutory interpretation

> favour construction which is in conformity and not in conflict with Australia's international obligations; this matter was discussed by Mason CJ and Deane J in *Teoh*.[17]

Nevertheless, their Honours noted that the treaty under consideration in *Teoh* had not been followed by any relevant exercise of legislative power with respect to external affairs, nor was it a self-executing treaty (such as a peace treaty).[18] There appears to be a clear implication in their joint judgment that the reasoning in *Teoh* failed to give sufficient attention to the relationship between international obligations and the domestic constitutional structure.[19]

3 Decision in *Al Masri*

(a) The factual background[20]

Mr Al Masri, the respondent, is a Palestinian from the Gaza Strip. He arrived in Australia illegally via a people-smuggling operation. His application for a protection visa was refused. That refusal was affirmed by the Refugee Review Tribunal. On 5 December 2001, Mr Al Masri signed a written request to the Minister that he be returned to the Gaza Strip. Five months later he was still in detention, as the surrounding countries would not grant permission for him to transit through their territory to the Gaza Strip.

On 21 May 2002, Mr Al Masri commenced proceedings in the Federal Court seeking his release from detention on the basis that, notwithstanding s196 of the *Migration Act*, the detention had become unlawful. Section 196 provides:

> (1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
> (a) removed from Australia under section 198 or 199; or
> (b) deported under section 200; or
> (c) granted a visa.
> (2) To avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or a lawful non-citizen.
> (3) To avoid doubt, subsection (1) prevents the release, even by a court, of an unlawful non-citizen from detention (otherwise than for removal or deportation) unless the non-citizen has been granted a visa.

Section 198(1) provides:

> An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

Merkel J, at first instance, held that the mandatory detention regime provided for by the *Migration Act* is subject to implied limits. In his view, detention is only valid provided that:

- the Minister is taking all reasonable steps to secure the removal from Australia of a removee (who has requested removal under section 198(1)) as soon as is reasonably practical; and

- there is a real likelihood or prospect of removal in the reasonably foreseeable future.[21]

His Honour held that the detention in this case was unlawful because there was no evidence that there was a reasonable prospect of Mr Al Masri being removed to his home country in the foreseeable future.

Following Merkel J's decision, a number of other detainees filed habeas corpus applications. There are conflicting authorities, but at first instance the majority of Federal Court judges refused to follow Merkel J.[22] The issue became academic in relation to Mr Al Masri who was removed from Australia shortly following Merkel J's decision. However, the Full Federal Court decided to deal with the Minister's appeal because of the outstanding costs issue and because of the general importance of the substantive issue. This appeal is the first consideration of the issues at appellate level.

(b) The Full Court decision

The Full Court did not accept the first limb of Merkel J's formulation,[23] but did endorse the second. Unless the power (and duty) to detain unlawful non-citizens were subject to a temporal limitation like the one implied by the trial judge, then a serious question of invalidity would arise. The Court considered that, without an implied limitation, the relevant sections may be unconstitutional because the 'aliens' power does not authorise indefinite detention. The High Court's decision in *Lim* was distinguished on the basis that the legislation under consideration in that case contained a time limit on detention and because it was assumed in that case that a request by an applicant to be removed would bring detention to an end. The High Court was simply not dealing with the scenario where the Department is unable to remove an individual to his or her country of origin.[24]

The Full Court found it unnecessary to finally decide the constitutional issue because it considered that the appeal could be determined on statutory construction grounds.

