YES MINISTER? THE 2012 MIGRATION AMENDMENTS: WHENCE HAVE WE COME AND WHITHER ARE WE GOING?

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The zigzag approach to finding a response to the influx of asylum seekers has recently taken a further turn. This is the most recent attempt of the executive to avoid judicial scrutiny of political treatment of asylum seekers.

I will endeavour to explain why this latest asylum legislation, which echoes past Government endeavours, is likely to be just another temporary milestone in grappling with ever increasing migration waves.

Mandatory detention

The introduction of mandatory detention in 1992 was the first step by Australia to deter those arriving by boat seeking asylum. An applicant had first to be viewed as engaging Australia's protection obligations under the *Refugee Convention*. Initially adverse decisions about asylum seekers were challenged by prerogative writ and sometimes even at common law. People smugglers were few. Very often the boats were bought by the fleeing occupants themselves. Such was the case in *Wu Yu Fang and 117 Others v MIEA and Commonwealth of Australia*[1] in which Sino Vietnamese fled China and were boarded by Australian officers off Ashmore Reef. A formal review process developed in the 1990s and a Refugee Review Tribunal (RRT) examined the correctness of the initial departmental decision maker on refugee status. However, if an asylum seeker wanted to go further than the RRT, no assistance was given to the applicant in framing appropriate grounds for a hearing by the Federal Court, although the law did allow a limited right of appeal on legal issues.

Offshore processing

It was this absence of a structured and orderly review process beyond the RRT which resulted in the Coalition Government introducing, in 2001, six Acts amending the *Migration Act 1958* (Cth). The Federal Court had been swamped with ill framed and futile applications for review, and well over 40 per cent of the appeals in the Federal Court were from asylum seekers who had failed before the RRT.

The Coalition Government commenced offshore processing by excising certain territories, such as Christmas Island and Ashmore Reef, as designated areas. Asylum seekers might now be precluded from making valid applications and were now called 'offshore entry persons'. They no longer had access to law courts as a right; such access was one of the articles contained in the *Refugee Convention*, of which Australia was a signatory.[2] The Government also introduced section 198A of the *Migration Act 1958* (Cth), which allowed for declaration of a country as a receiving country. At that time, the primary purpose of offshore processing was to prevent judicial review. Nauru, an island mostly known for its phosphate

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extraction with a minimal population of around 9,000, housed many of the asylum seekers who had been sent there pursuant to a declaration under section 198A by the Minister. Manus Island, a protectorate of Papua New Guinea, housed others. The Coalition Government under John Howard maintained that the so called Pacific Strategy did have the effect of stopping people arriving by boat.

In taking these steps, Australia was not alone in departing from the terms of the *Refugee Convention.* Professor Godwin Gill, an eminent Canadian international jurist, had said as long ago as 1996 that 'the developed world has expended considerable energy in trying to find ways to prevent claims for protection being made at their borders, or to allow for them to be summarily passed on or back to others.....[T]he intention may be either to forestall arrivals or to allow those arriving to be dealt with at discretion, but the clear intention is that, for states at large, refugees are protected by international law and, as a matter of law, entitled to a better and higher standard of treatment'.

The new construction of a privative clause

In 2001 the Coalition Government also moved to abolish judicial review for onshore applicants. Section 474 of the Act forbade appeal against 'privative clause' decisions. The Australian courts had, up to 2003, been prepared to countenance privative clauses protecting decision makers against appeal, provided the decision was made in good faith, related to the subject matter of the legislation and was reasonably capable of reference to the power.[3] In *Plaintiff S157/2002 v the Minister,*[4] the High Court explained that such a 'privative clause' may not protect against a jurisdictional error the nature of which could take various forms. Furthermore, where an Act imposed 'inviolable limitations' or 'imperative duties' it was not to be presumed that a general privative clause purporting to protect a decision against any form of appeal would necessarily prevail. In short, the courts now displayed a marked reluctance to allow their jurisdiction to be ousted by clauses seeking to prevent review of decisions by administrators.

The consequence of the High Court decision in *Plaintiff S157* was that onshore asylum seekers who had failed before the RRT now had the legal capacity to appeal to the Federal Court and the High Court. An appeal could now succeed where it could be shown that there had been jurisdictional error. This might take varied forms, such as the Tribunal asking itself the wrong question, having ignored relevant considerations or taken into account irrelevant considerations, where those considerations amounted to jurisdictional error including jurisdictional facts.[5] Indeed the grounds for jurisdictional error cast a wider net than the statutory rights of appeal which the Government had intended, by use of the privative clause, to prevent.

