Australia's Papua New Guinea Response to the Boat People Crisis – Legal and Constitutional Perspectives

Paper delivered by Mark Robinson SC to the ANZAPPL National Conference 20 November 2014

Introduction

In this paper, I am going to speak on an epic constitutional challenge in the High Court of Australia that was argued and determined this year concerning the constitutional validity of Australia's handling of the "boat people" refugees.

As you all probably know, Australia treats any refugee applicant who arrives in Australia by boat is a very special way.

They are considered "queue-jumpers" and described publicly as "illegals" and by Parliament in legislation as "illegal maritime arrivals".

The queue they are said to be jumping is primarily located in the United Nations High Commissioner for Refugees camps in Indonesia. There cannot be such queue any longer as from yesterday, when the Minister for Immigration and Boarder Protection announced that anyone in such a refugee camp will not be resettled in Australia – so there is no longer any queue to jump.

My paper will speak about that challenge and also about another challenge this year in the Full Federal Court of Australia about new laws designed to monster refugees and refugee applicants currently in immigration detention around Australia.

One of the six challengers, an accepted refugee in Australia, spat at a SERCO security officer and the Minister for Immigration then determined that he would never be issued with a protection visa. Because he cannot be refouled to his home country (where he would certainly be in real danger of serious harm) and since no other country wants to take him, he is now (today) in indefinite detention in immigration detention. He could spend the rest of his life there. Same applies to the other five men, all found refugees.

I will also speak briefly about some other recent developments in refugee law in Australia and touch on where we might be going.

Manus Island

Australia currently transports some of the most vulnerable and desperate people on Earth to a small remote impoverished island, two degrees south of the equator in Papua New Guinea. It is Manus Island.

It denies them entry to Australia, apart from a few days for processing and transport arrangements to be made. These refugee applicants, many of them found later to be genuine refugees, are never to return to Australia. They are effectively banned for life.

The procedure is shored up in complex and lengthy legislative provisions added into the *Migration Act 1958* (Cth) with effect from 18 August 2012 by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act* 2012.

The amendments gave to the Minister for Immigration and Border Protection almost unfettered discretion to choose any country in the world as a "*regional processing country*" and to drop Australia's boat arrivals and refugee applicants there (as long as he or she thought it was in the – undefined - "*national interest*").

They will be there for five or more years and possibly subject to indefinite immigration detention in PNG.

The amending Act implemented key recommendations of the Report of the Expert Panel on Asylum Seekers provided to the then Prime Minister on 13 August 2012. That committee comprised Air Chief Marshall Angus Houston AC, Paris Aristotle AM, and Professor Michael L'Estrange AO.

It examined Australia's refugee system and made a number of recommendations to the federal government. It determined that refugee applicants who arrived by boat were to receive "*no advantage*" and "*no benefit*" in processing of their claims.

This is also known as the "*five year rule*" whereby such persons must wait at least five years or more before their claims are finally determined by the country in which they are seeking refuge. It also recommended that all persons who arrived by boat be sent to the Pacific island country of Nauru or to Papua New Guinea and their claims be processed by Australia in those countries. It recommended legislation be drafted, and it was soon after the expert report was handed down.

I will attempt to explain and assess the structure of these arrangement and the epic challenge to their validity and legality made to the High Court of Australia by one brave Iranian man (named S156). His case as concluded is reported as *Plaintiff S156-2013 v Minister for Immigration and Border Protection* (2014) 88 ALJR 690.

At the outset, I should tell you that the plaintiff was unsuccessful in his challenge to the validity of the amending legislation and to the legality of the decisions that saw him forcibly removed from Australia within days after he claimed refugee status here.

The plaintiff came to Australia by boat and landed at Christmas Island on 23 July 2013. He was just 26 years old, was not married and had no children.

He was met by the Australian authorities there and he claimed refugee status. He is a citizen of the Islamic Republic of Iran (Iran) and he asserted that he was a member of the Nematollahi Sultan Ali Shahi Gonabadi Sufi Order, a religious minority in Iran. He

contended he had a well-founded fear of persecution in Iran for a reason specified in the 1951 Convention Relating to the Status of Refugees (the Convention) as amended by the 1967 Protocol Relating to the Status of Refugees (the Protocol), and that he was owed protection from serious harm in Iran in accordance with these and other international human rights treaties to which Australia was each signatory.

He came to become my client in this convoluted way.