(c) Construction in accordance with international obligations

The Solicitor-General for the Commonwealth, counsel for the Minister, submitted that the clear intent of the Parliament is that detention under section 196 is unqualified and in terms unlimited in time except by reference to the three terminating events specified therein. He went on to argue that it is not possible, having regard to the intractable language, to conclude that Parliament did not consciously decide upon curtailment of a person's liberty where a person cannot be removed for reasons beyond his or her control. It is not open to conclude that Parliament has not used sufficiently clear words to cover the circumstance where removal may not be readily possible. The Solicitor-General submitted that the words 'as soon as reasonably practical' in section 198 impose a continuing duty and it is not appropriate as a matter of statutory construction to require Parliament to deal with every possible contingency where removal may not be possible.[25]

This argument was not successful. The Full Court considered that the right to personal liberty is the most fundamental of all common law rights, so that any attempt to abrogate it must, in accordance with established principles of statutory construction, be expressed in clear, unambiguous words. Controversially, the Court did not consider that the language of sections 196 and 198 was unambiguous:

> We conclude that an intention to curtail the right of personal liberty to the extent discussed has not been clearly manifested. It has not been manifested by any unmistakable or ambiguous language. There is no indication by clear words or by necessary implication that the legislature has directed its attention to, or that it has consciously decided upon, the curtailment of a fundamental common law right to the extent contended for by the Solicitor-General.[26]

Rather, the textual framework of the relevant provisions suggested that Parliament had not directed its attention to the question of possible unlimited or permanent detention of unlawful non-citizens, but had instead assumed that detention will necessarily come to an end.

The Full Court considered that its conclusions on this point were supported by the decisions of overseas courts dealing with similar questions[27] and the presumption that legislation is to be interpreted and applied in a manner consistent with established rules of international law and in a manner that accords with Australia's treaty obligations.[28] Reference was made to Article 9 of the ICCPR and the view of the Human Rights Committee in *A v Australia*,[29] in which indefinite detention of aliens was found to be unlawful. Whilst the Court noted that the views of the Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects by performing functions that include reporting, receiving reports, conciliating and considering claims that a State Party is not fulfilling its obligations. The Court also noted that it is appropriate to consider opinions expressed in works of scholarship in the field of international law and considered the jurisprudence of the European Court of Human Rights. Finally, the Court drew attention to Article 37(b) of the UN Convention on the Rights of the Child.

4 Decision in *B & B*

(a) The factual background[30]

Two male children (by their next friend, their mother) applied to the Family Court for release from immigration detention. The children's father (who is married to the children's mother) also made an application that the children and their three sisters reside with him in Sydney (where he then resided) or, alternatively, that he have contact with the children, that they be given adequate medical treatment and not assaulted, that they be accommodated in community housing and that they not be placed in Woomera or a similar environment.

At first instance, Dawe J dismissed the application, accepting the Minister's argument that the mandatory detention provisions of the *Migration Act* are specific and unambiguous in requiring detention of the applicants and that the general welfare jurisdiction provisions of the *Family Law Act 1975* (Cth) must be read as subject to the *Migration Act* provisions. The Family Court therefore did not have jurisdiction to make the orders for release sought by the children. Dawe J also dismissed the father's application on the grounds that the Family Court did not have jurisdiction because the *Family Law Act* did not confer a broad welfare jurisdiction for all children in South Australia. She also considered that the welfare jurisdiction is not an unlimited jurisdiction and cannot generally be used override other laws. The children and the father appealed.

(b) The Full Court decision

The Full Family Court allowed the appeal against the judgment of Justice Dawe of the Family Court and remitted the matter to a single judge for rehearing as a matter of urgency. The majority judges (Nicholson CJ and O'Ryan JJ) decided in a joint judgment that:

- the Family Court has power to release the children if their detention is unlawful. The Family Court could release the children on the basis that their detention is indefinite. Although the appellants had not put their case on the basis that their detention was unlawful and no facts had been found on this issue - or any other - the majority assumed that the children's detention was indefinite and expressed the view that the children's detention was probably unlawful;[31] and

- even if the Family Court cannot order release, the welfare jurisdiction gives that Court power to give directions as to the welfare of the children in detention, including as to medical treatment and education.[32]

Although it was not necessary to decide the issue in this case, the majority said that Part VII of the *Family Law Act* ('Children'), including the conferral of jurisdiction on the Family Court to make orders against third parties for the protection of children, is also supported by the external affairs power in section 51(xxix) of the Constitution because it implements the Convention on the Rights of the Child.[33]