The Malaysian deal

The subsequent Labor Government, under Kevin Rudd, briefly flirted with onshore processing before reverting to offshore processing when there was an increase in the number of boats sailing towards Australia. On 25 July 2011, a swap deal was done with Malaysia whereby 800 asylum seekers were to be transferred to Malaysia in exchange for 4,000 established refugees whose cases had been verified by the United Nations Refugee Agency. These refugees would be sent to Australia. In announcing the deal, the Gillard Government said the agreement reaffirmed Malaysia's commitment that asylum seekers would be treated with dignity and respect in accordance with human rights standards.

Subsequently, six members of the High Court concluded that the ministerial declaration was invalid.[6] In so finding it said that Malaysia does not recognise the status of refugees in domestic law and that it was open to the Malaysian authorities to prosecute 'offshore entry

persons', such as those intended to be sent to Malaysia, under section 6 of the *Malaysian Immigration Act 1959*, which provided for such persons, upon conviction, to receive a term of imprisonment of up to five years and be liable to a whipping of up to six strokes.[7] Malaysia did not sign the *Refugee Convention* and had not bound itself to observe those rights contained in the *Refugee Convention*, such as giving the same treatment to asylum seekers and nationals in relation to freedom of religion, access to education, access to courts of law and freedom of movement.[8] Most importantly, there was no commitment by Malaysia to observe the core obligation of *non-refoulement*, whereby there is a prohibition under the *Refugee Convention* against expulsion to any territory where a refugee's life or freedom would be threatened.[9]

Looking back it is hard to understand quite what the Government hoped to achieve by the Malaysian swap. On the one hand, the *Migration Act 1958* (Cth), reflecting duties under the *Refugee Convention*, required countries to ensure that refugees were not returned to their countries of origin directly or through a third country. Section 198A(3) required the Minister to be satisfied that the receiving country met human rights standards in providing protection. On the other hand, the Government wished to signal to people smugglers and others who might be tempted to travel to Australia by boat, that if they arrived here they were likely to be sent to declared countries which provided few of these human rights standards, and this would thereby deter them from coming. To put it another way, the minister was required only to declare a receiving country suitable for asylum seekers if it met relevant human rights standards mandated by section 198A(3), whilst at the same time, the Government wanted to signal that the designated countries to which the asylum seekers are sent are ones well known for their inhospitality and draconian regimes when it comes to treatment of asylum seekers.

Government policy and its implications

The recent *Houston Report*, from which the present amendments to the *Migration Act 1958* (Cth) stem, recommended enough which was palatable to both the major parties to enable acceptance of most of its major recommendations.

What is now intended is, presumably, to deter boat arrivals by the prospect that they will spend a long period of time in Nauru, Manus Island or Christmas Island or any other declared centre. One must ask what the long term prospects of offshore processing will be if the boats keep coming? Should the boats continue to arrive at the rate experienced in 2011, the Manus Island and Nauru accommodation is predicted to be full by the end of 2012 or in early 2013. Neither Malaysia nor Indonesia are signatories of the *Refugee Convention* and it is unclear whether they, or other countries in the Asian region, are likely to enter into arrangements with Australia to receive asylum seekers. The statistical evidence shows that around 70 per cent of those who arrived by boat and were put on Nauru or Manus Island, eventually qualified as refugees.[10] One therefore has to ask whether the purpose intended justifies the expense to be incurred. If some 70 per cent of those who arrive are refugees, what is the purpose of prioritising others in refugee camps simply because they have already been found to be refugees? It is the Government which opts to set a self imposed quota (now to be 20,000) for humanitarian overseas applicants. There is no priority to the order and mode in which people flee persecution. Australia has chosen to subscribe to and not resile from a *Refugee Convention* which sets no quota upon the number of refugees that may be accepted.

The 2012 Migration Amendments[11]

The latest legislation is the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (the *2012 Amendments*). Under the *2012 Amendments*,

amending schedule 1 subdivision B of the *Migration Act 1958* (Cth), a Minister may, by legislative instrument, designate a country as a 'regional processing country'. The only condition for the exercise of the power is that the Minister thinks that it is in the national interest to designate a country as a 'regional processing country'.[12] In considering the national interest the Minister 'must have regard to' whether or not the country has given Australia assurances to the effect that:

(i) it will not expel or return a person to another country where his/her life would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion (ie *non-refoulement* under Article 33 of the R*efugee Convention*); and

(ii) the country will make an assessment, or permit an assessment to be made, of whether that person is covered by the definition of 'refugee' in Article 1A of the *Refugee Convention*.