He had a cousin who was a permanent Australian resident living in Sydney and who knew he had arrived in Australia.

That cousin contacted my instructing solicitor, Mr Adrian Joel, who then prepared a brief for me and together we commenced proceedings for him in the High Court of Australia seeking to challenge the constitutional validity of the new provisions in sections 198AB and AD of the *Migration Act 1958* (Cth).

These provisions permit the relevant Minister to declare a country to be a "regional processing country" (whatever that means – it is not defined in the Act). Once a declaration such as that is made, the Minister's officers have no choice but to immediately deport such person as the plaintiff to that third country for processing.

On 9 October 2012 (about 9 months before the plaintiff's arrival in Australia), the Minister had declared the Independent State of Papua New Guinea to be a regional processing country.

Just a few weeks before this declaration the Australian government published an extensive overseas travel warning on the internet in respect of Papua New Guinea stating the following things (on 4 September 2012):

Overall: EXERCISE A HIGH DEGREE OF CAUTION (sic) - Reconsider your need to travel - Do not travel

Summary:

- high levels of serious crime;
- safety or security risks;
- large crowds and public gatherings should be avoided as they may turn violent;
- crime rates are high;
- heightened risk of armed robbery and attack at well-attended shopping centres in urban areas;
- ethnic disputes continue to flare up around the country. Disputes can quickly escalate into violent clashes. Such clashes not only create danger within the immediate area but also promote a general atmosphere of lawlessness, with an associated increase in opportunistic crime;
- car-jacking is an ever-present threat. Car doors should be locked with windows up at all times and caution should be taken when travelling after dark. In the evening or at night, we recommend you travel in a convoy;
- there have been a small number of high profile kidnappings for ransom;

- cholera is now considered as endemic in PNG.

On 2 August 2013 the plaintiff was forcibly removed from Australia and taken to PNG where he was imprisoned in a detention centre on a site located, built and maintained and staffed by Australia. He remains there to this day.

He commenced proceedings on 20 August 2013 in the High Court of Australia seeking declarations that the underlying legislative provisions were unconstitutional and that the Minister's declaration as to PNG was unlawful on administrative law grounds.

The case was heard before six judges in the High Court in Canberra on 9 May and 13 May 2014. The justices reserved their decision and handed it down on 18 June 2014 (almost a record short time for a constitutional case).

All the transcripts, written submissions and video of the final hearing are collected on a High Court web page at: http://www.hcourt.gov.au/cases/case_s156-2013

The legal arguments

Sections 198AB and AD of the *Migration Act 1958* (Cth) are arguably supported by the naturalization and aliens power in s 51(xix) of the Constitution and the immigration and emigration power in s 51(xxvii) and/or the external affairs power in s 51(xxix).

The Commonwealth argued that all three heads of power applied. The plaintiff argued that none of them applied and that no incidental power was invoked.

The plaintiff argued that the aliens power is normally considered to be a subject matter power or a "non-purposive" power. Sufficiency of connection is normally the test of characterisation applied. However, a "proportionality" test (that is, whether the power is reasonably appropriate and adapted to achieve the purpose intended) should be used in that it may inform the sufficient connection test. As to the immigration power, the plaintiff argued that even if the proportionality test approach was not accepted, it is impossible to see the scheme is sufficiently connected with the removal of aliens from Australia (which is the relevant aspect of the immigration power) since it directed to the <u>continued</u> imprisonment and control of aliens deported from Australia <u>after</u> the deportation process is complete. As to the external affairs power, the plaintiff argued that it was predicated on their first being in fact a pre-existing external affair and that the present PNG scheme had no pre-existing external affair – it was all of the Commonwealth's creation. The plaintiff argued that there must be limits to the external affairs power.

These arguments had never been run before in the High Court.

The plaintiff's case was radically different from the Malaysia Solution case in the High Court in *Plaintiff M70-2011 v Minister for Immigration and Citizenship (Malaysian Declaration Case)* (2011) 244 CLR 144. There, the High Court struck down a Ministerial direction declaring Malaysia a regional processing country. That case did not involve a constitutional challenge. After the case, the court's interpretation of the Minister's power to engage in

regional processing of Australia's asylum seekers was considered by the Commonwealth to be too restrictive. Accordingly, Parliament enacted a complete replacement of the provisions in the Migration Act which took effect from 18 August 2012. It was a whole new system and a completely new power for the Minister to make a declaration of a regional processing country. The stated intention of the new legislation was to overturn the High Court's decision in the *Malaysian Declaration Case*.