Ellis J dissented in part. He decided that Part VII is not a law with respect to external affairs.[34] He did not agree that there was no real prospect in the reasonably foreseeable future of the children being removed and that the detention of the children was unlawful.[35]

(c) The Human Rights and Equal Opportunities Commission Act

A question which was raised, but unanswered, by the *B & B* case is the status of the international instruments which have been scheduled to, or are subject to a declaration under, the Commonwealth's *Human Rights and Equal Opportunities Act* 1986 (Cth) ('HREOC Act').[36] The argument is that they must be given a higher status than ordinary non-incorporated treaties because they have been subject to parliamentary debate and approval, as they either formed schedules to the Act when it was first passed by the Parliament, or were capable of being disallowed by either House of the Parliament if they were the subject of a declaration by the Minister.

In *Minister for Foreign Affairs and Trade v Magno*,[37] Gummow J considered that this was not the case. He gave the example of the Charter of the United Nations, which is contained in the schedule to the Charter of the United Nations Act. Gummow J observed that s 3 of that Act simply states that the Charter is 'approved', but said that this was insufficient to render the Charter binding on individuals in Australia.[38] Similarly, in *Dietrich*, it was observed by some members of the High Court that although the text of the ICCPR is contained in schedule 2 to the HREOC Act, this does not mean that this convention is part of domestic law conferring directly justiciable rights on individuals.[39]

Nicholson CJ stated in *Re Marion*[40] that he had changed his mind from his original view that parliamentary recognition of the treaties in the HREOC Act made no difference. He stated:

> It seems to me that the Act and its Schedules constitute a specific recognition by the parliament of the existence of the human rights conferred by the various instruments within Australia and, that it is strongly arguable that they imply an application of the relevant instruments in Australia.[41]

His Honour concluded:

> Contrary to what I said in *Re Jane* ... I now think it strongly arguable that the existence of the human rights set out in the relevant instrument, defined as they are by reference to them, have been recognised by the parliament as a source of Australian domestic law by reason of this legislation.[42]

A similar view was taken by Einfeld J in the *Magno* case.[43] After discussing the judgments of the High Court in the case of *Dietrich*, he concluded:

> Whilst authoritatively determining that treaties ratified only by the executive government do not per se become part of domestic law, *Dietrich* seems to make clear that the statutory approval or scheduling of treaties is not to be ignored as merely platitudinous or ineffectual, but must be given a meaning in terms of the parliamentary will. Thus when the Australian Parliament endorses and acknowledges a treaty by legislation, there being no contrary statutory or clearly applicable common law provision in relation to the matters contained in the treaty, it approves or validates the treaty as part of the law which ought as far as possible to be applicable to and enforceable on or by Australians and others in the country to whom it is available.[44]

Some support for this view may also be found in the judgment of Kirby P in *Young v Registrar, Court of Appeal (No 3)*, who said that the fact that the ICCPR is contained in a schedule to an Act of Parliament has been regarded by the courts 'as a consideration relevant to the attention which should be paid to the International Covenant'.[45] However, he added that this does not, as such, incorporate the covenant into Australian domestic law.[46] Similarly, in *Irving v Minister for Immigration, Local Government and Ethnic Affairs*, French J said that the approach to construction which he took was 'strengthened ... by the legislative recognition, albeit short of direct domestic force, given to the rights and freedoms under the covenant in the Human Rights and Equal Opportunity Act 1986 (Cth)'.[47]

In *Teoh*, this point was not directly relevant. Toohey J noted the comments by Nicholson CJ in *Re Marion*, but stated that '[w]hether this is so is a matter which does not arise in the present case'.[48] Mason CJ, Deane and Gaudron JJ did not address the argument. McHugh J, on the other hand, expressly rejected it. He concluded:

> The HREOC Act recognises that there may exist acts and practices that are inconsistent with or contrary to Australia's human rights obligations as defined by the Act. The mechanisms for remedying those inconsistencies are those provided in the Act. I find it difficult to accept that parliament intended that there should be remedies in the ordinary courts for breaches of an instrument declared for the purpose of s 47 of the HREOC Act when such remedies are not provided for by the Act.[49]

In *B & B*, Nicholson CJ and O'Ryan J noted that this issue appeared not to have been considered by the High Court in *Teoh* and concluded that '[t]he relevance of UNCROC being a declared instrument annexed to the HREOC legislation thus appears to be an open question'.[50]

Given the absence of clear authority on the question in *B & B*, it is still unclear whether the courts regard the international instruments which are scheduled to, or declared under, the HREOC Act, as having a higher status than other ratified treaties which have not been directly implemented by legislation.[51]

5 Conclusion

Where domestic legislation is passed to give effect to an international convention, there is a presumption that Parliament intended to fulfil its international obligations. It may also be that in the case of an ambiguity in any legislation, even if not enacted for the purpose of implementing a treaty, the courts will favour a construction that is consistent with Australia's obligations under international human rights treaties. This may be an aspect of a more general principle of statutory interpretation that a court will interpret statutes in the light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms.[52] However, as Albrechtsen commented:

> [I]t's funny how creative judicial decisions draped in the mellifluous language of international human rights invariably infringe upon one of the most fundamental human rights - the citizen's right to vote, to decide important moral, social and political issues, by a majoritarian democratic process. Mandatory detention, like other highly charged issues, is one over which rational minds differ. Even judicial minds differ. Given disagreement, how do we resolve these issues? Eminent legal philosopher Jeremy Waldron has a suggestion: if these matters are to be settled by counting heads, then citizens may well feel that 'it is their heads or those of their accountable representatives that should be counted'.[53]

Postscript

After this article was written, the Full Family Court (Nicholson CJ, O'Ryan and Ellis JJ) handed down a decision reported as *KN & SD v Secretary, Department of Immigration and Multicultural and Indigenous Affairs*.[54] The Court looked at the issue of whether section 198 of the *Migration Act* could be read down so as to prevent the removal of an unlawful non-citizen mother who had an Australian citizen child. Nicholson CJ and O'Ryan J maintained (as they did in *B & B*) that the Convention on the Rights of the Child had been incorporated into Australian law by the *Family Law Act*, whereas Ellis J maintained that it did not have this effect. However, all three judges held that whether fundamental rights have been conferred by the *Family Law Act* or not, the reference in section 198 of the *Migration Act* to 'remove as reasonably practicable' did not create an ambiguity so that the principles set out in the *Family Law Act* operate so as to prevent the removal of the mother from Australia. The majority stated:

> We think it clear that this part of the *Migration Act* is expressed in terms that override Australia's international obligations (UNCROC) as incorporated in Australian municipal law and also the Act. If this is so then it is apparent that the effect is to override the rights of an Australian child to know and have contact with one of his parents who entered Australia on a false passport.[55]

Ellis J was also prepared to accept that the *Migration Act* provided a detailed code dealing with the removal of unlawful non-citizens from Australia.[56] The majority did not deal with this argument.