The Minister may also have regard to any other matter which, in the opinion of the Minister, relates to the national interest.[13]

The assurances given by the receiving country need not be legally binding and the rules of natural justice do not apply to the exercise of the Minister's power (section 198AB (4) and (7)).

The Minister must cause to be laid before Parliament a statement of the Minister's reasons for thinking that it is in the national interest to designate a country to be a regional processing country, together with a copy of the written agreement with that country; a statement about the Minister's consultations with the UNHCR in relation to the designation; and a statement about any arrangements that are, or will be, put in place in that country for the treatment of persons taken to that country (section 198AC(2)). The intended purpose of laying these documents before the Parliament is to inform the Parliament about these things; nothing in the documents affects the validity of the designation. That some of those documents do not exist will not affect the validity of the designation, and a failure to comply with the section at all does not affect the validity of the designation.[14]

There are procedures for the removal of 'offshore entry persons' to a regional processing country, including force where necessary and reasonable.[15]

It was a feature of the *Malaysian case*, that the second plaintiff, who was a minor, was not removable to Malaysia because the Minister had not signed the consent as the guardian for the minor which was a requirement of the *Immigration (Guardianship of Children) Act 1946* (Cth). There is now no obligation upon the Minister to authorise or sign a consent form before the removal of an unaccompanied child.[16]

The *2012 Amendments* prohibit the institution in any court of proceedings to challenge the exercise of a function, duty or power; this prohibition includes Ministerial acts as well as those performed by immigration officers in carrying out their powers. This last provision may be regarded as a 'privative clause' which purports to prevent access to judicial review, although there is a formal acknowledgment in the *2012 Amendments* of the High Court's grant of jurisdiction under section 75(v) of the *Constitution* in respect of constitutional writs being brought against a Commonwealth officer.

The purpose of the 2012 Amendments

The centrepiece of this new legislation is the designation power of the Minister. A principal purpose of the current legislation is to enable the Minister to designate a country as a regional processing country without that decision being impugned by the courts. In the *Malaysian case* the Minister's declaration was successfully challenged on the basis that the four statutory criteria which he was required to consider under section 198A(3) constituted jurisdictional facts. Accordingly, where a Minister made a declaration on the basis of a misconstrued criterion, it was said that the declaration made was not authorised by Parliament and that such misconstruction would be a jurisdictional error[17]. In the joint judgment it was pointed out that the power of the minister was 'not a power to declare that the minister thinks or believes or is satisfied' that the country has the characteristics set out in the criteria, but that the Minister is 'satisfied of the existence of those criteria'.[18] In that case it was said that the access and protections to which the sub-paragraphs of section 198A referred must be provided as a matter of legal obligation and that Malaysia did not, either by its domestic law or by international convention, demonstrate a legal commitment to the values required.

The new legislation seeks to avoid any judicial scrutiny of the Minister's powers to designate a regional processing country. This is done, firstly, by stating that the 'Minister thinks that it is in the national interest to designate the country' and that the Minister 'must have regard to whether the country has given Australia any assurances' in regard to *non-refoulement* and, further, that the assessment will be done according to the definition of a 'refugee' under the *Convention*; these assurances do not have to be legally binding. The only condition for the exercise of the power is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country. In considering this, the Minister only has to consider *non-refoulement* and whether the country will make an assessment, or permit an assessment to be made (in the case of Nauru, on previous occasions, the applications were processed by Australians). Otherwise it is up to the Minister to decide if there are any other matters relevant to the national interest which should be considered. The rules of natural justice are excluded in respect of the exercise of this power.

Will the 2012 legislation survive challenge?