That is why the plaintiff's challenge in S156 was so difficult.

The Constitutional law principles are discussed above. The approach taken by the plaintiff would have given the High Court considerably more flexibility in considering the constitutional validity of Commonwealth legislation in future.

As to the administrative law challenge, the plaintiff argued that there were seven mandatory and relevant considerations as to a section 198AB designation and that the Minister did not consider them. Accordingly the declaration decision was invalid. Also the plaintiff argued the Minister failed to afford those considerations proper, genuine or realistic consideration (which is a ground of judicial review that, if accepted, should render the decision void). Further, it was argued that the designation was afflicted by legal unreasonableness and was accordingly void.

One of the mandatory considerations concerned a United Nations High Commissioner for Refugees (UNHCR) letter dated 9 October 2012.

Section 198AC(2)(d) of the Act provided that the Minister must cause to be laid before both Houses of Parliament a copy of his consultations with the Office of the United Nations High Commissioner for Refugees in relation to the proposed designation and the nature of those consultations. The plaintiff argued that this was a mandatory consideration in designating any country as a regional processing country.

In September 2012, the Minister wrote to the UNHCR, his Excellency, Mr António Guterres seeking the UNHCR's views on the possible designation of PNG as a regional processing country and consideration of what role the UNHCR could play to ensure the independent oversight of processing activities in PNG and Nauru. On 2 October 2012, the Minister <u>again</u> wrote to the UNHCR, in relation to the implementation of the recommendations of the Expert Panel on Asylum Seekers. The letter also sought the UNHCR's views on the designation of PNG as a regional processing country under section 198AB of the Act. No particular timeframe was provided for a response.

The Minister made his PNG designation decision on 9 October 2012 (at SCB 253). He simply failed to take into account the advice of the UNHCR, which did not arrive until <u>after</u> the designation decision.

The response was scathing in its assessment of PNG as a regional processing country. It said (in as diplomatic language as possible):

- appropriate protection safeguards are not in place;

- there must be humane reception conditions including protection against arbitrary detention;
- there must be progressive access to Convention rights and adequate and dignified means of existence;
- there must be durable solutions for refugees within a reasonable period;
- the question of legal responsibility in PNG is not fully appropriate;
- there are several crucial challenges;
- as to PNG's legal framework at the domestic level there is no effective national legal or regulatory framework to address refugee issues;
- there are no laws or procedures in place in the country for the determination of refugee status under the Convention;
- there are no immigration officers with experience, skill or expertise to undertake refugee status determinations;
- PNG does not have the legal safeguards or competence or capacity to shoulder alone the responsibility of protecting and processing asylum seekers transferred by Australia;
- such responsibility should be shared with Australia under a joint legal responsibility arrangement;
- the UNHCR is concerned about the "no advantage principle" and its negative impact on recognized refugees who might be required to wait for long periods of time in remote island locations.

It was a powerful argument against the designation of PNG.

The Minister's advice from his Department was that the Minister could lawfully ignore the UNHCR response. He took that advice.

The Minister accordingly made his decision without that crucial response. He failed to table it before the Lower House. Even after he did receive it, he failed to table it before the Upper House. Thus, Parliament was deprived of the UNHCR response.

The case involved over 10 months of hard work on the part of my instructing solicitor and my two junior counsel, constitutional law expert, Professor George Williams and an international law expert barrister, Jay Williams. It was difficult because the Commonwealth did not concede very much and it refused to provide all the necessary documents. We were forced to go to quite a number of directions hearings before the Chief Justice and we had to seek and obtain an order for discovery from the Commonwealth (see, *Plaintiff S156-2013 v Minister for Immigration and Border Protection* (unreported, 19 December 2013, French CJ). There were attempted negotiations to agree on a stated case to be referred to the full court. However, the Commonwealth made things very difficult and the Chief Justice ultimately was forced to make a judgment in order to send the matter up to the full court.

This was the first challenge of any kind to the new scheme and all of the work that had to be undertaken was original work and difficult work. In that regard, it was also exciting work and very challenging.

The Decision

The High Court dismissed the plaintiff's case almost in its entirety.

The constitutional law arguments were given fairly short shrift by the court. It was held that the words "with respect to" in section 51 of the Constitution simply required a relevance to or connection with one of the subject matter is assigned by the placita in section 51. Once a federal law had an immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that was said to be enough. A law authorising the removal of aliens deals with the very subject matter of the aliens power in section 51 and the amending provisions of the *Migration Act* were held to be valid. The plaintiff's argument on proportionality did not attract the interest of the court and was not applied (outside purposive powers where the concept originated).