Endnotes

1 See Glen Cranwell, 'Treaties and Australian Law: Administrative Discretions, Statutes and the Common Law' (2002) 9 *Aust Jo of Admin Law* 65, 65-68.
2 (2003) 197 ALR 241 (Black CJ, Sundberg and Weinberg JJ).
3 [2003] FamCA 415 (Nicholson CJ and Ellis J; O'Ryan JJ dissenting in part).
4 See, eg, *Polites v Commonwealth* (1945) 70 CLR 60, 68-9, 77, 80-1.
5 (1974) 48 ALJR 132, 135.
6 (1977) 139 CLR 28, 43-4.
7 (1992) 177 CLR 292.
8 Ibid 306.
9 Ibid 348-9.
10 (1992) 176 CLR 1.
11 Ibid 38 (Brennan, Deane and Dawson JJ).
12 (1995) 183 CLR 273.
13 With whom Gaudron J agreed on this point.
14 See *R v Secretary of State for the Home Department; ex parte Brind* [1991] AC 696, 747-8 (Lord Bridge).
15 (1995) 183 CLR 273, 287, and see 315 (McHugh J).
16 Ibid 287-8.
17 (2003) 195 ALR 502, [100] (footnote omitted). See also *Kartinyeri v Commonwealth* (1998) 152 ALR 540, 599 (Gummow and Hayne JJ): '[A] statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is not in conflict with the established rules of international law.'
18 Ibid [98]-[100].
19 Ibid [98], and see [147] (Callinan J).
20 The factual background is extracted from the judgment of the Full Federal Court.
21 *Al Masri v Minister for Immigration and Multicultural Affairs* (2002) 192 ALR 609.

22 French J doubted the correctness of the judgment at first instance in *WAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1625; Beaumont J agreed with the principles of French J in *NAES v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 2; Whitlam J in *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 52, [36] agreed with the analysis of French J and labelled the *Al Masri* decision at first instance as 'plainly wrong'. Jacobson J in *NAKG of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1600 also doubted the correctness of the decision in *Al Masri*. Selway J did not follow *Al Masri* in *SHFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 29, nor did von Doussa J in *SHDB v Goodwin & Ors* [2003] FCA 30 and *SHFB v Goodwin & Ors* [2003] FCA 294, nor Emmett J in *NAGA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 224. On the other hand, Mansfield J in *Al Khafaji v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1369 followed *Al Masri* at first instance and Finkelstein J in *WAIW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 1621 applied *Al Masri* to grant interlocutory relief.
23 (2003) 197 ALR 241, [134]-[135].
24 Ibid [49]-[81].
25 Ibid [39]-[43].
26 Ibid [132]. See also *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD of 2002* [2002] FCAFC 390, [108]-[113].
27 Ibid [133].
28 Ibid [138]-[155].
29 UNHRC Communication No. 560/93.
30 The factual background is extracted from the judgments of the Full Family Court.
31 [2003] FamCA 451, [319]-[390]
32 Ibid [391]-[400]
33 Ibid [248]-[289].
34 Ibid [424].
35 Ibid [426].
36 Ibid [252]ff.
37 (1992) 37 FCR 298.
38 Ibid 304, citing *Bradley v Commonwealth* (1973) 128 CLR 557, 582; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224.
39 (1992) 177 CLR 292, 305 (Mason CJ and McHugh J), 359-60 (Toohey J); also at 321 (Brennan J), 348 (Dawson J).
40 (1990) 14 Fam LR 427.
41 Ibid 449.
42 Ibid 451.
43 (1992) 37 FCR 298.
44 Ibid 343.
45 (1993) 32 NSWLR 262, 274.
46 Ibid.
47 (1993) 115 ALR 125, 140.
48 (1995) 183 CLR 273, 301.
49 Ibid 317-8.
50 [2003] FamCA 451, [263]. See also *Marriage of Murray and Tam* (1993) 16 Fam LR 982, 998 (Nicholson CJ and Fogarty J): '[I]t may be that this is still an open issue.'
51 See also Anne Twomey, '*Minister for Immigration and Ethnic Affairs v Teoh*' (1995) 23 *Fed L Rev* 349, 359-61.
52 *Potter v Minahan* (1908) 7 CLR 277, 304; *Re Bolton; ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 183 (Dawson J); *Nationwide News v Wills* (1992) 177 CLR 1, 43 (Brennan J); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24, 30 (Gleeson CJ).
53 Janet Albrechtsen, 'Judiciary oversteps mark on immigration', *The Australian* (Sydney), 2 July 2003.
54 [2003] FamCA 610.
55 Ibid [76].
56 Ibid [160].