Some provisions, such as the prohibition on proceedings, may be open to challenge. Indeed, the legislation is bound to and does recognise the High Court's powers under section 75(v) of the *Constitution*, which grants jurisdiction for constitutional writs against a Commonwealth officer. But, in light of the recent decisions striking down privative clauses, it may be going too far to say that proceedings may not be brought challenging the decision of the Minister or Commonwealth officer where jurisdictional error is shown.[19] In *Lim v MILGEA*, the provision in the *Migration Act 1958* (Cth) prohibiting a court from ordering release of a detainee from custody was held to be unconstitutional.[20] Furthermore, there are dicta of the High Court which suggest that judicial power under Chapter III of the *Constitution* may embrace legislation which breaches the rules of natural justice.[21] Natural justice has frequently been equated with procedural fairness, though it is a concept which may in time have a broader reach. It is often said that the rules of natural justice are applicable unless expressly excluded or excluded by necessary intendment.[22] However, even where there is an express statutory exclusion there may be scope to challenge conduct that offends the principles of natural justice.[23]

Nonetheless, given the restricted criteria to which the Minister now has to have regard, and the subjective nature of the discretion to be exercised, it may be overly optimistic to believe that the legislation can successfully be challenged in its essentials. The judicial system depends upon the good will and respect of the public, and where the two major political

parties have joined in asserting executive discretion based upon minimal objective criteria, it will be a formidable task to disturb a discretionary political judgment about designation of a regional processing centre. To use the words of French J (as he then was) in *Patto v Minister for Immigration*[24] about Ministerial power, 'Their very character is evaluative and polycentric and not readily amenable to judicial review'.[25] However, if bad faith or jurisdictional error is made out as his Honour recognised, this will not prevent a judicial challenge. The difficulty in challenging a subjective Ministerial discretion is reinforced by the recent High Court decision about the Minister's discretionary powers.

Limits upon procedural fairness: *Plaintiff S10–2011 and others v Minister for Immigration and Citizenship*[26]

On 7 September 2012, the High Court unanimously dismissed an application by four plaintiffs for constitutional writs to quash rejections made of their earlier applications for protection visas.

These plaintiffs were not 'offshore entry' persons unable thereby to engage the visa provisions of the *Migration Act 1958* (Cth). All had their applications considered and ultimately rejected by either the Refugee Review Tribunal or the Migration Review Tribunal. Under the four dispensing provisions of the Act[27] the Minister was authorised, in given circumstances, to make rulings favourable to a visa applicant and these dispensing provisions stood apart from the scheme of tightly controlled powers and dispositions under the Act conferring upon the Minister flexibility in allowing the grant of visas, which otherwise could not be granted.[28] Ministerial instructions stated when such powers would or would not be exercised by the Minister. The various plaintiffs had applied for protection visas and their applications had been rejected by the Minister under these guidelines.

The plaintiffs contended that the obligation to afford procedural fairness includes an opportunity to be heard in relation to adverse materials or any proposed deviation from published guidelines.

The joint judgment concluded that the extraordinary nature of the dispensing provisions and their exceptional place within the scheme of the Act, provided a basis to exclude what otherwise might be an implication of procedural fairness.[29] The Minister's powers were personal, non-compellable, public interest powers.[30] In a separate judgment, French CJ and Kiefel J said that there is no statutory duty upon the Minister to consider the exercise of the Minister's powers, and so no question of procedural fairness arises when the Minister declines to embark upon such a consideration.[31]

Relevant factors for the exclusion of procedural fairness, according to the joint judgment, included the absence of obligation upon the Minister to consider exercise of the power; a tabling requirement before Parliament showing an accountability to Parliament; and consideration of the 'public interest' involving a Ministerial value judgment.[32]

These are cognate statutory powers to those now contained in the new schedule 1 subdivision B of the Act.

How long will the legislative strategy adopted be likely to last if the boats keep coming?

The cost of offshore processing may become prohibitive, and receiving countries will no doubt expect reasonable remuneration for the services which they will be providing. Indeed Nauru is cash strapped after its phosphate mining was exhausted and it received very

favourable treatment from Australia for its participation in the Coalition Government's Pacific strategy.[33]

There may be a growing realisation that such a prohibitively expensive processing system is unsustainable, aside from the obvious difficulty that it pays lip service to civil liberties and is premised upon a doctrine of deterrence which contradicts Australia's international obligations. If it is shown that offshore processing is likely to serve no other purpose than to deter asylum seekers who arrive by boat, most of whom in the past have been proved to have valid claims, and are now put to the back of the processing 'queue', a new approach may be forced upon a reluctant government unless a greater degree of co-operation in sharing the burden can be achieved from regional countries.