The court did not consider the immigration power or the external affairs power because of its ruling on the aliens power.

The court also did not consider what happened to the aliens after they were removed from Australia.

In other words, the court only considered the Commonwealth's scheme for removing aliens from Australia and not what happened to them (or was to happen to them) in Papua New Guinea.

The terms of the impugned legislation said nothing about Papua New Guinea and it said nothing about what was to happen to any refugees that were removed pursuant to the impugned provisions. The High Court refused to consider the scheme as a whole and it refused to consider the Expert Panel Report and it confined itself only to the terms of the legislation which in fact was a foundation for the entire scheme.

The court held that since the legislation was the only thing it was going to look at, it could ignore the extensive administrative arrangements made between PNG and Australia in order to house the refugees in the detention centre for a period of five or more years in harsh, inhumane and terrible conditions.

In other words, the High Court only chose to look at half of the legislative scheme and not the whole scheme that was in evidence before it. Accordingly it held that the scheme was valid so far as the legislation was concerned.

As to the administrative law challenge to the Minister's designation of PNG as a regional processing centre, the High Court held that the decision of the Minister was lawful and therefore valid. The key provision in section 198AB(2) was that:

> "The only condition for the exercise of the power under subsection (1) is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country."

The Minister was required to have regard to host country assurances, that were not legally binding, that the country would not expel the refugees or return them to their home country for Convention reasons and that it would permit an assessment of their status under the refugee convention.

These were the only requirements in the legislation.

The High Court held that this power was very wide and there were no other mandatory considerations outside those words as was contended by the plaintiff in argument. The court said (at [44]):

> "There may be some doubt whether the provisions of subdiv B, which were inserted after these cases, can be said to respond to Australia's obligations under the Refugees Convention. Indeed, that is part of the plaintiff's complaint. This possibility does not assist the plaintiff's argument. Rather, it would follow that the conditions for which the plaintiff contends cannot be implied on the basis of any assumptions respecting the fulfilment by Australia of its international obligations."

This paragraph is an indication that the court did not see the impugned provisions as being consistent with Australia's international obligations, and that, in light of this, it was <u>not</u> prepared to hold the Commonwealth to those international obligations.

This is a significant departure from the court's prior practice of reading the *Migration Act* consistently with those obligations. The Commonwealth has now gone beyond anything that could be said to be consistent with the Convention. Of course, if the Convention is not going to be a constraint, it is hard to see what, if any, constraints now apply to federal legislation in this area.

The Commonwealth has been emboldened by the decision.

So much so, that since it, it has signed up Cambodia as another regional processing country and it has legislation going through Parliament at the moment designed to remove references to the Convention (which is currently reproduced in the Migration Act in full and is modified) and to raise the standard for determining who can be returned to their home country, against accepted High Court and international recognition of the "*real chance*" test (see the *Migration Amendment (Protection and Other Measures) Bill 2014* which has passed the lower house already).

The Bill is intended to replace the real chance test with a test of "*more likely than not*". Real chance has been equated judicially in Australia as contemplating as low as a ten per cent chance of harm eventuating (*Chan Yee Kin v MIAC* (1989) 169 CLR 379). More likely than not is above 50/50. So more persons can be sent to their home country than would otherwise be the case.

While the amendments are primarily directed towards refoulement under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 and the International Covenant on Civil and Political

Rights, they represent the first steps to a markedly higher test for refugees and a passage to complete abandonment of the Refugees Convention in Australia.

There is also the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill* 2014 currently before the Senate. This nasty piece of work:

- amends the *Maritime Powers Act 2013* (Cth) provide "*clarity and consistency*" in relation to powers to detain and move vessels and people and to significantly increase the Minister's powere for at sea matters;
- amends the *Migration Act 1958* (Cth) to introduce temporary protection for those who engage Australia's non-refoulement obligations and who arrive in Australia illegally; create the authority to make deeming regulations; create the Safe Haven Enterprise Visa class; introduce a fast track assessment process and remove access to the Refugee Review Tribunal (RRT); establish the Immigration Assessment Authority within the RRT to consider fast track reviewable decisions; clarify the availability of removal powers independent of assessments of Australia's non-refoulement obligations; codify (code for lessen) Australia's interpretation of its protection obligations under the Refugees Convention; clarify (code again) the legal status of children of unauthorised maritime arrivals and transitory persons; and enable the Minister to place a statutory limit on the number of protection visas granted.

It was not all bad news for refugee lawyers this year in Australia.

There was a smashing victory in April this year in the Full Federal Court against the Commonwealth Minister for Immigration and Border Protection by six men who had each been found to be refugees in Australia and who were each effectively banned permanently from ever getting a protection visa because they committed a minor crime while being held in immigration detention in Australia.

In *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44 and in *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 the Full Court issued the ancient prerogative writs of certiorari and prohibition against six decisions of the Minister (both Labour and Liberal ministers) quashing them completely.

The ministers each made decisions to refuse to grant the applicants a protection (class XA) visa under s 501(1) of the *Migration Act 1958* (Cth). They had all been found to be refugees in Australia. They were all in detention. A new law was passed. Section 501(6)(aa) of the *Migration Act* was inserted on 26 April 2011. It said, relevantly, that a person does not pass the character test for securing for holding onto a visa if the person has been convicted of an offence that was committed while the person was in immigration detention.

This means any offence at all, including, for example, stealing a paperclip.

A person who does not pass the character test is effectively sent before the Minister for a decision on whether or not he or she may have a visa in Australia.

In NBNB, five men committed minor offences while in immigration detention.

One man spat at a Commonwealth security officer.

He was mentally ill and very depressed and under significant pressure at the time. However he pleaded guilty and released from prison upon giving security by recognizance of $500 on the first offence and $1000 on the second offence, to be of good behaviour for 12 months.

The others played a small role in a riot one day at the Darwin detention centre. One turned over some chairs. The others turned over a fridge and a television. All were convicted of these offences and all was sent up to the Minister for determination as to whether they may have a protection visa.

All of the men had significant mental health problems and very large files relating to their treatment while in detention. Some had tried to kill themselves while in detention. Others had self-harmed. All were receiving medical and psychological treatment while in detention.

The Minister wrote to each of them and said that he was considering exercising his power under the Act to deny them each a protection visa. He set out the matters that he might consider and invited written submissions.

The Minister's decision in each matter was relevantly identical. He said:

> "In reaching my decision to refuse Mr [NBNB] a Protection visa, I have taken the view that engaging in criminal behaviour while in immigration detention is serious and that the Australian community has an expectation that people who seek to remain in Australia will respect Australia's laws and legal authority, and be of good character. I considered that the consequences of such behaviour in particular cases should also provide a disincentive to others who may be at risk of engaging in criminal behaviour while in immigration detention"

In other words, the notion of deterrence proved to be the primary decision-making reason in all five cases.

The Minister wanted to send a message to <u>everyone else</u> in detention that they should not engage in any breaches of the law, no matter how minor they might be.

By way of contrast, the long established provisions of the Act in this area provide that a visa applicant or a visa holder being considered for deportation must be convicted of an offence and sentenced to imprisonment of not less than 12 months before the trigger to the Minister's discretion is enlivened.

The decisions were set aside for a number of reasons.

Firstly, the Minister failed to take into account the mandatory consideration of the legal consequences of the decision being made in the context of Australia's obligation of non-refoulement which was indefinite detention. The Minister apparently did not appreciate that by denying these refugees a visa while they were in detention and when they could not be sent to their home country (because of the Refugee Convention) and when no third country

wanted them, they were effectively being sentenced by him to indefinite detention in Australia.

Secondly, when the Minister sent out the invitation to each applicant for him to make submissions, the invitation did not indicate that deterrence was to be a factor. The invitation was very expansive and directed to many matters and issues. However deterrence was not mentioned, let alone highlighted as the most important factor it proved to be. This was held to constitute a denial of procedural fairness or natural justice. A finding of such is sufficient alone to quash an administrative decision including one by a Minister.

As to the immediate future for refugee law, all I can say is that it looks truly bleak.

The High Court has indicated plainly that it does not want to know about the off-shore Pacific Solution. It appears that the Malaysia Declaration Case was the high point in this area.

The Commonwealth has been so emboldened, that its Bills as introduced so far this year indicate that there are no limits to the depths it is prepared to plunge so as to monster refugees further than levels unthinkable only years ago.

There will surely be constitutional and other High Court challenges in the future. However, when both Parliament and the High Court are singing in the same tune, it might be time to find another place to live.

Thank You