Where applications are finally successful the years of trauma, aggravated by prolonged detention, are likely to leave a residue of bitter memories. Each step of government policy commencing with mandatory detention in 1993 has taken Australia deeper into a quagmire. Release from detention after an initial period of health, security and identification checks would mean some integration for asylum seekers into an Australian community and must surely be more productive and less expensive than ongoing detention. Offshore regional processing is open to much criticism for its prohibitive cost, lack of accountability for the assessment process, and the dire living standards to which asylum seekers are exposed. If mandatory detention had not been pursued by both major parties it is doubtful that today there would be the present acrimony. Secondly, if some reasonable review procedures for applicants whose RRT applications had failed, had been adopted so as to filter out unsuitable cases while enabling proper formulation of grounds for others (which could have been done with a very modest financial investment), offshore processing, with its inherent flaws, would not have been adopted. Until there is some realisation that these basic pillars of the political approach have to be reassessed, the anguish and political controversy is likely to continue unabated. Emotional nationalism, which has cradled itself to sleep oblivious to a tidal wave of suffering humanity beyond its shores, will continue in thrall to a recurring nightmare.

Endnotes

1 *Wu Fang and 17 others v The Minister of Immigration & Ethnic Affairs & Cwth of Australia* (1996) FCA 1272.
2 Article 16 of the *Convention on the Status of Refugees 1951* amended by the 1969 protocol: for summary of the 2001 Act; see *Plaintiff M11/2010E v Commonwealth of Australia* [2010] HCA 41 at [49] to [31].
3 *R v Hickman* (1945) 70 CLR 598 per Dixon J.
4 *Plaintiff S157/2002 v Commonwealth* ()11 CLR 476 which qualifies *R v Hickman* (1945) 70 CLR 598.
5 *Craig v South Australia* (1995) 184 CLR 163; *MIMA v Yusuf & Others* (2001) 181 ALR 1.
6 *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M166 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 Heydon J dissented.
7 *Plaintiff M70* French CJ at [30] – [33]; joint judgment at [126].
8 *Plaintiff M70* joint judgment at [117].
9 *Refugee Convention* article 33 per French CJ at [66].
10 1,637 people were processed on Nauru and Manus Island between 2001 and 2008; 1,153 (70.5%) were resettled - the others voluntarily returned to their country of origin (Report, *West Australian,* Tuesday 21 August 2012).
11 Emily Price, ALA Legal Officer. I am indebted to her paper on the new legislation.
12 *Migration Act 1958* (Cth) (Act) Schedule 1 Subdivision B section 198AB(2).
13 Act Schedule 1 Subdivision B section 198AB(3).
14 Act Schedule 1 Subdivision B section 198AC(4) and (5).
15 Act Schedule 1 Subdivision B section 198AD.
16 Act Schedule 1 Subdivision B schedule 2 paragraph 8.
17 *Plaintiff M70* French CJ at [59].
18 *Plaintiff M70* at [106].
19 *Kirk v Industrial Relations Commission* (2010) HCA 1 at [100].
20 *Lim v MILEA* (1992) 176 CLR 1.
21 *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49 French CJ at [54] & [55].

22 *Annetts v McCann* (1990) 170 CLR 596 at 598: *Re Minister: Ex parte Miah* (2001) 206 CLR 57 at 93 McHugh CJ at [126].
23 *Leeth v The Commonwealth* (1992) 174 CLR 455 per Mason CJ, Dawson and McHugh JJ at [30] and French CJ in *International Finance Trust Co v NSW Commission* 2009 240 CLR 345 [28].
24 [2000] FCA 1554.
25 *Patto* supra at French J [36].
26 2012 HCA 31.
27 *Plaintiff S10-2011 and others*: 'dispensing provisions' refers to s 48B which authorises the Minister to determine the bar imposed by s 48A be lifted upon a further application; s 195A allowing a detained unlawful non-citizen under s 189 be granted a visa whether or not applied for; s 351 allows the Minister to substitute a decision of the MRT which is more favourable to the applicant; and under s 417 the Minister may do so in the case of a decision of the RRT.
28 *Plaintiff S10-2011* French CJ and Kiefel J at [30].
29 *Plaintiff S10-2011* Gummow J, Hayne J, Crennan J, Bell J (joint judgment) at [96].
30 *Plaintiff S10-2011* joint judgment at [100].
31 *Plaintiff S10-2011* French CJ and Kiefel J at [50].
32 *Plaintiff S10-2011* joint judgment at [99].
33 See P Mares, *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa* (UNSW Press, 2nd ed, 2002) pp 128-130.